






*Shorter*  
**CONSTITUTION OF  
INDIA**

BY  
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SIXTH EDITION



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## ABBREVIATIONS

A. or A.I.R.	..	.. All India Reporter
A. & N.	..	.. Assam and Nagaland
All.	..	.. Allahabad.
A.P.	..	.. Andhra Pradesh.
Bom.	..	.. Bombay.
Cal.	..	.. Calcutta
Mad.	..	.. Madras.
H.P.	..	.. Himachal Pradesh
Hyd.	..	.. Hyderabad.
J. & K.	..	.. Jammu & Kashmir
Ker.	..	.. Kerala.
M.B.	..	.. Madhya Bharat
M.P.	..	.. Madhya Pradesh
Mys.	..	.. Mysore
Guj.	..	.. Gujarat.
Nag.	..	.. Nagpur.
Pat.	..	.. Patna
Punj.	..	.. Punjab.
Raj.	..	.. Rajasthan.
Sau.	..	.. Saurashtra.
S.C.	..	.. Supreme Court
T.C.	..	.. Travancore Cochin
A.L.J.	..	.. Allahabad Law Journal.
Bom.L.R.	..	.. Bombay Law Reporter.
C.L.J.	..	.. Calcutta Law Journal.
C.W.N.	..	.. Calcutta Weekly Notes
C.W.N. (F.R.)	..	.. Do. (Federal Court Reports).
C.W.N. (P.C.)	..	.. Do (Privy Council).
D.L.R.	..	.. Dominion Law Reporter (now defunct).
F.C.R.	..	.. Federal Court Reports.
F.L.R.	..	.. Indian Factories & Labour Reports (Allahabad).
I.L.R.	..	.. Indian Law Reports.
L.L.J.	..	.. Labour Law Journal (Madras).
M.L.J.	..	.. Madras Law Journal.
S.C.D.	..	.. Supreme Court Decisions (Cutlack).
S.C.R.	..	.. Supreme Court Reports (Govt. of India Publication).
S.C.J.	..	.. Supreme Court Journal (Madras).
S.C.A.	..	.. Supreme Court Appeals (C.W.N. Publication).

S.C.C.	..	..	Supreme Court Cases (Lucknow).
S.C.W.R.	..	..	Supreme Court Weekly Reporter (Kerala).
F.B.	..	..	Full Bench.
S.B.	..	..	Special Bench.
U.J. (S.C.)	..	..	Unreported Judgments (Supreme Court), Jodhpur.
P.C.	..	..	Privy Council.
F.C.	..	..	Federal Court.
W.B.	..	..	West Bengal.
I.P.C.	..	..	Indian Penal Code.
C.P.C.	..	..	Code of Civil Procedure.
Cr.P.C.	..	..	Criminal Procedure Code.
C-5, Vol. I, p. 1	..	..	Author's <i>Commentary on the Constitution of India</i> , Fifth Edition, Vol. I, p. 1.
(1950-51) C.C. 1	..	..	Author's <i>Cases on the Constitution of India</i> , 1950-51.
(1952-54) 2 C.C. 1	..	..	Author's <i>Cases on the Constitution of India</i> , Vol. 2, p. 1.
'Our Constitution'	..	..	The Constitution of India.

ब्रह्मसाधाय कर्माणि भद्रं त्यक्त्वा करोति यः ।

शिष्यते न स पापेन पद्मपत्रमिवाश्रया ॥

—श्रीमद्भगवद्गीता ( ५।१० )

*One who does acts without ego,  
Reposing them in the Creator  
And regardless of their fruits,  
Does not get entangled by the bonds of action  
Just as the lotus-leaf remains unaffected  
By the water on which it floats.*

—Bhagavad-Gita (V. 10).



# **PREFACE**

## **TO THE SIXTH EDITION**

*As will be evident from the increase in volume, the book has been revised and enlarged under each article and the arrangement has also been improved.*

*The text of the Constitution is correct up to the Twenty-Third Amendment ( ) and every attempt has been made to incorporate case-law up to the end of ( ) including numerous unreported decisions.*

*The Author reiterates once more that there is no scope in like a work the present one to express the Author's own views upon any question ; for that the reader will have to turn to the Commentary on the Constitution of India.*

**THE AUTHOR.**



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# THE CONSTITUTION OF INDIA

**WE, THE PEOPLE OF INDIA**, having solemnly resolved to constitute India into a **SOVEREIGN DEMOCRATIC REPUBLIC** and to secure to all its citizens:

Preamble.

**JUSTICE**, social, economic and political;  
**LIBERTY** of thought, expression, belief, faith and worship;  
**EQUALITY** of status and of opportunity;  
and to promote among them all

**FRATERNITY** assuring the dignity of the individual and the unity of the Nation;

**IN OUR CONSTITUENT ASSEMBLY** this twenty-sixth day of November, 1949, do **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.**

## Utility of the Preamble.

The Preamble shows the general purpose behind the several provisions of the Constitution but, nevertheless, it is not a part of the Constitution and is never regarded as a source of any substantive power.<sup>1</sup>

## PART I

### THE UNION AND ITS TERRITORY

1. (1) India, that is Bharat, shall be a Union of States.

Name and territory of the Union. (2) The States and the territories thereof shall be as specified in . . . .<sup>2</sup> the First Schedule.

(3) The territory of India shall comprise

(a) the territories of the States;

(b) the *Union*<sup>2</sup> territories specified in . . .<sup>2</sup> the First Schedule;  
and

(c) such other territories as may be acquired.

**Amendment.** The Article has been amended by the Constitution (Seventh Amendment) Act, 1956, as follows:

(a) In cl. (2), for the words 'the States and their territories', the word 'as' has been substituted; and the words "Parts A, B and C" have been omitted.

(b) In cl. (3) (b), the word 'Union' has been inserted before the word 'territories' and the words "Part D of" have been omitted

**Effects of Amendment.**— In the original Constitution, the States which formed the Union of India were classified into three categories and

1. *Re Berubari Union*, A. 1960 S.C. 845 (856)!

2. The Article has been amended by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.

enumerated in Parts A, B and C of the First Schedule of the Constitution. At the date of the Constitution (Seventh Amendment) Act, 1956 the number of these States was 10, 8 and 9 respectively, making a total of 27.

Besides these 27 States of different categories, there was another category, *viz.*, a territory specified in Part D of the First Schedule. The Constitution (Seventh Amendment) Act, 1956 reduced these 4 categories into two only. Instead of three categories of States, there will now be only one class of 'States', and the number of such States became 15.

The category of 'territory in Part D' was replaced by 'Union Territories', and this class was now to include not only the Andaman and Nicobar Islands which were previously included in Part D, but also some of the erstwhile Part C States. The total number of these Union territories was 6.

#### Cl. (1): 'Union of States'.

This union is a federal union, with a distribution of powers of which the Judiciary is the interpreter.<sup>2a</sup>

#### Cl. (2): Membership of the Union and the Territory of India.

The Constitution will extend to any territory which comes within the scope of the expression 'territory of India' as defined in cl. (3) of the present Article.

These three categories, as altered by the Constitution (Seventh Amendment) Act 1956 and subsequent Acts, are—

(a) The 'States', and these are members of the 'Union of States' referred to in Cl. (1). These are now 17 in number, *viz.*, Andhra Pradesh, Assam, Bihar, Gujarat<sup>3</sup>, Harayana<sup>4</sup>, Kerala, Madhya Pradesh, Madras, Maharashtra<sup>5</sup>, Mysore, Nagaland<sup>6</sup>, Orissa, Punjab, Rajasthan, \* Uttar Pradesh, West Bengal, Jammu & Kashmir. [See Sch I, *post*].

(b) The 'Union Territories', are now 10 in number, *viz.*, Chandigarh<sup>4</sup>, Delhi, Himachal Pradesh, Manipur, Tripura, the Andaman & Nicobar Islands; the Laccadive, Minicoy and Aminidivi Islands; Dadra & Nagar Haveli; Goa, Daman & Diu; Pondicherry

(c) Any territory that may be acquired<sup>6</sup> by India, at any time<sup>7</sup>. Thus, Goa, Daman and Diu, acquired from the Portuguese by annexation, were being administered since 20-12-61 as 'acquired Territory', until they were incorporated as a Union Territory, under Sch I, by the Constitution (Twelfth Amendment) Act, 1962

#### Difference in status between the States and the Union Territories.

(a) Since the Constitution (Seventh Amendment) Act, 1956, there is no distinction between the 'States' *inter se*. All of them now belong to one class, and barring Jammu & Kashmir (for which special provisions are maintained), all provisions of the Constitution which are applicable to the 'States' are applicable to them alike, and the provisions of Part VI form the Constitution of all States alike.

It is to be noted that the administration of the Scheduled Areas, Scheduled Tribes and Tribal Areas as are included within the States are

2a. Special Ref. 1 of 1964, A 1965 S.C. 745 (762).

3. The State of Bombay was split up into two States,—Gujarat and Maharashtra, by the Bombay Reorganisation Act, 1960

4. Added by the Punjab Reorganisation Act, 1966

5. Inserted by the State of Nagaland Act, 1962

6. 'Acquired' means acquired according to any of the modes recognised by International Law, as distinguished from mere *de facto* control [*Manthan Sahib v. Chief Commr*, A 1962 S.C. 797 (803)].

7. See Art 246 (4), as to their governance.

taken out from the operation of the general provisions of Parts VI and VII, and are placed under the Fifth and Sixth Schedules which provide certain self-contained provisions regarding them [Article 244].

(b) The 'Union territories' shall be governed according to the provisions contained in Part VIII. These territories, in short, will be governed,—subject to legislation by Parliament, if any,—by the President acting through an 'Administrator' appointed by him.

(c) As regards 'acquired territories',—these are included within the definition of 'Union Territories' in Art. 366 (30), *post*. In the result, such territories will also be governed by provisions in Part VIII.

### CL (3) (c).

Sub-Cl. (c) does not purport to confer power on India to acquire territories which a sovereign State has the inherent right to do by virtue of its sovereignty.<sup>8</sup> It merely provides for and recognises automatic absorption or assimilation into the territory of India of areas which may be acquired by India. Foreign territories which thus become a part of the territory of India may, either be admitted into the Union or constituted into new States, under art. 2 or merged into an existing State under art. 3 (a) or (b).<sup>8</sup>

**2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.**  
Admission or establishment of new States.

### Art. 2: Admission of New States.

This Article shows that foreign territories which, on acquisition, would become part of the territory of India under Art. 1(3) (c) can by law be admitted into the Union under Art. 2. Such territories may also be assimilated under Art. 3 (a) or (b).<sup>8</sup>

### 3. Parliament may by law—

Formation of new States and alteration of areas, boundaries or names of existing States. (a) **form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;**

(b) **increase the area of any State;**

(c) **diminish the area of any State;**

(d) **alter the boundaries of any State;**

(e) **alter the name of any State;**

**Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States,.....the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.**<sup>9</sup>

*Explanation 1.*—In this article, in clauses (a) to (e), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory.<sup>9</sup>

8. *Re. Berubari Union*, A. 1960 S.C. 845 (853-1).

9. For amendments, see p. 4.

**Amendment.**—(1) The italicised words in the Proviso were substituted by the Constitution (Fifth Amendment) Act, 1955 in order to put a time limit within which the States are to express their views on any proposal for reorganisation referred to them under Art. 3.

2. Explanations I and II were added by the Constitution (Eighteenth Amendment) Act, 1966, w.e.f. 27-8-66.

### Effects of Amendment.

(1) By the amendment of the Proviso, the time of making the reference and also the power to extend the period so specified were provided. If, within the period so specified or extended any State does not express its views, the Bill may be introduced even though the views of that State have not been obtained by the President.

(ii) The first part of Expl. I codifies what was overlooked in *Re Berubari Union*<sup>10</sup> and acknowledged in *Ramkishore v. Union of India*,<sup>11</sup> namely, that by reason of the definition of the word 'State' in the General Clauses Act, the word 'State' in this Article must be read as including a 'Union Territory'.

The second part of Expl. I, however, excepts the Proviso from that definition. The result is that Art. 3 empowers Parliament to form a new Union Territory, alter the boundaries of an existing Union Territory or include the whole or part of a Union Territory in a State (Expl. II); but in doing so, the Bill need not be referred to the Legislature of the Union Territory in question.

### Scope of Art. 3.

Broadly speaking, Art. 3 deals with the internal adjustment *inter se* of the territories of the constituent States of India.<sup>12</sup>

### 'Parliament may by law'.

The five acts specified in the Article can be done only by legislation by Parliament and not by the Executive without the sanction of Parliament,<sup>13</sup> even though it involves the implementation of a treaty.<sup>14</sup>

### 'Uniting two or more States'.

This shows that the very existence of an existing State as a separate entity may be done away with by an Act of Parliament under Art. 3(a).<sup>15</sup>

### 'Diminishing the area of any State'.

This clause is restricted to inter-State adjustments and does not apply to cession of territory in favour of a foreign State.<sup>16</sup> Hence an agreement which involves a cession of a part of the territory of India in favour of a Foreign State cannot be implemented by passing a law under this Article.<sup>17</sup>

### Alteration of area or boundaries of a Union Territory.

The word 'State' in Art. 3 includes a Union Territory, by reason of the definition of 'State' in s. 3 (58) (b) of the General Clauses Act, 1897.<sup>18</sup>

10. *Re Berubari Union*, A. 1960 S.C. 845 (862).

11. *Ramkishore v. Union of India*, A. 1966 S.C. 644 (648).

12. *Nirmal v. Union of India*, A. 1969 Cal 506.

13. *Srikishan v. State*, A. 1957 A.P. 734 (737).

• 14. *Ram Kishore v. Union of India*, A. 1966 S.C. 644 (648), followed up by the insertion of Expl. I, p. 1... *ante*.

**'Bill has been referred'.**

1. Once the original Bill is referred to the State or States, the purpose of the Proviso is served, and no fresh reference shall be required every time an amendment to the Bill is moved and accepted, according to the rules of procedure in Parliament.<sup>15</sup>

2. Nor is there anything in the Proviso to indicate that Parliament must accept or act upon the views of the State Legislature,<sup>16</sup> it received in time.

4. (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

**'Supplemental, incidental and consequential provisions.'**

1. This expression is wide enough to include provisions relating to the setting up of the legislative, executive and judicial organs of the State, formed under Arts. 2-3 essential to the effective administration of that State under the Constitution, expenditure and distribution of revenue, apportionment of assets and liabilities, provisions as to services, application and adaptation of laws, transfer of proceedings and other related matters.<sup>16</sup> These may not necessarily be consequential to the amendment of the First or the Fourth Schedule.<sup>17</sup> Of course, the power to make such supplemental provisions is not to override the constitutional scheme and would not go to the length of including a power to *abolish* any of the organs of the State altogether.<sup>18</sup>

2. The following are instances of provisions covered by the above expression

- (i) States Reorganisation Act, 1956 ss. 65 (2),<sup>19</sup> 115 (5).<sup>16, 17</sup>
- (ii) Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1950, ss. 11, 15, 17.<sup>20</sup>
- (iii) Punjab Reorganisation Act, 1946, ss. 13 (1) ; 20,<sup>19</sup> 22,<sup>14</sup> 24.<sup>12</sup>

## PART II

## CITIZENSHIP

5. At the commencement of this Constitution, every person who has his domicile in the territory of India—

Citizenship at the commencement of the Constitution.

- (a) who was born in the territory of India; or
- (i) either of whose parents was born in the territory of India; or

- 15. *Babulal v. State of Bombay*, A. 1960 SC 51 (54); (1960) 1 SCR. 605
- 16. *Mangal Singh v. Union of India*, A. 1967 SC 944 (945); (1967) 2 SCR. 109
- 17. *Madappa v. Appa Rao*, A. 1960 Mys. 310
- 18. *Jaleel v. State of Mysore*, A. 1961 Mys. 210 (218)
- 19. *Patel v. State of Gujarat*, A. 1965 Guj. 23 (37) FB.
- 20. *Venkatarama v. State of A. P.*, A. 1961 AP. 50 (54).

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.

**Persons who were Citizens of India at the commencement of the Constitution.**

The following persons shall be citizens of India at the date of commencement of the Constitution, under Articles 5-8:

I. A person born as well as domiciled in the 'territory of India' [see under Article 1(3), *ante*]-irrespective of the nationality of his parents [Art. 5 (a)].

II. A person domiciled in the 'territory of India', either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [Art. 5 (b)].

III. A person who or whose father was not born in the territory of India, but who (a) has his domicile in the territory of India, and (b) has been ordinarily residing within the 'territory of India' for not less than 5 years immediately preceding the commencement of the Constitution. In this case also, the nationality of the person's parents, is immaterial. Thus, a subject of a Portuguese or French Settlement, residing in India for 5 years preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution [Art. 5 (c)].

IV. A person who has migrated from Pakistan, provided—

(i) he or either of his parents or grand-parents was born in 'India as defined in the Government of India Act, 1935 (as originally enacted)'; and—

(ii) (a) if he has migrated before July 19, 1948,—he has ordinarily resided within the "territory of India" [see Article 1 (3), *ante*], since the date of such migration (in this case no registration of the immigrant is necessary for citizenship); or

(b) if he has migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as a citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application [Art. 6].

V. A person who migrated from India to Pakistan after 1st March, 1947, but has subsequently *returned* to India, under a permit issued under the authority of the Government of India for re-settlement or permanent return or under the authority of any law provided he gets himself registered in the same manner as under Article 6(b)(ii). [Art. 7].

VI. A person who, or any of whose parents or grandparents was born in 'India' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India provided he gets himself registered as a citizen of India (whether *before* or *after* the commencement of this Constitution), on application in the prescribed form, to the consular or diplomatic representative of India in the country of his residence [Article 8]. So, under this Article, a person, born of Indian parents but residing in Malaya or S. Africa, may acquire Indian citizenship under the Constitution by mere registration at the Indian consulate in that country.

The basic condition for the application of Art. 5 is<sup>1</sup> that the person must have his domicile in India on the date of commencement of the Constitution. If this condition is satisfied, the person must *further show* that he comes within *any* of the three clauses (a), (b) and (c), which are alternative and not cumulative.<sup>2</sup> In short, mere domicile is not sufficient to confer on a person the citizenship of India.<sup>3</sup>

#### **'At the commencement of the Constitution'.**

According to Art. 395, *post*, Art. 5 of the Constitution came into force with effect from the date of adoption of the Constitution, which, as stated in the Preamble (p. 1, *ante*), was 26.11.49.<sup>4</sup> Hence the period of residence material for the application of cl. (c) of Art. 5 is five years immediately preceding 26.11.49.

**Whether a corporation can be a citizen of India.**—See under Art. 19, *post*.

#### **'India' and 'India as defined in the Government of India Act'.**

Throughout the Constitution, the word 'India' means the territory of 'Bharat' as defined in Art. 1, *ante*.

The expression 'India as defined in the Government of India Act, 1935 (as originally enacted)', which is used in Art. 6 (a) or Art. 8 means 'India' as defined in s. 311 (1) of the Government of India Act, 1935, i.e., British India as well as the territory of the Indian States. Part of this territory has since been included in Pakistan.

#### **Domicile.**

1. Domicile means the place where a person's habitation is fixed without any present intention of removing therefrom.<sup>4</sup>

2. Every person has a domicile at his birth called the domicile of origin. This prevails until he acquires a new domicile.<sup>4</sup>

3. The domicile of a minor is that of his father at the time of his birth.<sup>5</sup>

4. The domicile of origin cannot be changed until the person acquires a new domicile *an mo et facto*, i.e., by actually settling in another country with the *intention of permanently* residing there.<sup>4, 6</sup> Till then the domicile of origin continues notwithstanding the fact that he has left the country of his origin with an intention of never returning again.<sup>4, 6</sup>

5. 'The onus to prove that a person has changed his domicile of origin lies upon him.'<sup>6</sup> For this purpose the course of his conduct both before and after the material time is relevant.<sup>6</sup>

#### **Domicile in the territory of India, at the commencement of the Constitution.**

As a result of the creation of the two Dominions of India and Pakistan by s. 1 of the Indian Independence Act, 1947, a person who had his domicile in 'British India' prior to 15-8-47, would automatically acquire the domicile of either India or Pakistan on 15-8-47, unless, of course, he

1. *Abdul Sattar v. State of Gujarat*, A. 1965 S.C. 810 (812).

2. *Joshi v. State of M. B.* A. 1965 S.C. 334; (1965) 1 S.C.R. 1215.

3. The reference to this date being 21-11-49 in paras. 2-4 of AIR 1966 S.C. 1936 [*Md. Reza v. State of Bombay*] appears to be incorrect.

4. *Central Bank of India v. Ram Narain*, A. 1955 S.C. 36.

5. *Raza Dabshani v. State of Bombay*, (1966) 3 S.C.R. 440 (442): A. 1966 S.C. 1486.

6. *Kedar v. Narain*, A. 1966 S.C. 160 (163-4).



acquired the domicile of some other country outside the ambit of British India, by his choice. Thus, he would acquire domicile of India if he habitually resides within that part of British India which came to be included in the Dominion of India, with the intention of permanently residing there, but not otherwise.<sup>7</sup> A person who continues to reside and carry on business in Pakistan would not acquire Indian domicile by simply sending his family to India, without himself coming to reside in India.<sup>8</sup>

#### CL. (c): 'Ordinarily resident'.

In order to be ordinarily resident in India for the specified period, it is not necessary that the person should have resided in India for every day of this period; what is required is residence during the period without any serious break.<sup>9</sup>

**6. Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—**

Rights of citizenship of certain persons who have migrated to India from Pakistan

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government;

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

#### 'Migrated'.

1. It refers to a migration at any time before the commencement of the Constitution, to a place now in the territory of India.<sup>1</sup>

2. By 'migration' is meant 'coming to India with the intention of residing here permanently',<sup>2</sup> i.e., not for a specific purpose.<sup>10</sup> Even where a person moved to a place for a temporary period he may, if he subsequently forms the intention of residing there permanently, be said to have 'migrated to that place, from the latter point of time'.<sup>3</sup> But the word 'migration' is not to be construed in the sense of 'change of domicile' in International Law.<sup>10</sup>

[See, further, under Art. 7, below.]

7. *Attaulah v. Attaulah*, A. 1952 Cal. 530 (533) (1955) 1 S.C.R. 697

8. *Central Bank of India v. Ramnaram* A. 1955 S.C. 36

9. *Shanno Devi v. Marwal Sahi*, A. 1961 S.C. 58 (61-2).

10. *Kusum v. State of Kerala*, A. 1966 S.C. 1614 (1618-9), modifying the view taken in *Shanno Devi's* case, A. 1961 S.C. 58.

**7. Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:**

Rights of citizenship to certain migrants to Pakistan.

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

#### Art. 7: Migration to Pakistan.

1. This Article says that if a person had gone from the territory of India to the territory now included in Pakistan, after 1-3-47, with the intention of shifting his *permanent residence* from India to Pakistan, he would not acquire the citizenship of India which could have accrued to him by his coming within the terms of Art. 5,<sup>11</sup> even though he returns to India before 19-7-48 (unless he so returns under a permit for permanent return).

2. The *Proviso*, however, says that even though a person had migrated to Pakistan after 1-3-47 if he returns to India under a permit for resettlement or for permanent return, Indian citizenship would be vested in him under Art. 6 (b), as if he had migrated to India after 19-7-48.

3. The 'migration' referred to in this Article refers to migration between 1-3-47 and 20-1-50 and does not extend to migrations after that date, which will be governed by the Citizenship Act, 1955.<sup>14</sup>

#### Arts. 5 and 7.

These two articles have to be read together. In the result—

If a person continued to be in India under Art. 5, he would not lose that citizenship by the fact of migration to Pakistan subsequently unless it is shown that under Art. 6 he has voluntarily acquired the citizenship of a foreign State.<sup>15-16</sup>

#### 'Migration'.

1. The word 'migration' in this Article, when read in the light of the *Proviso*, indicates going to Pakistan with the "intention of residing there *permanently*"<sup>17-18</sup> and not for a specific purpose.<sup>19</sup>

But in a later case<sup>11</sup> it has been held that the concept of 'domicil' or permanent residence *does not* enter into the word 'migration', and that a movement from India to Pakistan, if it was *not for a specific purpose* and for a short and limited period, would constitute migration under Art. 7. It follows that even a minor or a married woman may be held to have migrated, even though they may not acquire a domicil of choice.<sup>16</sup>

11. *Shabbir v U. P. State*, A. 1952 All. 257.

12. *State of A. P. v. Khadeq*, A. 1961 SC 1467 (1470); *State of M. P. v. Peer Md.*, A. 1963 SC 645.

13. *Abdul Sattar v State of Gujarat*, A. 1965 SC 810 (812).

14. *Kulathil v State of Kerala*, A. 1966 SC 1614 (1619).

15. *Moharik Ali v State of Bombay*, A. 1958 SC. 857 (867). (1958) SCR 328.

16. *State of Bihar v. Amur Singh*, (1955) 1 SCR. 1259 (1265). A. 1955 SC 282.

17. *Shawno Devi v. Mansal Sain*, A. 1961 SC. 58.

18. *Abdul Sattar v. State of Gujarat*, A. 1965 SC. 810.

19. *Kulathil v. State of Kerala*, A. 1966 SC. 1614 (1619).

2. Departure from India to Pakistan for the purpose of employment or labour,<sup>10</sup> for an *indefinite* period, constitutes migration. Movement to Pakistan by a Government servant who opted for Pakistan is 'migration' within the meaning of Art. 7.<sup>20-21</sup>

3. The fact that the person acquired no property there while he possessed considerable property in India,<sup>22</sup> or that he did not remove his parents,<sup>21</sup> are not relevant considerations for determining the question of migration.

4. A citizen of India would not lose his citizenship by a mere *temporary* visit to Pakistan on some business or otherwise.<sup>24</sup> But a person who, after moving to Pakistan, subsequently came to India on a temporary permit, representing himself to be a Pakistan national, can hardly claim that he went to Pakistan only for a temporary purpose.<sup>25</sup> The declaration in the permit or passport should be taken as showing his intention.<sup>1</sup>

### Migration of a wife or a minor.

1. Though the rule of Private International law that the domicile of a married woman follows that of her husband has been applied for the purpose of determining the domicile for purposes of Art. 5, it has been held that that rule is not applicable for interpreting the meaning of 'migration' under Art. 7 to which Art. 5 is subject.<sup>2</sup>

2. In the result, even though a Muslim wife went to Pakistan (*after 1-3-47*), leaving her husband in India and so retaining her Indian domicile through her husband, she would lose her Indian citizenship by reason of s. 7, if she fails to prove that she went to Pakistan only for some temporary purpose,<sup>2</sup> unless she returns to India under a permit for permanent return as referred to in the Proviso to Art. 7 (i.e. distinguished from a Pakistani passport).<sup>4</sup>

3. The same view has been taken as regards the migration of a minor.<sup>5</sup>

### 'Permit'.

The Influx from Pakistan (Control) Act (XXIII of 1949) provided that no person (subject to some exceptions) shall enter India from any place in Pakistan, whether directly or indirectly, unless he is in possession of a 'permit'.<sup>6, 25</sup> The Act was repealed in 1952. Now, it is the Indian Passport Act, 1967, which governs influx from Pakistan as from any other foreign country.

The Proviso would be applicable only if the permit was a *valid* permit. A permit which was invalid or which has been revoked according to law, cannot attract the Proviso.<sup>4</sup>

20. *Aslam v. Fazal*, A. 1959 All 79.

21. *Gulam Rasul v. Supdt. of Police*, (1964) 69 C.W.N. 126 (129). A. 1965 Cal 302. [His decision now gains strength from the view taken in *Kullathil v. State of Kerala*, A. 1966 S.C. 1614.]

22. *Attaur Rahman v. State of M. P.* A. 1951 Nag. 43.

23. *Gulam Rasul v. Supdt. of Police* (1964) 69 C.W.N. 126 (129).

24. *State of A. P. v. Khader*, A. 1951 S.C. 1468 (1470).

25. *State of Bihar v. Amar Singh*, (1955) 1 S.C.R. 1259 (1265).

1. *Abdul v. State of M. P.* A. 1956 M.B. 250 (252).

2. *State of Bihar v. Amar Singh*, A. 1955 S.C. 282; (1955) 1 S.C.R. 1259 (1264).

3. *Yakub v. Union of India*, (1958) 62 C.W.N. 589.

4. *Nazranbhai v. State*, A. 1957 M.B. 1.

5. *Kullathil v. State of Kerala*, A. 1966 S.C. 1614 (1621).

6-25. *Mohammad v. High Commissioner for India*, A. 1951 Nag. 38.

8. Notwithstanding anything in article 5, any person<sup>1</sup> who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Rights of citizenship of certain persons of Indian origin residing outside India

**Date from which registration takes effect.**—Sec 5(5) of the Citizenship Act, 1955

9. No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

Persons voluntarily acquiring citizenship of a foreign State not to be citizens

#### 'Foreign State'.

See under Art. 367 (5) *pass*. As matter stand Pakistan is not a foreign State under the present Article by reason of the Declaration as to Foreign States Order, 1950 made under Art. 367 (3) read with Art. 392 (3) of the Constitution.

But the word 'foreign State' does not occur in Art. 7 and Art. 9 has no reference to Art. 7.<sup>2</sup> Hence persons who migrated to Pakistan after 13-17 and acquired Pakistani nationality cannot claim the citizenship of India.<sup>3</sup>

#### 'Voluntarily acquired the citizenship of a foreign State'.

1. When a person establishes that he had acquired the citizenship of India under Art. 5, 6 or 8 (or under the Citizenship Act) but the Government contends that he has subsequently lost that citizenship by reason of having voluntarily acquired the citizenship of a foreign State (e.g. by obtaining a Pakistani passport), the question must be determined by the Central Government under s. 9 (2).<sup>4</sup> No writ or order can be taken against such person as a foreigner.<sup>5</sup>

2. \*The Central Government is vested by s. 9 (2) with exclusive jurisdiction to determine the foregoing question, namely whether a person, who was a citizen of India, has lost that citizenship by having voluntarily acquired the citizenship of a foreign State,<sup>6</sup> and this question cannot be determined by the State Government or by any Court either by sump<sup>2</sup> or in a proceeding under Art. 226 or under Art. 32.<sup>4</sup> If this question arises in such proceedings, the Court should stay the proceedings to enable the parties to obtain the determination of the Central Government under s. 9 (2).<sup>4</sup> or restrain the Government from giving effect to the order of deportation until the question under s. 9 (2) is determined by the Central Government.<sup>3</sup>

1 *Abdul Sattar v. State of Gujarat*, A 1965 SC 810 (513)

2 *Akbar v. Union of India*, A 1962 SC 70 (72)

3 *Govt of A.P. v. Srid. Md.* A 1962 SC 1778

4 *State of M.P. v. Perti Md.* A 1963 SC 645 (647)

5 *Ishar Ahmad v. Union of India*, A 1962 SC 1052

6 *State of A.P. v. Khader*, A 1961 SC 1647

If it is a criminal proceeding, the accused should be discharged, leaving the State Government to proceed afresh against the accused, after obtaining the determination of the Central Government that the accused has become a 'foreigner' by reason of his acquiring the citizenship of a foreign State.<sup>7</sup>

3. A suit is, however, not barred to determine questions outside s. 9(2) of the Citizenship Act, e.g., whether a person had acquired the citizenship of India under Art. 5 or the Proviso to Art. 7 of the Constitution,<sup>8</sup> or, in other words, whether he *ever* was a citizen of India.<sup>9</sup> Where it is necessary to go into disputed questions of fact in order to determine this question, the question can hardly be determined by the High Court under Art. 226. The Petitioner may, in such cases, be relegated to a suit.<sup>10</sup>

4. It is not competent for the Central Government to dispose of an application under s. 9(2), without giving an opportunity to the person concerned to show that he has not 'voluntarily' acquired the citizenship of another country or that he has been compelled to obtain a Pakistan passport by force, fraud or misrepresentation;<sup>11</sup> if no such opportunity is given, the resulting order must be quashed.<sup>12</sup> But no such opportunity need be given where he does not take the plea that the Pakistan passport had not been voluntarily obtained.<sup>13</sup>

5. There is no question of the application of s. 9(2), where it is neither established nor admitted that the person was ever a citizen of India<sup>14</sup> under Art. 5 or 6 or 8. In such a case, a person against whom action has been taken under the Foreigners Act, 1946, has the onus of proving that he is not a foreigner.<sup>15</sup> But he should be given a chance to prove it.

6. S. 9(2) has no application where, a person who had come to India on a Pakistani passport on a previous occasion had been validly deported and, on a subsequent occasion, he has been charged with having entered India without a valid travel document.<sup>16</sup>

### **'Has acquired'.**

1. This means acquisition of foreign citizenship before 26.1.50.<sup>17 18</sup> If the person acquired foreign citizenship before the commencement of the Constitution, he cannot take the advantage of Art. 5.

2. *Overruling* an earlier decision, the Supreme Court has held that cases of migration taking place *after* 26.1.50 do not fall under Art. 9 but have to be dealt with under the provisions of the Citizenship Act, 1955. If a person voluntarily migrates to a foreign State *after* that date, he will lose his Indian citizenship under the provisions of the Citizenship Act.<sup>19</sup>

**10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.**

Continuance of the rights of citizenship

7. *Union of India v. Ghaus*, A. 1961 S.C. 1526.

8. *Ayub Khan v. Commr. of Police*, (1965) 1 S.C.A. 642 (649) A. 1965 S.C. 1623.

9. *Moinuddin v. Govt. of India*, (1967) 2 S.C.R. 401.

10. *Ibrahim v. State of Rajasthan*, (1965) S.C.D. 236 (242).

11. *Fach Md. v. Delhi Administration*, A. 1968 S.C. 1035. [The position in this respect has changed owing to the amendment of the definition of 'foreigner' in s. 2 of the Foreigners Act, 1946, in 1957, so that the pre-amendment decisions, such as *Fida Husain v. State of U. P.* A. 1961 S.C. 1522, no longer hold the field].

12. *Abdul Sattar v. State of Gujarat*, A. 1965 S.C. 810 (813).

13. *State of M. P. v. Peer Md.*, A. 1963 S.C. 645 (648).

14. *Kulathil v. State of Kerala*, A. 1966 S.C. 1614 (1618).

**11. Nothing in the foregoing provisions of this Part<sup>1</sup> shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.**

Parliament to regulate the right of citizenship by law.

#### **Law relating to citizenship.**

As has been pointed out at the outset, the Constitution does not intend to lay down a permanent or comprehensive law relating to citizenship of India. The power to enact such law is left to Parliament by the present Articles.

In exercise of this power, *Parliament*, has enacted the Citizenship Act (LVI of 1955) making elaborate provisions for the acquisition and termination of citizenship **subsequent to the commencement of the Constitution.**

This power is not fettered by Arts. 5 to 10 and it is competent for Parliament, in exercise of this power, to take away or affect citizenship already acquired under the earlier Articles.<sup>2</sup>

### PART III

#### FUNDAMENTAL RIGHTS

##### *General*

**12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.**

Definition

#### **Scope of Art. 12.**

This definition is only for the purpose of application of the provisions contained in Part III. Hence, even though a body of persons may not constitute 'State' within the meaning defined, a writ under Art. 226 may be granted to them on non-constitutional grounds or on ground of contravention of some provision of the Constitution outside Part III, e.g. where such body has a public duty to perform or where its acts are supported by the State or public officials.<sup>3</sup>

#### **The State in Part III.**

The present Article gives an extended meaning to the words 'the State', wherever they occur in Part III of the Constitution. Unless the context otherwise requires, 'the State' will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'.<sup>4</sup>

#### **'Local authorities'.**

This expression includes a Panchayat, a Port Trust, or other bodies

15. *Izhar Ahmad v. Union of India*, A 1962 SC 1052

1. *Karjick v. W. B. S. I. Corpn.*, A 1967 Cal. 231 (234)

2. *Keshwani v. State of Madras*, A 1959 SC 725 (1959) Supp. (2) SCR 316

3. *Basheshkar v. I. T. Commr.*, A 1959 SC 149 (158)

4. *Ajit Singh v. State of Punjab*, A 1967 SC 855 (866)

5. *Madras Pinjapole v. Labour Court*, A 1961 Mad. 234 (239).

coming within the definition of 'local authority' in s. 3(31) of the General Clauses Act, 1897.<sup>6</sup>

### 'Other authorities'.

1. The rule of *ejusdem generis* cannot be applied to interpret this expression inasmuch as there is no common feature running through the named bodies.<sup>7</sup>

2. The expression refers to—

(i) Instrumentalities of the Government and Government Departments;<sup>8</sup>

(ii) Every type of public authority, exercising statutory powers,<sup>9</sup> whether such powers are governmental or quasi-governmental<sup>7</sup> or non-governmental<sup>7</sup> and whether such authority is under the control of Government or not,<sup>9</sup> and even though it may be engaged in carrying on some activities in the nature of trade or commerce,<sup>7</sup> e.g.,

A Board,<sup>7</sup> a University,<sup>10</sup> a registered co-operative society,<sup>11</sup> the Chief Justice of a High Court,<sup>12</sup> having the power to issue rules, bye-laws or regulations having the force of law<sup>7</sup> or the power to make statutory appointments.<sup>12</sup>

(iii) An authority set up under a statute for the purpose of administering a law enacted by the Legislature, including those vested with the duty to make decisions in order to implement them.<sup>13</sup>

But—

A non-statutory body, exercising no statutory power<sup>14</sup> is not 'State', e.g.,—

A company,<sup>15</sup> even though it may be a 'Government company' coming under s. 617 of the Companies Act, 1956.<sup>1-16</sup>

### 'Within the territory... or under the control of the Government of India'.

These words qualify the words 'local or other authorities', and the qualifications (a) within the territory of India and (b) under the control of the Government of India are disjunctive. Hence, the two kinds of local or other authorities coming under Art. 12 are—

(i) All such authorities within the territory of India, whether under the control of the Government of India or of any of the States, and would thus include autonomous bodies which are not under the control of the Government at all,<sup>17</sup> e.g., a corporation exercising statutory power.<sup>18</sup>

(ii) Any such authority, which is under the control of the Government of India, even though situated outside the territory of India.<sup>18</sup>

6. *Sarangapani v. Madras Port Trust*, A. 1961 Mad. 234 (239).

7. *Rajasthan State Electricity Bd. v. Mohan Lal*, A. 1967 S.C. 1856 (1861-3), dissenting from *University of Madras v. Shanta Bai*, A. 1964 Mad. 67.

8. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267 (277); A. 1966 S.C. 479.

9. *Ramamurthy v. Chief Commr.*, A. 1963 S.C. 1464; (1964) 1 S.C.R. 656.

10. *Umesh v. Singh*, A. 1967 Pat. 3 (9) F.B.

11. *Dukhooram v. Co operative Assocn.*, A. 1961 M.P. 289 [*Sobhnath v. Rajkishore*, A. 1967 All 121, to the contrary, does not appear to be sound].

12. *Paramatma v. Chief Justice*, A. 1964 Raj. 13.

13. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621; (1963) 1 S.C.R. 778 (969).

14. *Devdas v. K. E. College*, A. 1964 Raj. 6 (11).

15. *S. K. Mukherjee v. Chemicals*, A. 1962 Cal. 10 (12); 65 C.W.N. 1172.

16. *Kartick v. W. B. S. I. Corpn.*, A. 1967 Cal. 231 (234); *A. B. Biswas v. Hindusthan Cables*, (1968) 16 F.L.R. 289.

17. *Ramamurthy v. Chief Commr.*, A. 1963 S.C. 1464.

18. *Rajasthan State Electricity Bd. v. Mohan Lal*, A. 1967 S.C. 1856.

But a quasi-judicial authority has been held *not* to be under the control of the Government of India.<sup>19</sup>

### **Fundamental Rights—a guarantee against State action.**

It has now been settled that the rights which are guaranteed by Arts 19,<sup>20</sup> 21 and 31<sup>21</sup> are guaranteed against State action as distinguished from violation of such rights by private individuals. In case of violation of such rights by private individuals the person aggrieved must seek his remedies under the general law.

But where the claim of a private person is supported by a State act executive or legislative<sup>22</sup> the person aggrieved may challenge the constitutionality of the State act which supports the private claim.<sup>23</sup>

### **Conflict between different Fundamental Rights.**

It may be that an Article embodying a fundamental right may exclude another by necessary implication, but before such a construction is accepted, every attempt should be made to harmonise the two articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other.<sup>22</sup>

**Fundamental Rights of Government servants.**—See under Art 309, *post*

**Fundamental rights of military personnel.** See Art 33, *post*

**Whether a corporation can have fundamental rights.**—See under Art 19, *post*

**13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.**

Law inconsistent with or in derogation of the fundamental rights.

**(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.**

**(3) In this article, unless the context otherwise requires,—**

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

### **Cl. (1): Existing laws inconsistent with the Constitution.**

This clause provides that all laws in force at the commencement of the Constitution which clash with the exercise of the fundamental rights conferred by Part III of the Constitution shall to that extent be void.<sup>2</sup>

19 *Samdhan v. Central Bank* (1952) SCR 391 (1950-51) CC 68 A 1952 SC 59

20 *Vidya Verma v. Shrinarain*, (1956) SCR 357 A 1956 SC 108

21 *Kochummi v. State of Madras (I)* A 1959 SC 725 (730)

22 *Kochummi v. State of Madras & Kerala (II)*, A 1960 SC 1080 (1089)

23 *Keshavan v. State of Bombay*, (1951) SCR 228 (1950-1) CC 1 A 1951 S.C. 128.



1. But this does not make the existing laws which are inconsistent with the fundamental rights void *ab initio*. The entire Part III of the Constitution, inconsistent with any provision of Part III are rendered void only with effect from the commencement of the Constitution which for the first time created the Fundamental Rights. The inconsistency referred to in Art. 13 (1), therefore, does not affect transactions past and closed before commencement of the Constitution or the enforcement of rights and liabilities that had accrued under the 'inconsistent laws' before the commencement of the Constitution.<sup>23</sup>

2. On the other hand, it does not mean that an unconstitutional *procedure* laid down by a pre-Constitution Act is to be followed in respect of 'pending' proceedings or in respect of new proceedings instituted in respect of pre-Constitution rights or liabilities. Just as there is no vested *right* in any course of procedure, there is no vested *liability* in matter of procedure in the absence of any special provision to the contrary.<sup>24</sup>

3. But if the proceedings had been *completed* or become final before commencement of the Constitution, nothing in the Fundamental Rights Chapter of the Constitution can operate retrospectively so as to affect those proceedings.<sup>25</sup> For the same reason, it is not possible to impeach the validity of *that part* of the proceedings which had taken place under the 'inconsistent' law, prior to the commencement of the Constitution.<sup>1</sup>

4. The effect of Art. 13 (1) is not to obliterate the inconsistent law from the statute book for all times or for all purposes or for all people.<sup>2</sup> The effect is that the inconsistent law cannot, since the commencement of the Constitution, stand in the way of exercise of fundamental rights by persons who are entitled to those rights under the Constitution.<sup>2</sup> It remains good, even after the commencement of the Constitution, as regards persons who have not been given fundamental rights e.g., aliens.<sup>3</sup>

(a) It follows, therefore, that if at any subsequent point of time, the inconsistent provision is amended so as to remove its inconsistency with the fundamental rights, the amended provision cannot be challenged on the ground that the provision had become dead at the commencement of the Constitution and cannot be revived by the amendment. All acts done under the law since the amendment will be valid notwithstanding the fact of inconsistency before the amendment.<sup>4</sup>

(b) For the same reason if the Constitution itself is amended subsequently, so as to remove the repugnancy the impugned law becomes free from all blemish from the date when the amendment of the Constitution takes place.<sup>1</sup>

### Constitutionality of pre-Constitution orders.

1. The provisions of Part III of the Constitution having no retrospective effect,<sup>4</sup> any action taken under any law which was valid at the time when such action was taken (i.e., prior to the coming into force of the Constitution) cannot, after the commencement of the Constitution, be challenged as unconstitutional on the score of its infringing any of the fundamental rights.<sup>4-7</sup>

24. *Lachmandas v. State of Bombay*, (1952-54) 2 C.C. 49; (1952) S.C.R. 710

25. *Abdul Khader v. State of Mysore*, (1952-54) 2 C.C. 27; A. 1953 S.C. 355

1. *Qasim Razvi v. State of Hyderabad*, (1952-54) 2 C.C. 7; (1953) S.C.R. 589.

2. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 589 (589-9); A. 1955 S.C. 781; *Purshottam v. Desai* (1955) 2 S.C.R. 887 (904); A. 1955 S.C. 20.

3. *Behram v. State of Bombay*, (1955) 1 S.C.R. 613 (651); A. 1955 S.C. 123.

4. *Rajendraswami v. H. R. E.*, (1965) S.C.D. 209 [C. A. 745/6].

5. *Keshavan v. State of Bombay*, (1951) S.C.R. 228; A. 1951 S.C. 128 (130).

6. *Parnalal v. Union of India*, A. 1957 S.C. 397 (412).

7. *Nabhirajiah v. State of Mysore*, (1952-54) 2 C.C. 2; A. 1952 S.C. 339; *Jagad-guru v. Commr. H. R. E.*, (1965) 1 S.C.R. 252.

2. A person whose interest had been lawfully put an end to before the Constitution came into force is not entitled to invoke the protection of Art. 19 or 31.<sup>8</sup>

On the other hand,—

(i) Where, though the deprivation of the right was made by a pre-Constitution order, the deprivation is continued from day to day, the order becomes void owing to contravention of a fundamental right as soon as the Constitution came into force.<sup>9</sup>

This exception would, however, apply only where the pre-Constitution order was void *ab initio*, i.e., invalid according to the law as it then existed and not where it was valid under the existing law in which case, the deprivation was complete at a time when there was no fundamental right and no case of inconsistency with fundamental right could be raised, because they are not retrospective.<sup>4</sup>

(ii) Where though the statute is a pre-Constitution law, it is sought to be enforced after the commencement of the Constitution, the validity of the executive action can be challenged without involving a challenge as to the validity of the pre-Constitution statute.<sup>10</sup>

**Cl. (2): Post-Constitution laws which are inconsistent shall be void *ab initio*.**

1. This clause provides that any law made by any Legislature or other authority after the commencement of the Constitution, which contravenes any of the fundamental rights included in Part III of the Constitution shall, to the extent of the contravention be void. An amendment made after the commencement of the Constitution to an existing law will come within the purview of the clause.<sup>11</sup>

2. As distinguished from cl. (1), cl. (2) makes the inconsistent laws void *ab initio*<sup>12</sup> and even convictions made under such unconstitutional laws shall have to be set aside. Anything done under the unconstitutional law, whether closed, completed or inchoate will be wholly illegal and relief in one shape or another has to be given to the person affected by such unconstitutional law.<sup>13</sup>

3. This does not, however, mean that the offending law is wiped out from the statute-book altogether. It remains in operation as regards persons who are not entitled to the fundamental right in question (e.g., a non-citizen in respect of a right guaranteed by Art. 19).<sup>14,15</sup>

4. Nor does cl. (2) authorise the Courts to interfere with the passing of a bill on the ground that it would when enacted be void for contraven-

8. *Guru Datta v. State of Bihar*, A. 1961 SC 1681 (1697-8).

9. *Santiswarup v. Union of India*, A. 1953 SC 691.

10. *Cf. Zila Parihad v. K. S. Mills*, A. 1958 SC 98 (106).

11. *Sri Ram v. State of Bombay*, A. 1959 SC 459 (1961) (1969) Supp. (1) SCR, 469.

12. *Deen Chand v. State of U. P.*, A. 1959 SC 648 (656) (1959) Supp. (2) SCR, 8.

13. *Keshavan v. State of Bombay*, (1951) SCR 228 (256) (1958 51 C.C. 1 (6)) A. 1951 SC 128.

14. *Bhikaji v. State of M. P.* (1955) 2 SCR 589 (590) A. 1955 SC 781.

15. This proposition has, however, been dissented from by the majority in *Deen Chand v. State of U. P.*, A. 1959 SC 648 (663) with the observation that contrasted with cl. (1), cl. (2) of Art. 13 goes to the root of the legislative power and takes away the power of the State to make a law which is inconsistent with a fundamental right. Such law is, accordingly, void *ab initio* and does not survive for any purposes.

tion of the Constitution. The jurisdiction of the Court arises when the bill is enacted into law.<sup>16</sup>

### Shall be void.

1. This expression occurs both in cls. (1) and (2). It does not appear that an inconsistent law becomes void without any declaration from the Court to that effect. A citizen who is possessed of a fundamental right and whose right has been infringed can apply to the Court for relief upon a declaration that the law is inconsistent with the Constitution. But if a citizen is not possessed of the right, he cannot claim this relief.<sup>17, 18</sup>

2. But once a statute is declared invalid for contravention of a fundamental right, the invalidity attaches to the law from the date of commencement of the Constitution in the case of a pre-Constitution law.<sup>19</sup>

### The Doctrine of severability

1. The words "*to the extent of the inconsistency or contravention*" make it clear that when some of the provisions of a statute become unconstitutional on account of inconsistency with a fundamental right, only the repugnant provisions of the law in question shall be treated by the Courts as void, and not the whole statute,<sup>20</sup> subject, of course, to the doctrine of severability.

2. The doctrine of severability means that when some particular provision of a statute offends against a constitutional limitation, but that provision (*i.e.*, the section or clause) is *severable* from the rest of the statute, only that offending provision will be declared void by the Court and not the entire statute.

3. The *test* of severability is—

"Whether what remains is so *inextricably bound up* with the part declared invalid that what remains cannot independently survive or, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted at all that which survives without enacting the part that is *ultra vires*".<sup>18, 19</sup>

Thus—

(A) If good and bad provisions are joined together by using the words 'and' or 'or', and the enforcement of the good provision is not made dependent on the enforcement of the bad one, *i.e.*, the good provision can be enforced even if the bad one cannot be, or had not existed, the two provisions are severable and the good one will be upheld as valid and given effect to.<sup>20, 21</sup>

(B) On the other hand, if there is one provision (as distinct from several joined together) and it hits valid objects as well as invalid ones, which cannot be separated *without altering the language* (which is beyond the jurisdiction of the Courts) and is capable of being used for a legal purpose as well as for an illegal one, it is invalid and cannot be allowed

16. *Chotey Lal v. State of U. P.*, A. 1951 All. 228.

17. *Habeeb v. State of Hyderabad*, (1952-54) C.C. 21: A. 1953 S.C. 287; (1953) S.C.R. 661.

18. *State of Bombay v. Balsara*, (1951) S.C.R. 662; (1950-51) C.C. 308 (322): A. 1951 S.C. 318.

19. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (277): (1952) S.C.R. 889.

20. *Superintendent v. Ram Monohar*, A. 1960 S.C. 633 (642).

21. *Gopalan v. State of Madras*, (1950) S.C.R. 88; (1950-51) C.C. 74 (90): A. 1950 S.C. 27.

to be used even for the legal purpose.<sup>20</sup> In the words of the Supreme Court.<sup>22</sup>—

“Where a law purports to authorise the imposition of restrictions on a fundamental right in language *wide enough* to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits as it is not several. So long as the possibility of its being applied to purposes not sanctioned by the Constitution cannot be ruled out it must be held to be wholly unconstitutional and void”.<sup>22, 23</sup>

**Doctrine of severability as applied to legislation which is partly ultra vires.**— See under Art. 254, *post*.

### Court's power and duty to declare a law unconstitutional.

1. Our Constitution expressly confers upon the Courts the powers of judicial review, and as regards Fundamental Rights, the Court has been, by the present Article, assigned the role of a sentinel on the ‘*qui vive*’. While the Court naturally attaches great weight to the legislative judgment, it can not desert its own duty to determine finally the constitutionality of an impugned statute.<sup>21</sup>

2. In determining the constitutionality of a provision alleged to be violative of a fundamental right, the Court must weigh the real effect and impact thereof on the fundamental right.<sup>24</sup>

On the other hand,--

1. In determining the question of constitutionality of a statute, what the Court is concerned with is the *competence* of the Legislature to make it and not the wisdom or the motives of the Legislature in making it.<sup>25</sup>

2. When the constitutionality of a statute is challenged, what the Court has to do is to examine its provisions in the light of the relevant provisions of the Constitution, (e.g., Part III) regardless of how it is actually administered or capable of being administered.<sup>26</sup> Thus

(a) The possibility of abuse of a statute does not impart to it any element of invalidity.<sup>27</sup>

(b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.<sup>28</sup>

3. Once the Supreme Court is *prima facie* satisfied that the Petitioner before it has a fundamental right which is or is likely to be infringed by State action, it becomes the *duty* of the Supreme Court to interfere,<sup>29</sup> because the right to move the Supreme Court for the enforcement of fundamental rights is itself guaranteed by the Constitution and the Court cannot, accordingly, throw out a petition on grounds such as that the proper writ has not been prayed for or that there is another alternative remedy open to the Petitioner.<sup>30</sup> In the Author's opinion, the duty of the High Court (under

22. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594; A. 1950 S.C. 124; (1950-51) C.C. 40 (45).

23. *Chintamanrao v. State of M. P.*, (1950-51) C.C. 64 (66); (1950) S.C.R. 759; A. 1951 S.C. 118.

24. *State of Madras v. Row*, (1952) S.C.R. 597 (605).

25. *Re Kerala Education Bill*, A. 1958 S.C. 956 (981); (1959) S.C.R. 995.

1. *Sarup Singh v. State of Punjab*, A. 1959 S.C. 860 (864).

2. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316 (332).

3. *Kochummi v. State of Madras*, A. 1959 S.C. 725 (730).

Art. 226) in respect of fundamental rights is identical even though it is not expressly laid down as in Art. 32.<sup>3a</sup>

### When will a Court decide the question of constitutionality of a law.

1. The Court will not enter upon the question of constitutionality of a law if it is possible to dispose of the case and determine the rights of the parties before it, on other grounds.<sup>4</sup>

2. On the same principle,—where the validity of a law is challenged on the ground of contravention of several Articles of the Constitution, the Supreme Court has refusal to decide the issues arising out of each of the Articles relied upon if it is possible to dispose of the case with reference to one or some of them.<sup>5</sup>

3. The Court should not cover grounds or make observations on points not directly involved in the proceeding.<sup>6</sup>

### Presumption in favour of constitutionality.

1. The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.<sup>7</sup>

2. The burden of proving all the facts which are requisite for the constitutional invalidity is thus upon the person who challenges the constitutionality.<sup>8</sup>

3. By reason of this presumption, in considering the validity of the impugned law, the Court will not be restricted to the pleadings of the respondent and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained.<sup>9</sup>

### Adjustment of competing fundamental rights.

An Article embodying a fundamental right may exclude another by necessary implication. But before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two articles so as to make them co-exist; and only if it is not possible to do so, one can be made to yield to the other.<sup>10</sup>

### Who can challenge the constitutionality of a law.

(i) No one but whose rights are directly affected by a law can raise the question of the constitutionality of that law.<sup>6</sup>

It follows that—

(a) If a person is outside the class that might be injured by the statute, he has no right to complain.<sup>11</sup>

(b) Where a statute affects *'ona vacantia'*, there is no person who is competent to challenge the validity of such statute.<sup>12</sup>

(c) Where a statute operates on a contract, either party to the contract is entitled to challenge the validity of the statute.<sup>12</sup>

3a. This view of the Author, expressed at p. 17 of the previous Edition now finds support from *Devilal v. S. T. O.*, A. 1965 S.C. 1150 (1152).

4. *State of Bihar v. Hurdut Mills*, (1960) 2 S.C.R. 331: A. 1960 S.C. 378.

5. *Cf. Saghir Ahmad v. State of U. P.*, A. 1955 S.C. 728 (742); *Seshadri v. D. M.*, (1955) 1 S.C.R. 886: A. 1954 S.C. 747.

6. *Narash v. State of Maharashtra*, A. 1967 S.C. 1 (7).

7. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (879): A. 1951 S.C. 41.

8. *Cf. Rao Bahadur v. State of V. P.*, (1953) S.C.R. 1189 (1202).

9. *Buraker Coal Co. v. Union of India*, A. 1951 S.C. 954 (963).

10. *Kochuni v. State of Madras (II)*, A. 1960 S.C. 1080 (1089).

11. *Isker Singh v. Union of India*, A. 1956 Punj. 19.

12. *Bombay Dyeing v. State of Bombay*, A. 1958 S.C. 328 (339): (1958) S.C.R. 1182.

(ii) A person who challenges the constitutionality of a statute must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of enforcement of the statute and that the injury complained of is justiciable.<sup>13</sup>

This does not mean that there may not be cases where the mere operation of an enactment is prejudicial to the exercise of a fundamental right of a person. Where an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms, the aggrieved person may at once come to the Court without waiting for the State to take some overt action threatening to infringe his fundamental right.<sup>14</sup>

(iii) A person who is not possessed of a fundamental right cannot challenge the validity of a law on the ground that it is inconsistent with a fundamental right.<sup>15</sup>

(iv) A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the share-holders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation<sup>16</sup> or of the share-holders have been affected by the impugned statute.<sup>17</sup>

But it may happen that while a statute infringes the fundamental rights of a company, it indirectly affects the interests of its share-holders, in such a case, the share-holders also can impugn the constitutionality of the statute.<sup>17</sup>

### Whether a fundamental right can be waived.

1. The question whether a fundamental right can be waived has not yet been finally decided by the Supreme Court.

(a) In *Behram v. State of Bombay*,<sup>18</sup> Venkatarama, J. had expressed the view that such of the rights as were created for the benefit of individuals (as distinguished from the interests of the public) could be waived and according to his Lordship, even a right guaranteed by Art. 19 (1) came within this category.

But the majority, on reference (Mahajan, C.J., Mukherjea, Bose and Hasan, JJ.), without finally deciding the question, expressed the view that the fundamental rights, though primarily for the benefit of individuals, have been put into our Constitution on grounds of public policy and in pursuance of the objective declared in the Preamble. Hence, none of them can be waived.

(b) In *Bhashar v. Commr. of I. T.*,<sup>19</sup> Bhagwati and Subba Rao, JJ. have held that a fundamental right being in the nature of a prohibition addressed to the State, none of the fundamental rights in our Constitution can be waived by an individual. [This view is thus in agreement with the majority view in *Behram's case*].

Das, C.J. and Kapur, J. agreed with the above view only in respect

13. *Dwarkanadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674 (712).

14. *Kochunni v. State of Madras*, A. 1959 S.C. 725 (731). (1959) Supp. (2) S.C.R. 316.

15. *Nabhiar v. State of Mysore*, (1952-54) 2 C.C. (5) (1952) S.C.R. 744: A. 1952 S.C. 339.

16. Now that it has been held that a corporation can have no fundamental rights (see under Art. 19, *post*), this question has lost its importance so far the unconstitutionality of a law owing to contravention of fundamental rights is concerned.

17. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

18. *Behram v. State of Bombay*, (1955) 1 S.C.R. 613. A. 1955 S.C. 123.

19. *Bhashar v. Commr., of I. T.*, A. 1959 S.C. 149; (1959) Supp. (1) S.C.R. 528.

of the right conferred by Art. 14 and refrained from making any observation as regards the other rights in Part III of our Constitution.

S. K. Das, J. opined that where a fundamental right is intended primarily for the benefit of an individual, it can be waived by him, but his Lordship did not enumerate those of the rights included in Part III which would come under this category.

The views expressed in *Behram's case*<sup>18</sup> being *obiter*, and the decision in *Bhakeshar's case*<sup>19</sup> not being comprehensive, a direct decision is yet to be made.

The view of S. K. Das, J. is in accord with the American view but if this view is acceptable to a future Court, a classification of all the fundamental rights enumerated in Part III shall have to be undertaken, in order to settle the controversy.

2. In a subsequent case, without entering into the question of waiver, the Court has held that a person who has applied for appointment to an office created by an Act is not precluded from challenging the constitutionality on the ground that it violates his fundamental right under Art. 16.<sup>20</sup>

### Effect of Acquiescence.

1. There are cases<sup>21</sup> in which it has been held that a person who has received a benefit under a statute is not entitled to challenge its constitutional validity.

2. In *Nain Sukh v. State of U. P.*,<sup>22</sup> the Supreme Court observed that a person who had acquiesced in an election being conducted on the basis of separate electorates formed on communal lines, could not seek his remedy under Art. 32, after the election was over.<sup>23</sup>

3. But a fundamental right cannot be lost merely on the ground of non-exercise of it.<sup>24</sup>

### Effect of a law being declared unconstitutional.

(i) Art. 141 of our Constitution declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Once, therefore, the Supreme Court declares a law to be unconstitutional, the decision becomes binding on all courts within the territory of India. The virtual effect of it is that, that decision operates as a judgment *in rem* against all persons who may seek relief in any Court in India subsequently. In a subsequently proceeding, therefore, there is no onus on the party affected by the unconstitutional law to establish its unconstitutionality again. The Court is bound to ignore the law which has been declared invalid by the Supreme Court, as if it never existed.<sup>25</sup>

(ii) The same principle applies where a law has been declared to be unconstitutional *partially* (e.g., where part of a section has been declared to be invalid). If the law is sought to be enforced in a subsequent case, no notice is to be taken by the Court of that part which has been declared by the Supreme Court to be unconstitutional; in other words, the Court will read the statute as if the part of the section which has been declared to be invalid were not there. If, therefore, a person is prosecuted for contravention of the section a part of which has been declared invalid, no onus is cast on the accused to prove that his case falls under that part of the

20. *Dasanatha v. State of A. P.*, A. 1961 S.C. 564. [See C<sup>o</sup>, Vol. 2, pp. 55-64].

21. *Ch. Narayana v. State of Andhra*, A. 1959 A.P. 471 (475).

22. *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184. A. 1953 S.C. 384.

23. It should be noted that in this case the writ prayed for was *quo warranto*, with respect to which acquiescence is a good plea in bar, under English common law.

24. *Kerala Education Bill*, in re, A. 1958 S.C. 956: (1959) S.C.R. 955.

25. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (663): (1959) Supp. (2) S.C.R. 8.

section which has been held unenforceable; on the other hand, the prosecution cannot succeed unless it proves that the accused has contravened that portion of the section which is enforceable and valid after the Supreme Court decision.<sup>1</sup>

(iii) In the application of the above principles, no distinction can be made between a case where the law is declared to be invalid for lack of legislative competence and a case where it is declared invalid on the ground of contravention of a Fundamental Right. Art. 245 (1) of our Constitution lays down specifically that the legislative power whether of the Union or of a State Legislature is subject to the other provisions of the Constitution. The result is, when a Legislature makes a law contravening a Fundamental Right, the position is the same as if it had no power to legislate over the subject-matter of the legislation at all and, accordingly, the declaration of invalidity of the law by the Supreme Court goes to the root of the legislative power in either case.<sup>1</sup>

### Effects of constitutional amendment upon an unconstitutional statute.

Though there was some difference of opinion on this point in the earlier cases, the following propositions appears to be settled now:

1. The doctrine of 'eclipse' can be invoked in the case of a pre-Constitution law which was valid when it had been enacted, but a shadow was cast by a supervening event, namely, inconsistency with the Constitution which came into existence subsequently; if and when the shadow is removed, the pre-Constitution law becomes free from all infirmity.<sup>2</sup>

2. But the foregoing principle cannot be invoked in the case of a pre-Constitution law which is void *ab initio*.<sup>3</sup>

(a) In view of art. 13 (2), the fundamental rights constitute express limitations upon the legislative power of a Legislature making a law after the commencement of the Constitution and no distinction can be drawn between a post-Constitution law which is *ultra vires*, i.e., beyond the legislative competence of the Legislature and a law which contravenes a fundamental right.<sup>4</sup>

(b) In the result, a post-Constitution law, which violates a fundamental right is void *ab initio* and no subsequent amendment of the Constitution can revive such law.<sup>5,6</sup>

### Power of the Legislature when statute declared unconstitutional.

When a statute is declared unconstitutional by a Court, the Legislature cannot directly override that decision and pronounce the statute to have been valid or anything done under that statute to have been valid on the date of that judgment. It is, however, competent for the Legislature to make a fresh law, free from the unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions.<sup>7</sup>

### Effects of a Proclamation of Emergency upon unconstitutional statute.

A Proclamation of Emergency under Art. 352 is prospective in its operation. Art. 358 similarly frees the Legislature from the limitation of

1. *Behram Khurshed v. State of Bombay*, A. 1955 S.C. 123; (1955) 1 S.C.R. 613.
2. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 569.
3. *Deep Chand v. State of U. P.*, A. 1959 S.C. 649; (1950) Supp. 2 S.C.R. 8.
4. *Mahendra v. State of U. P.*, A. 1963 S.C. 1019 (2029-30).
5. *Sedait v. State of Orissa*, (1956) S.C.R. 43; A. 1956 S.C. 432.



Art. 19 during the continuance of the Proclamation. But it does not operate to validate a law, enacted prior to the Proclamation, which was invalid owing to contravention of Art. 13 (2).<sup>6</sup> Such law is void *ab initio* and cannot be revived by the Proclamation of Emergency; hence, any executive action taken in exercise of any power conferred by such void law will also be invalid even though such action takes place after the commencement of the Proclamation.<sup>6</sup>

### CL (3) (a): 'Law'.

1. Law, in this Article, means the law made by the Legislature and includes *intra vires* statutory orders<sup>7</sup> and orders made in exercise of power conferred by statutory rules,<sup>8</sup> but not administrative orders having no statutory sanction.<sup>9</sup> A statutory scheme is a 'law'.<sup>11</sup>

2. This does not, however, mean that an administrative order which offends against a fundamental right will, nevertheless, be valid because it is not a 'law' within the meaning of Art. 13 (3).<sup>10</sup>

3. So is a custom having the force of law.<sup>11a</sup>

4. In view of the present definition, a rule, order or notification issued under a statute may be held invalid for contravention of a fundamental right even though the statute under which it was issued may not offend against the Constitution,<sup>7 12, 13</sup> or the validity of the latter is not challenged.<sup>13</sup>

5. In the case of an absolute sovereign like the Ruler of an erst-while Indian State, 'law' is to be distinguished from a grant which is founded upon an agreement and not on the command of the sovereign.<sup>14</sup>

### No law excluded from Art. 13 (2).

1. It is now settled that any law which is passed by Parliament or a State Legislature by virtue of the powers conferred by Arts. 245-6, is subject to Art. 13, thus, including—

(i) A taxing statute;<sup>15</sup>

(ii) A law for the making of which provided for by some specific provision of the Constitution, e.g. Art. 105 (3);<sup>16</sup> 194 (3).<sup>16</sup>

2. On the other hand, the Supreme Court has held that where a law is made in exercise of a power conferred by a specific Article of the Constitution other than Arts. 245-6, such law must not be construed as being included in Art. 13 (2); for, to do so would render nugatory the independent provision of the Constitution, which stands on an equal footing with Art. 13.<sup>17</sup> It is on this reasoning that the Court has excluded<sup>18</sup> a Proclamation of Emergency under Arts. 358-9 from the purview of the Fundamental Rights, overruling an earlier decision of the Supreme Court.<sup>19</sup>

6. *State of M. P. v. Bharat Singh*, A. 1967 S.C. 1170 (1173).

7. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267 (277); *Edward Mills v. State of Aimer*, (1955) 1 S.C.R. 735.

8. *State of M. P. v. Mandawar*, (1964) S.C.R. 599 (604); A. 1964 S.C. 493.

9. *Dwarkanath v. State of Bihar*, A. 1959 S.C. 249 (253).

10. *More v. Union of India*, A. 1969 Bom. 134 (137).

11. *Narayanappa v. State of Mysore*, A. 1960 S.C. 1073 (1079).

11a. *Bhau Ram v. Baijnath*, A. 1962 S.C. 1476.

12. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538; (1959) S.C.R. 279.

13. *Madhubhai v. Union of India*, A. 1961 S.C. 21 (25).

14. *Narsing Pratap v. State of Orissa*, A. 1964 S.C. 1793; *Umaid Mills v. Union of India*, A. 1963 S.C. 953.

15. *Haril Krishna v. Union of India*, A. 1966 S.C. 619 (623).

16. Ref. under Art. 143 of the Constitution, A. 1966 S.C. 745 (761).

17. *Yaqub v. State of J. & K.*, (1967) S.C. W.P. 109-114 of 1967.

18. *Ghulam Sarwar v. Union of India*, (1967) 2 S.C.R. 271.

3. There has, however, been controversy as to whether an amendment of the Constitution, made in the manner provided for under Art. 368, must have to conform to the requirements of Art. 13 (2), as a 'law' as defined in cl. (3) of Art. 13.

In *Shankari Prasad v. Union of India*<sup>19</sup> and *Sajjan Singh v. State of Rajasthan*,<sup>20</sup> the Supreme Court held that an amendment Act, passed in exercise of the power conferred by Art 368, is not a 'law' within the meaning of Art. 13 (2). But this view has been overruled by the majority in *Golak Nath's case*<sup>21 22</sup>

### Sub-clause (b): 'Laws in force'.

1. This expression is defined in the present clause in the identical language used in the definition of the expression in Expl. I to Art. 372 and should receive the same interpretation in both Articles. There is also no material difference<sup>23</sup> between 'existing law' as defined in Art 366 (10) and 'law in force.'

2. By reason of the word 'includes', the definition should be treated as *not* exhaustive,<sup>24</sup> and would, therefore, include not only laws made by the Indian Legislatures, but also pre Constitution statutes made by the British Parliament,<sup>25, 1</sup> English rules of common law as applied in India,<sup>2</sup> subordinate legislation such as order, by law rule, regulation, notification, as well as personal law & custom or usage having the force of law<sup>4</sup> [Cl 3 (a)].

3. It follows that a custom<sup>12</sup> which is inconsistent with a fundamental right must be held to be void, e.g., a custom of succession to hereditary village offices, which are now held under the State is void, for contravention of Art 16 (1).<sup>4</sup>

4. The words 'notwithstanding . . . areas' mean that any law which was on the statute book at the commencement of the Constitution would come under this sub-clause even though it might not yet have been brought into operation.<sup>24</sup>

**Conditions of validity of subordinate legislation.**—See under Art. 245, *post*.

### Constitutionality of some Rules, Orders, Notifications, Bye-Laws.

**Ajmer Law Regulation, 1877:**

*Held.*—R 1 framed under the Act is void for contravention of Art. 19(1)(g).<sup>7</sup>

**Assam Food Grains (Licensing & Control) Order, 1961:**

*Held.* Cl 5 (c) does not contravene Arts 14 and 19(1)(g).<sup>8</sup>

**Coir Industry Act, 1953:**

*Held.*—Rr 18, 19, 20(1)(a), 21, 22(a) do not contravene Art 19(1)(g) <sup>9</sup> or Art 14.<sup>9</sup>

19. *Shankari Prasad v. Union of India*, A 1951 SC 458 (1952) S.C.R. 89

20. *Sajjan Singh v. State of Rajasthan*, A 1961 SC 845 (1965) 1 S.C.R. 973.

21. *Golak Nath v. State of Punjab*, A 1967 SC 1613 (1969, 1670, 1718)

22. A reversion to the earlier view is not unlikely.

23. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735 A 1955 SC 25.

24. *Sant Ram v. Lakh Singh*, A 1964 SC 314 (316)

25. *State of Madras v. Menon*, (1955) 1 S.C.R. 280

1. It is to be noted that all British statutes have ceased to be applicable to India, by reason of the British Statutes (Application to India) Repeal Act, 1960, enacted by our Parliament.

2. Cf. *United Provinces v. Atiq*, A 1491 F.C. 16 (31)

3. *Shao Kumar v. Sudama*, A 1962 Pat 125 (126)

4. *Dasratha v. State of A. P.*, A 1961 S.C. 564 (570 2)

5-7. *Ganeshji v. State of Ajmer*, A 1955 SC. 188: (1952-54) 2 CC 237 (1955) 1 S.C.R. 1065.

8. *Mamulal v. State of Assam*, A. 1962 S.C. 386 (393).

9. *Sivaraman v. Union of India*, A 1959 S.C. 566 (559): (1959) Supp. (1) S.C.R. 779.

**Cotton Control Order, 1950:**

*Held*—Cl 4 does not contravene Art. 19(1)(g).<sup>10</sup>

**Custom House Agents Licensing Rules, 1950.**

*Held invalid*—Rr 10 (c),<sup>11</sup> 11.<sup>11</sup>

**Daily Newspaper (Price & Page) Order, 1960.**

*Held invalid* For contravention of Art 19(1)(a) <sup>12</sup>

**District Board, Muzaffarnagar:**

*Held* Bye-law no 2 void for contravention of Art 19(1)(g) <sup>13</sup>

**Exports (Control) Order, 1959.**

*Held*—Cl 7 does not contravene Art 14 <sup>14</sup>

**Government of C. P. & Berar:**

*Held*—Resolution d 16-9-48, does not contravene Art 14 <sup>15</sup>

**Government of Bombay, Education Department Circular Order, dated 6-1-54:**

*Held*—Void for contravention of Arts 29(1), 30(1) <sup>16</sup>

**Imports (Control) Order, 1955:**

*Held*—Para 6 (h) does not contravene Arts 14, 19 or 31 <sup>17</sup>

**Iron & Steel Control of Production & Distribution Order, 1941:**

*Held* Cl 11B does not contravene Art 14 <sup>18</sup>

**Jail Manual:**

*Held*—Para 575 does not contravene Art 14 <sup>19</sup>

**Madras Communal G.O.:**

*Held void* <sup>20</sup>

**Madras G. O. 416, Education, dated 24-2-39:**

*Held void*.<sup>21</sup>

**Motor Vehicles Act, 1939:**

*Held*—R 248 framed by Madras Government does not contravene Art 19(1)(g) <sup>1</sup>

**Municipal Board, Koirana:**

*Held void*—Bye-laws 2, 4 <sup>2</sup>

**Non-Ferrous Metal Control Order, 1958:**

*Held valid* <sup>3</sup>

**Railway Services (Safeguarding of National Security) Rules, 1949:**

*Held*—Does not contravene Art 14 <sup>4</sup>

**Rajasthan Foodgrains Control Order, 1949:**

*Held*—Cl 25 void for contravention of Art 19(1)(g) <sup>5</sup>

**Regional Transport Authority, Calcutta:**

*Held*—Notification, d 13-5-52 does not contravene Art 19(1)(g) <sup>6</sup>

10 *M B Cotton Assn v Union of India* A 1954 SC 634

11 *Chandrakant v Jasut*, A 1962 SC 204 (208-9)

12 *Sakal Papers v Union of India*, A 1962 SC 305

13 *Tahir Hussain v Dt Board* A 1954 SC 630 (1952-54) 2 CC 234

14. *Venkatkrishnan in re*, A 1958 Mad 216

15 *State of M P v Mandwar* A 1954 SC 493 (1954) SCR 599

16 *State of Bombay v Education Society* (1955) 1 SCR 568

17 *Glass Chateaux Assn v Union of India* A 1961 SC 1514

18 *Bhagwati Saran v. State of U P*, A 1961 SC 928 (933)

19 *Ranbir v State of Punjab*, 1962 SC 510

20 *State of Madras v Champakam*, (1951) SCR 525 (1950-1) CC 183;

*Venkataraman v State of Madras*, A 1951 SC 229 (1950-1) C.C. 37.

21-25 *Ramkrishnaiah v Dt Board*, A 1952 Mad 253

1. *Ibrahim v. R T. A.* (1963) SCR 290 A 1963 SC 79.

2. *Rashid Ahmed v Municipal Board* (1950) S.C.R. 566

3. *Narendra v Union of India*, A. 1966 SC 23: (1966) S.C.R. 1052

4. *Balakrishnaiah v Union of India*, A. 1966 SC 232: (1966) S.C.R. 1052.

5. *State of Rajasthan v. Nathmal*, (1954) S.C.R. 982: (1952-54) 2 C.C. 239.

6 *Harnam Singh v R T. A.*, (1954) S.C.R. 371: A. 1954 SC. 140.

**Securities Contracts (Regulation) Act, 1959:**

*Held valid.*—Notification under s. 4.<sup>7</sup>

**Sugar (Control) Order, 1955:**

*Held valid.*—Notification, d. 30-7-58, under cl. (5).<sup>8</sup>

**Town Area Committee, Jalalabad:**

*Held.*—Bye-laws 1, 4 (b) do not contravene Art. 19(1)(g).<sup>9</sup>

**U.P. Coal Control Order, 1953:**

*Held.*—Cls. 3 (2) (b); 4 (3) contravene Art. 19(1)(g).<sup>10</sup>

**U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953.**

*Held.*—Notification, dated 27-9-54, does not contravene Art. 19(1)(c).<sup>11</sup>

### *Right to Equality.*

**14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.**

#### **Meaning of Equal Protection.**

1. In interpreting this clause, it is permissible to refer to the decisions of the American Courts upon the Equal Protection clause of the American Constitution.<sup>12</sup>

2. Equal protection means the right to equal treatment in *similar circumstances*<sup>13</sup> both in the privileges conferred and in the liabilities imposed by the law.<sup>14</sup> In other words, there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same.<sup>15</sup>

But—

(i) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment<sup>16</sup>—

The principle does not take away from the State the power of classifying persons for legitimate purposes.<sup>1</sup>

"A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects, and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."<sup>2</sup>

(ii) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.<sup>3</sup>

7. *Madhubhai v. Union of India*, A. 1961 S.C. 21.

8. *D. S. & G. Mills v. Union of India*, A. 1959 S.C. 626 (632).

9. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

10. *Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 80.

11. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676 (711).

12. *State of U. P. v. Deoman*, A. 1960 S.C. 1125 (1131).

13. *Shrikishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

14. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (320), Mukherjee J.

15. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (17); (1950) S.C.R. 839.

16. *Dhirendra v. Legal Remembrancer*, (1952-54) 2 C.C. 111 (114); (1955) 1 S.C.R. 224; A. 1954 S.C. 424.

17-25. *State of Bombay v. Balsara*, (1951) S.C.R. 682 (708-9); (1950-51) C.C. 10 (308).

1. *State of Bombay v. Balsara*, (1951) S.C.R. 682 (708-9).

2. *Amarabhis v. Mehboob*, (1953) S.C.R. 404 (414); (1952-54) 2 C.C. 117; A. 1953 S.C. 91.

Differential treatment does not 'per se' constitute violation of Art. 14. It denies equal protection only when there is no *reasonable* basis for the differentiation.<sup>3</sup>

(iii) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.<sup>4</sup> Legislation enacted for the achievement of a particular object or purpose need not be all-embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render the legislation which has been enacted in any manner discriminatory and violative of Art. 14.<sup>5</sup>

(iv) Art. 14 does not prevent the Legislature from introducing a reform gradually, that is to say, at first applying the legislation to some of the institutions<sup>6</sup> or objects<sup>7</sup> having common<sup>8</sup> features or particular areas<sup>9</sup> only, according to the exigencies of the situation.

### Classification authorised by other provisions of the Constitution.

1. Art. 14 is a general provision and has to be read subject to the other provisions included within the Part on Fundamental Rights. Hence, any law making special provision for women (or children) under Art. 15(3) cannot be challenged on the ground of contravention of Art. 14.<sup>1</sup>

Thus, s. 54 (4) of the Representation of the People Act, 1951, which confers a double advantage upon members of the Schedule Castes or Tribes to be returned to the general seats even though seats have been reserved for them under the Constitution, being sanctioned by Art. 15 (4), cannot be held to be void for contravention of Art. 14.<sup>2</sup>

2. Where the Constitution itself makes a classification, the charge of discrimination cannot be levelled against such separate treatment.<sup>3</sup> Thus—

The special treatment of Government servants in the matter of their tenure [Art. 310(1)]<sup>4</sup>, or an order made by the President under Art. 311(2), Proviso (c)<sup>5</sup>; or the taxation by a State of road transport [Entry 56, List II]<sup>6</sup>, cannot be challenged as violative of Art. 14.

But—

The special treatment authorised by these other provisions must be kept within reasonable limits and should not be made so excessive as to render nugatory the general equality professed to the members of all communities by Art. 14.<sup>7</sup> Hence, the special provision for the advancement of the backward classes or Scheduled Castes and Tribes under Art. 15 (4)<sup>8</sup> or the reservation of posts for the backward classes under Art. 16 (4) will be unconstitutional because of contravention of Art. 14, if it is carried to an unreasonable extent<sup>9</sup> [see under Art. 16 (4), *post*].

3. *Sakthant v. State of Orissa*, (1955) 1 S.C.R. 1004; (1952-4) 2 C.C. 155 (156).

4. *Lakshminidra v. Commr*, A. 1952 Mad. 613.

5. *Biswambhar v. State of Orissa*, (1954) S.C.R. 842 (845); *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (366).

6. *Ramchandra v. State of Orissa*, (1956) S.C.R. 28; *Karam Das v. Union of India*, (1956) S.C. (unreported).

7. *Yusuf v. State of Bombay*, (1954) S.C.R. 930.

8. *Giri v. Dora*, A. 1959 S.C. 1318 (1325); (1960) 1 S.C.R. 426.

9. *Sanki Motors v. State of Rajasthan*, A. 1961 S.C. 1480 (1486).

10. *Rajkishore v. State of U. P.*, A. 1954 All. 343.

11. *Jagadish v. Accountant-General*, A. 1958 Bom. 283.

12. *Devadasan v. Union of India*, A. 1964 S.C. 179 (180).

13. *General Manager v. Rangachari*, (1962) 2 S.C.R. 586.

14. *Balaji v. State of Mysore*, A. 1963 S.C. 649 (664).

**How far reasonableness may be determined with reference to other laws.**

1. For the purpose of application of Art. 14, laws made by different Legislatures *cannot* be taken together for the purpose of comparison or contrast to show that the provisions of the one are discriminatory when read with the provisions of the other. Each law must be dealt with specifically.<sup>15</sup>

2. Of course, when the same Legislature enacts a number of connected laws, their combined operation may be taken into consideration for determining whether the provisions of any one of them are discriminatory. But the same process cannot be applied where similar laws on the same subject are enacted by different Legislatures.<sup>17</sup>

### **What classification is reasonable.**

1. As has been already stated, what Art. 14 prohibits is class legislation and not reasonable classification for the purposes of legislation.<sup>16</sup> If the Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a 'well-defined class', it is not open to the charge or denial of equal protection on the ground that the law does not apply to other persons.<sup>17-18</sup>

2. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that, that differential must have a rational relation to the object sought to be achieved by the statute in question.<sup>16-17</sup> The classification may be founded on different bases; such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a *nexus* between the basis of classification and the object of the Act under consideration.<sup>18-17</sup>

3. (a) Art. 14 does not insist that legislative classification should be *scientifically perfect* or logically complete.<sup>19</sup>

(b) The difference which will warrant a reasonable classification *need not be great*. What is required is that it must be real and substantial and must bear some just and reasonable relation to the *object* of the legislation.<sup>21-24</sup>

4. When a law is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation.<sup>2</sup> Mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreason-

15. *State of M. P. v. Mandawar*, (1952-54) 2 C.C. 137 (140); A. 1954 493 (1954) S.C.R. 599.

16. *Budhan v. State of Bihar*, (1955) 1 S.C.R. 1045 (1049); (1952-54) 2 C.C. 157; A. 1955 S.C. 191.

17. *State of W. B. v. Anwar Ali* (1952) S.C.R. 284; *Vajravelu v. Sp. Dy. Collector*, A. 1953 S.C. 1017 (1027).

18. *Sakhwant v. State of Orissa*, (1955) 1 S.C.R. 1004.

19. *Haraj v. State of Bihar*, A. 1958 S.C. 731.

20. *Kedar Nath v. State of W. B.*, (1952-54) 2 C.C. 100; A. 1953 S.C. 404; (1954) S.C.R. 30.

21. *Babbar v. State of Bombay Housing Board*, (1952-54) 2 C.C. 126;

*Amegroonias v. Mahboob*, (1952-54) 2 C.C. 177; (1953) S.C.R. 404.

22. *Siraj Mall v. Binwanath*, (1952-54) 2 C.C. 141; A. 1953 S.C. 545; *State of W. B. v. Anwar Ali*, (1952-54) 2 C.C. 50. (1952) S.C.R. 284; A. 1953 S.C. 75.

able or arbitrary; that it does *not rest on* any rational basis having regard to the object which the Legislature has in view.<sup>22, 24</sup>

When the Legislature enacts a statutory presumption in respect of certain acts or a burden of proof upon certain persons, the statute cannot be challenged as discriminatory if the rule of evidence has a rational relation to the object to be achieved by the Act.<sup>25</sup>

5. When, therefore, a law is challenged as offending against the guarantee in Art. 14, the first duty of the Court is to examine the *purpose* and policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the Legislature seeks to obtain.<sup>1</sup> The purpose or object of the Act is to be ascertained from an examination of its *'title, preamble and provisions'*.<sup>2</sup>

6. A law which was non-discriminatory at its inception may be rendered discriminatory by reason of external circumstances which take away the reasonable basis of classification. This happened after the merger of different territories with differential laws and a number of Indian State laws have been held to be discriminatory since the commencement of the Constitution, on the ground that these laws differed from the laws which governed the rest of the territory of the State with which the Indian State in question merged.<sup>4</sup>

7. But the law of one State cannot be held to be discriminatory by contrasting it with the law prevailing in another State. If the source of authority for the two statutes be different, Art. 14 has no application.<sup>3</sup>

#### **Classification of a single individual and ad hoc legislation.**

1. A classification may be reasonable even though a single individual (or object) is treated as a class by himself (or itself), if there are some special circumstances or reasons applicable to him (or it) alone and not applicable to others.<sup>10-21</sup>

2. But even though it is permissible for the Legislature to classify a single individual where he possesses real and substantial features different from other individuals in relation to the object of the legislation in question, Art. 14 would not tolerate any discriminatory legislation against a single named individual or individuals which simulates a Bill of Attainder,<sup>1</sup> and no reasonable basis for the classification appears on the face of the legislation nor is deducible from the surrounding circumstances or matters of common knowledge.<sup>2-3</sup>

3. Where a law is of general application, it cannot be challenged as discriminatory merely because the object of its enactment was to benefit a particular individual.<sup>4-5</sup>

23. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538. (1959) S.C.R. 279.

24. *State of A. P. v. Nalla Raja*, (1967) 3 S.C.R. 28 (44).

25. *Babulal v. Collector of Customs*, (1957) S.C.R. 1110 (1122); A. 1957 S.C. 877; *Krishna v. State of Madras*, (1957) S.C.R. 399 (414).

1. *Kedar Nath v. State of W. B.*, (1962-54) 2 C.C. 100; (1953) S.C.R. 30.

2. *State of Rajasthan v. Manohar*, (1954) S.C.R. 996; (1952-54) 2 C.C. 133.

3. *State of M. P. v. Mandawar*, (1955) 1 S.C.R. 599; A. 1954 S.C. 493.

26. *Ramkrishna Daimia v. Tendolkar*, (1959) S.C.R. 279; A. 1958 S.C. 538; *Govindlalji v. State of Rajasthan*, (1964) 1 S.C.R. 561 (618); *State of J. & K. v. Golem Md.*, A. 1967 S.C. 122 (131).

1. *Ram Prasad v. State of Bihar*, A. 1953 S.C. 215; (1953) S.C.R. 1129.

2. *Ramkrishna v. Tendolkar*, (1959) S.C.R. 279.

3. *Reddy v. Chancellor*, (1967) 2 S.C.R. 214 (231).

4. *Atlas Cycle Co. v. Workmen*, (1962) Supp. 3 S.C.R. 89 (104).

5. *Cy. State of Orissa v. Bhanupendra*, (1962) Supp. 2 S.C.R. 380 (392).

## 4. On the other hand,—

In the name of classifying individuals on the ground of special features, the Legislature cannot assume the jurisdiction to *adjudicate* disputes regarding private rights and thus deprive named individuals of their right to go to the duly constituted courts a right of access to which for the determination of private legal rights belongs to every person.<sup>1, 6</sup> The principle is not, however, applicable where the individual who complains against the *ad hoc* legislation had no legal right enforceable in a court, e.g., an interest in property held at the discretion of the owner.<sup>7</sup>

**Reasonable basis of classification.**

It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. It depends on the objects of the legislation in view and whatever has a reasonable relation to the *object* or *purpose* of the legislation is a reasonable basis for classification of the objects coming under the purview of the enactment. Thus—

(a) The basis of classification may be *geographical*<sup>8, 12</sup> provided there is a nexus between the territorial basis of the classification and the object sought to be achieved by the Act.<sup>11, 20</sup> Thus—

(b) The justification for classification may be *historical*<sup>21, 25</sup>

(c) The classification may be according to difference in *time*.<sup>1</sup>

It is a matter exclusively for the Legislature to decide from what date a (civil) law should be given operation and the law cannot be challenged as discriminatory in not affecting prior transaction,<sup>2-8</sup> if it applies generally to all persons coming within its ambit as from the date on which it becomes operative.<sup>9</sup>

(d) Age may form a rational basis in relation to the object of particular subjects of legislation. Thus, persons who have not attained majority may be incapacitated for entering into contracts.<sup>8</sup>

(e) The classification may be based on the difference in the *nature*

6. *Ameroonissa v Mahboob*, (1953), SCR 404 (416). A 1953 SC 91.

7. *Sikander v. A. P. State Government* A 1962 SC 996

8. *Joshi v State of M. B.* (1965) 1 SCR 1215

9. *State of Punjab v. Azab Singh* (1953) SCR 254

10. *Gopal Nayain v State of U. P.* A 1964 SC 370 (375).

11. *State of Nagaland v Ratan Singh* A 1967 SC 212 (224).

12. *Gopaul v Union of India* A 1967 SC 1861 (1868)

13. *Purshottam v Desai*, (1955) 2 SCR 887 (902) A 1956 S.C. 20.

14. *Gopichand v Delhi Administration* A 1959 SC 611 (614).

15. *Kansari v. State of W. B.* A 1960 SC 457

16. *Srikishan v State of Rajasthan* (1955) 2 SCR 531 (536)

17. *Purshottam v Desai* (1955) 2 SCR 887 (901) A 1956 SC 20

18. *Purshottam v. Desai*, (1955) 2 S.C.R. 887

19. *Joshi v. State of M. B.* (1955) 1 SCR 1215 (1228)

20. *Ila Lal v Delhi Administration* A 1962 SC 1781 (1784)

21. *Mohanlal v Man Singh* A 1962 SC 73 (1962) Supp. 2 SCR 257

22. *Bhaivalal v State of M. P.* A 1967 SC 981 (1962) S. 2 SCR 257.

23. *Lachman v. State of Punjab* A 1963 SC 223 (233) *State of M. P. v. Bhopal Sugar Industries* A 1964 S.C. 1179

24. *Cf. Pashid v. I. T. O.* (1954) SC [CA 37/63].

25. *Sikander Jehan v A. P. State Govt.* A 1962 SC 996 (1000) (1962) Supp. 2 S.C.R. 226.

1. *Ramailal v I. T. Officer*, (1951) SCR 127. A 1951 SC 97.

2. *Inder Singh v. State of Rajasthan* A 1957 S.C. 510. (1957) S.C.R. 605.

3. *Hathising Mfg. Co. v Union of India*, A. 1960 S.C. 923 (931).

4. *Rihari Lal v. Chiet Settlement Commr.* A 1965 S.C. 134 (136).

5. *Purshottam v. Desai*, (1955) 2 S.C.R. 887 (901) A. 1956 S.C. 20

6. *Inder Singh v State of Rajasthan* A. 1957 S.C. 510.

7. *Shiv Bahadur v State of V. P.*, (1963) S.C.R. 1188 (1197); A. 1953 S.C. 394.

8. *Chittrabha v. State of Mysore*, A. 1964 S.C. 1623 (1832).



of the persons, trade calling or occupation, which is sought to be regulated by the legislation, e.g., admission to an educational institution.<sup>9</sup>

### *Ban on cattle slaughter.*

In a legislation imposing a ban on the slaughter of animals for the preservation and improvement of livestock, it is legitimate to classify animals into different categories according to their usefulness to society from different standpoints, e.g., usefulness for agriculture, yielding milk and the like<sup>10</sup> Thus, the Legislature may legitimately ban the slaughter of cows without prohibiting the slaughter of goats and sheep.<sup>10</sup> The butchers who slaughter the animals belonging to these different categories may also be classified on the same basis.<sup>10</sup>

### *Company.*

1. In view of the financial interest of a large number of citizens in the affairs of a company, it would be reasonable to classify the problem of misappropriation by persons in charge of companies from ordinary cases of misappropriation. It is not, therefore, unreasonable to deny the protection, afforded to witnesses under s. 132, Evidence Act, to persons in charge of companies in an investigation under ss. 239 and 240 of the Companies Act, 1956.<sup>11</sup>

2. In a law providing for compulsory acquisition of property, it would not be unreasonable to differentiate between acquisition for the purposes of a Government company and for other companies or between acquisition for companies and for individuals.<sup>12</sup>

### *Co-operative Societies*

In view of the Directive in Art. 43 of the Constitution, co-operative societies have been treated on a special footing as compared with other establishments or corporations, for the purpose of exempting them from the operation of the Employees' Provident Fund Act<sup>13</sup> or a Rent Control Act<sup>14</sup> or from excise duties on goods produced by them.<sup>15</sup>

### *Criminal proceedings*

(i) Ss. 207A<sup>16</sup> and 251A<sup>17</sup> of the Criminal Procedure Code are based on a reasonable classification inasmuch as they make a distinction between proceedings instituted on police report and those instituted otherwise, because the object of the amendment being to secure a speedy disposal of cases, the differentia adopted for classification is intelligible and relevant to that object namely, whether or not there has been a previous investigation by a responsible public servant whose duty is to detect crime.

(ii) S. 178A of the Sea Customs Act, 1878 provides that when certain goods such as diamonds are seized under the Act "in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized." The contention that this provision discriminated between such persons and other litigants by laying down an onerous rule of evidence contrary to that under the ordinary law, was rejected on the ground that the object of the Act was the prevention of smuggling and the differentia on the basis of which the goods were classified and a different presumption was applied had a rational relation to and directly furthered that object.<sup>18</sup>

9 *Hathisingh Mfg. Co. v. Union of India*, A. 1960 S.C. 931.

10 *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

11 *Narayanlal v. Maneck*, A. 1961 S.C. 29.

12 *Arora v. State of U. P.*, A. 1954 S.C. 1231, (1241).

13 *Mohmedalli v. Union of India*, A. 1964 S.C. 980 (986).

14 *Baburao v. Bombay Housing Board* (1954) S.C.R. 572.

15 *Orient Weaving Mills v. Union of India*, A. 1963 S.C. 98 (101); *British India Corpn. v. Collector of Central Excise*, A. 1963 S.C. 104 (107).

16 *Hammantha v. State of A. P.*, A. 1957 S.C. 927.

17 *Varalakshmi v. State*, A. 1968 A.P. 301.

(iii) Though the mere object of securing a *speedier trial* may not be a reasonable basis for providing a discriminatory procedure for certain offences,<sup>18</sup> it would be a valid basis for classification if the need for a speedier trial has a reasonable relation to the object sought to be achieved by the legislation,<sup>17-18</sup> e.g., taking prompt action against bribery and corruption<sup>19-20</sup>, which had become rampant at a particular point of time.

(iv) The very nature of a new offence of a serious nature, not to be found in the existing law of crimes, may require trial under a different or special procedure. There would be no violation of equal protection because anybody who committed such offence would be tried under the special procedure.<sup>21</sup>

(v) Where a convicted person is in jail and unable to engage a pleader, it is not unreasonable to provide that appeal shall be decided without hearing, though where such person is in a position to engage a pleader, the appeal cannot be disposed of without hearing the pleader.<sup>22</sup>

#### *Essential commodity.*

Special public interest in an industry, e.g., that it is engaged in the production of a commodity vitally essential to the community, may justify its regulation.<sup>23</sup>

#### *Foreign exchange.*

(i) In a programme for the promotion of earning foreign exchange, it is competent to the Government to select sugar produced by a particular process only. It is for the Government to select those commodities which have a demand abroad and are, accordingly, capable of earning foreign exchange.<sup>24</sup>

(ii) In view of the fact that foreign exchange has peculiar features and problems of its own, the provision for a special procedure for the investigation of breaches of foreign exchange regulations cannot be said to be violative of Art. 14.<sup>25</sup>

#### *Foreigners.*

In a law providing for the expulsion and detention of foreigners, reasons of State may make it desirable to classify foreigners into different groups.<sup>1</sup>

#### *Land reforms*

For the purposes of effecting the consolidation of holdings in an area, a speedier procedure for the revision of revenue than under the ordinary law may be provided for such area.<sup>2</sup> With a view to effecting a consolidation of holdings, the U. P. Consolidation of Holdings Act, 1954, empowered the State Government to declare that the Government had decided to make a scheme of consolidation for a specified area and then to prepare and revise the revenue records of that area for this purpose, under a procedure which was shorter than the ordinary procedure for the preparation of revenue records, (e.g., by reducing the number of appeals), which would have been applicable if the area had not been declared to be an area for the application of Art. Held, the object of the legislation, namely consolidation was a boon to the tenants and if it was to be put through, there must be a more expeditious procedure than under the ordinary law. Hence, the classification had a rational relation to the object of the legislation.<sup>3</sup>

18. *State of W. B. v. Anwar Ali*, (1952) SCR 284 (314, 328).

19. *Kedar Nath v. State of W. B.*, (1954) SCR 30; (1952-54) 2 CC 100 (103-5).

20. *Asarali v. State of Bombay*, A. 1957 503; (1957) S.C.R. 678.

21. *Rehman Shagoo v. State of I. & K. A.* 1960 SC 1 (1).

22. *Pratap Singh v. State of U. P.* (1961) 2 SCR 509.

23. *Chironjit Lal v. Union India* (1950) S.C.R. 869.

24. *Shanti Prasad v. Director of Enforcement*, A. 1962 S.C. 1764 (1788) (1963) 1 SCR 297 (304).

25. *Attar Singh v. State of U. P.*, A. 1959 S.C. 564 (567).

1. *Hans Muller v. Supdt.*, (1955) 1 SCR 1285 (1295).

2. *Attar Singh v. State of U. P.*, A. 1959 S.C. 564 (567).

*Pre-emption.*

A law of pre-emption which seeks to preserve the integrity of the village community and to prevent the fragmentation of holding may reasonably classify immovable property as rural and urban.<sup>3</sup>

*Prohibition.*

A law of prohibition may differentiate between civil and military personnel, between foreign visitors and Indian citizens.<sup>4</sup>

*Prostitutes.*

The differences between a woman who is a prostitute and one who is not justify their being placed in different classes. There are also differences between a prostitute carrying on her business in a secluded locality and another carrying on her business in a busy locality or in the vicinity of public institutions, so as to justify the removal of the latter or the imposition of restrictions upon her movements.<sup>5</sup>

*Public Servants*

(i) S. 4(1) of the Prevention of Corruption Act, 1947 provides—

"Where in any trial of an offence punishable under s. 161 or s. 165 of the Indian Penal Code, it is proved that an accused person has accepted or has agreed to accept or attempted to obtain .. any gratification (other than legal remuneration) or any valuable thing from any person, it *shall be presumed unless the contrary* is proved that he accepted or obtained that gratification or that valuable thing .. as a motive or reward such as is mentioned in the said section 161 .. ."

It was contended that the above provision raised a statutory presumption against public servants which was not applicable to other classes of persons accused of the same offence under s. 161 I.P.C. Repelling this contention, the Supreme Court observed—

"Legislature presumably realised how difficult it was to bring home to the accused persons the charge of bribery; evidence which is and can generally be adduced in such cases in support of the charge is apt to be treated as tainted, and so it is not very easy to establish the charge of bribery beyond a reasonable doubt. Legislature felt that the evil of corruption amongst public servants posed a *serious problem* and had to be affectively rooted out in the interest of clean and efficient administration. This is why the Legislature decided not to enact s. 4 (1) with a view to require the raising of the statutory presumption as soon as the condition precedent prescribed by it in that behalf is satisfied. The *object* which the Legislature thus wanted to achieve is the eradication of corruption from amongst public servants, and between the said object and the *intelligible differentia* on which the classification is based there is a *rational and direct 'relation'*".<sup>6</sup>

(ii) A Rule which, not being discriminatory as between members of the same service, authorises Government to resort to departmental proceedings instead of launching criminal prosecution even in cases where criminal offence is alleged to have been committed by the delinquent public servant does not offend against Art. 14, in view of the special position of public servants.<sup>7</sup>

(iii) S. 197 of the Cr. P. C. which requires sanction of the Government to prosecute public servants for acts done or purporting to be done in the discharge of his official duties is not discriminatory because it is based on a rational classification

3. *Kesar Devi v. Nanak*, A. 1958 Punj. 44.

4. *State of Bombay v. Balasara*, (1951) S.C.R. 682.

5. *State of U. P. v. Kaushiliya*, A. 1964 SC. 416.

6. *Emden v. State of C. P.*, A. 1960 S.C. 548 (550).

7. *Pantap Singh v. State of Punjab*, A. 1963 S.C. 72 (100).

*vis.*, that public servants have to be protected from harassment in the discharge of his official duties while ordinary citizens not so engaged do not require this safeguard.<sup>8</sup>

### *Regulation of business.*

(i) There may be circumstances where the size of the business may be a reasonable index for classification, and in such cases, the Legislature is entitled to make distinctions according to the degree of the evil, e.g., a bye-law charging higher license fee upon wholesale traders as compared with retailers,<sup>9</sup> a law exempting from excise duties goods produced by small power-loom weavers.<sup>10</sup>

(ii) The Coir Industry Act, 1953 was enacted for taking under control of the Union the coir industry. R. 18 of the Rules framed under the Act a person could be registered as an exporter of coir products only if he had during the period of three years preceding the commencement of the Rules exported the prescribed minimum quantity of coir products.

It was urged that the Rule was discriminatory against the small traders without any reasonable basis for the classification. Rejecting this contention, the Supreme Court held that the Act was passed in order to put a stop to the malpractices in and loss of reputation of the export trade in coir owing to the fact that exporters often accepted orders beyond their capacity, leading to the non-fulfilment of such contracts or the supply of inferior commodities. By prescribing a quantitative minimum standard, and at the same time providing for the exemption of co-operative societies, the Rule aimed at putting the trade on a firmer basis. The differentia adopted by the Rule had thus a rational to the object sought to be achieved by the Act.<sup>11</sup>

(iii) Similarly, since 'hedging' in cotton trading requires experience and stability, there is no violation of Art. 14 if Government treats the older cotton differently from the newer ones, as regards permission to enter into such transactions.<sup>12</sup>

### *Religious endowments.*

In view of the differences between the Hindus and the Jains in matters of faith and religious practices, there is no contravention of Art. 14 if the Legislature provides for the constitution of Boards for the superintendence of Hindu and Jain religious endowments differently.<sup>13</sup>

### *Relationship of landlord and tenant.*

In a Rent Control Act, it would be reasonable to exempt buildings belonging to Government<sup>14</sup> or a local authority<sup>15</sup> who are not likely to be actuated by any profit-making motive.

### *Social security and labour legislation.*

In a legislation for the provision of employees' provident fund, it is not an unreasonable classification to exempt—

(a) co-operative establishments; (b) establishments having been in existence for a period less than 3 years; (c) establishments where the employees are already enjoying benefits not less favourable than those provided by the Act.<sup>16</sup>

8. *Mutajog v. Bhari*, (1955) 2 S.C.R. 925.

9. *Muhammadbhai v. State of Gujarat*, A. 1962 S.C. 1517 (1524).

10. *Orient Weaving Mills v. Union of India*, A. 1963 S.C. 98 (103).

11. *Swarajan v. Union of India*, A. 1959 S.C. 556; (1959) Supp. (I) S.C.R. 779.

12. *M. B. Cotton Association v. Union of India*, (1952-54) 2 C.C. 232; A. 1954 S.C. 634.

13. *Moti Das v. Sahi*, A. 1959 S.C. 942 (946).

14. *Baburao v. Bombay Housing Board*, (1954) S.C.R. 572; (1952-4) 2 C.C. 126.

15. *Venkatadri v. Tenali Municipality*, A. 1956 Andhra 61.

16. *Mohamedalli v. Union of India*, (1963) II S.C.A. 87 (86-7).

*Tax, evasion of.*

For the purpose of preventing evasion of payment of income tax, the Legislature may make a differentiation between—

- (a) a person carrying on business in partnership with his wife or minor children;
- (b) a person carrying on business in partnership with his major children or with a third party male and female; and
- (c) a person and his wife or children carrying on business separately, and provide that in case (a) he must pay tax on the aggregate income of the partnership, while in case (b) or (c) he will be liable to pay tax only on his own share of the partnership income.<sup>17</sup>

*Tenants, protection of.*

In a legislation for the protection of tenants for eviction, it would be legitimate to differentiate between non-residential buildings in different towns, if it rests on economic conditions prevailing in the different towns.<sup>18</sup>

*Trade Unions.*

The classification of unions as "representative" and "qualified" according to the percentage of their membership and giving a "representative union" having a prescribed higher percentage of membership the right to represent the interests of the entire body of workers in the industry concerned, is a reasonable classification and involves no discrimination.<sup>19</sup>

*(A) Persons*

1. A law of prohibition may differentiate between civil and military personnel or between citizens of India and foreigners who have no intention of permanently residing in India.<sup>20</sup>

2 S 197 of the Cr P. C. which requires sanction of the Government to prosecute public servants for acts done or purporting to be done in the discharge of his official duties is not discriminatory because it is based on a rational classification, viz., that public servants have to be protected from harassment in the discharge of his official duties while ordinary citizens not so engaged do not require this safeguard.<sup>21, 22</sup>

3 In view of the differences between the Hindus and the Jains in matters of faith and religious practices, there is no contravention of Art 14 if the Legislature provides for the constitution of Boards for the superintendence of Hindu and Jain religious endowments differently.<sup>1</sup>

4. In view of the financial interest of a large number of citizens in the affairs of a company, it would be reasonable to classify the problem of misappropriation by persons in charge of companies from ordinary cases of misappropriation. It is not, therefore, unreasonable to deny the protection, afforded to witnesses under s. 132, Evidence Act, to persons in charge of companies in an investigation under ss. 239 and 240 of the Companies Act, 1956.<sup>2</sup>

5 Where a convicted person is in jail and unable to engage a pleader, it is not unreasonable to provide that his appeal shall be decided without hearing, though where such person is in a position to engage a pleader, the appeal cannot be disposed of without hearing the pleader.<sup>3</sup>

17. *Balan v. I. T. O.*, A. 1962 S.C. 123.

18. *Swami Motor Transports v. Sankaraswamikal*, A. 1963 S.C. 864 (872).

19. *Kulkarni v. State of Bombay*, (1952-54) C.C. 176; (1954) S.C.R. 384.

20. *State of Bombay v. Balsara*, (1951) S.C.R. 682; (1950-51) C.C. 308.

21-25. *Matajog v. Bhari*, A. 1957 S.C. 44; (1955) 2 S.C.R. 925.

1. *Moti Das v. Sahi*, A. 1959 S.C. 942 (946); (1959) Supp. (2) S.C.R. 563.

2. *Narayanlal v. Manesh*, A. 1961 S.C. 29 (40).

3. *Pratap Singh v. State of U. P.*, (1961) 2 S.C.R. 509.

(B) *Trade, colling, etc*

Special public interest in an industry, *e.g.*, that it is engaged in the production of a commodity vitally essential to the community, may justify its special regulation.<sup>4</sup> Thus,—

Since 'hedging' in cotton trading requires experience and stability, there is no violation of Art. 14 if Government treats the older Cotton Associations differently from the newer ones, as regards permission to enter into such transactions<sup>5</sup>

(C) *Degree of harm.*

The special treatment or classification may be based on the *degree* of public injury of harm<sup>6</sup> or of the urgency of the remedy or regulation. Thus,—

(i) The Legislature may regulate *only* the aggravated forms of a mischief;<sup>7</sup> or confine its restrictions only to particular areas 'where the needs are deemed to be clearest'<sup>8</sup> Thus, introducing compulsory education, the provision for earmarking certain areas as 'compulsion areas' is not discriminatory even though such classification may affect certain educational institution in such compulsion areas without affecting similar institution in the other areas<sup>9</sup>

(ii) The Legislature is similarly competent to reform *gradually*, *i.e.*, applying the legislation, in the first instance, to some of the institutions or objects or particular area<sup>10</sup>, according to the exigencies of the situation<sup>9</sup>

(iii) A legislation cannot be said to be discriminatory merely because it cannot provide for the acquisition of all the estates in the State at one and the same time, owing to administrative and financial difficulties<sup>1</sup>

(D) *Nature and object of legislation.*

The nature and object of the legislation itself may offer a reasonable basis of classification.<sup>11-13</sup>

*Control of rent.*

In a Rent Control Act, it would be reasonable to exempt buildings belonging to Government<sup>14</sup> or a local authority<sup>15</sup> who are not likely to be actuated by any profit-making motive.

*Prevention of evasion of tax*

For the purpose of preventing evasion of payment of income tax, the Legislature may make a differentiation between —

(a) a person carrying on business in partnership with his wife or minor children;

1. *Chnanjil Lal v. Union of India*, (1950 51) C.C. 10 (1950) S.C.R. 869.

5. *M. B. Cotton Association v. Union of India* (1952-54) 2 C.C. 232 A. 1954 S.C. 634.

6. *Kamkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538. (1959) S.C.R. 279.

7. *Sakhuant v. State of Orissa*, (1955) 1 S.C.R. 1004

8. Reference on the Kerala Education Bill, A. 1958 S.C. 956 (1959) S.C.R. 995

9. *Biswambhar v. State of Orissa*, (1954) S.C.R. 842.

10. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (366).

11. *Hanumantha v. State of A. P.*, 1957 S.C. 927.

12. *Veeraraghavulu v. State*, A. 1958 A.P. 301.

13. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (314, 328).

14. *Kedar Nath v. State of W. B.* (1954) S.C.R. 30: (1952-54) 2 C.C. 100 (103-5); A. 1953 S.C. 404.

15. *Asgarali v. State of Bombay*, A. 1957 S.C. 503: (1957) S.C.R. 678.

16. *Govinda Reddy, in re*, A. 1958 Mys. 150, *Bindeswari v. Birju*, A. 1959, Pat. 36.

17. *Babulal v. Collector of Customs*, A. 1957 S.C. 877: (1957) S.C.R. 1110.

18. *Rehman Shagoo v. State of J. & K.*, A. 1960 S.C. 1 (4).

19. *Baburao v. Bombay Housing Board*, (1954) S.C.R. 572: (1952-4) 2 C.C. 126.

20. *Venkatadri v. Tenali Municipality*, A. 1956 Andhra 61.

(b) a person<sup>20</sup> carrying on business in partnership with his major children or with a third party— male or female; and

(c) a person and his wife or children carrying on business separately, and provide that in case (a) he must pay tax on the aggregate income of the partnership, while in case (b) or (c) he will be liable to pay tax only on his share of the partnership income.<sup>21</sup>

### How the classification may be made by the Legislature.

It is not necessary that the classification, in order to be valid, must be fully carried out by the statute itself. The Legislature may make a valid classification in any of the following ways:

(a) The statute itself may indicate the persons or things to whom its provisions are intended to apply.<sup>22</sup>

(b) Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or the administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature (see *post*).<sup>23</sup>

(c) The Legislature may itself select certain objects to which the law should, in the first instance apply, and then empower the Executive to add other like objects according to the exigencies calling for application of the law.<sup>24</sup>

### Equal Protection and Taxation.

1. Taxation law is no exception to the doctrine of equal protection.<sup>25-26</sup>

Hence, a taxation will be struck down as violative of Art. 14 if there is no reasonable basis<sup>1</sup> behind the classification made by it, for example, where differentiation is made between tax evaders belonging to the same class merely because the evasion was detected by different methods, or, if the same class of property, similarly situated, is subjected to unequal taxation.<sup>2</sup> If there is no reasonable basis for the classification, the law will be struck down<sup>2</sup> and it is not necessary, further, to establish that the tax 'has been imposed with a deliberate intention of differentiating between individual and individual.'<sup>25</sup>

2. But—

(a) If the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground that, the result of the taxation is to impose unequal burdens on different persons.<sup>25</sup>

(b) As in the case of other laws, there is no violation of Art. 14 if there is a reasonable basis for the classification.<sup>2-11</sup>

21. *Balaji v. I. T. O.*, A. 1962 S.C. 123; *Sivaraman v. Union of India*, A. 1959 S.C. 556; (1959) Supp. (1) S.C.R. 779.

22. *Ramakrishna v. Tendolkar*, A. 1958 S.C. 538 (548); (1959) S.C.R. 279.

23. *Cf. Edwards Mills v. State of Ajmer*, (1955) 1 S.C.R. 735; (1952-4) 2 C.C. 626 (629).

24. *Khandige v. Agricultural I. T. O.*, A. 1963 S.C. 591 (594); *State of M. P. v. Gwalior Sugar Co.*, (1962) 2 S.C.R. 619.

25. *Kumathat v. State of Kerala*, (1961) 3 S.C.R. 77; A. 1961 S.C. 552.

1. *N. M. C. S. Mills v. Ahmedabad Municipality*, A. 1967 S.C. 1801 (1810).

2. *I. T. O. v. Lawrence Singh*, A. 1968 S.C. 658 (661).

3-11. *Ranjitlal v. I. T. O.*, (1961) S.C.R. 127; (1950-51) C.C. 242.

Thus,

(i) In a law imposing a sales tax,—

(a) The State may not consider it administratively worth while to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worth while to impose the tax.<sup>12</sup>

(b) If a particular commodity has peculiar features in a State (e.g., the business of untanned hides and skins), the Legislature may impose the tax on the purchasers of that commodity, while in the case of sales of all other commodities, the tax is levied upon the sellers.<sup>13</sup>

(c) In a law of taxation of income, it is competent for the Legislature to graduate the rate of tax according to the ability to pay.<sup>14, 15</sup>

3. In the matter of taxation laws, the Court permits a greater latitude to the discretion of the Legislature.<sup>16, 17</sup>

In tax matters, "the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably"<sup>18</sup>

Thus—

(a) Where there is more than one method of assessing a tax and the Legislature selects one out of them the Court will not be justified to strike down the law on the ground that the Legislature should have adopted another method which, in the opinion of the Court, is more reasonable, unless it is convinced that the method adopted is capricious, fanciful, arbitrary or clearly unjust.<sup>19</sup>

(b) Similarly, the classification between small and large manufacturers<sup>20</sup> or between imported and country tobacco<sup>21</sup> for the purpose of taxation; or the classification of goldsmiths for the purpose of exemption from sales tax, into those who make the ornaments by their personal labour or by paid artisans and those who sell ornaments produced by artisans on a commission basis;<sup>22</sup> has been held to be reasonable.

(c) On the same need for flexibility in the matter of taxation, a provision empowering the Executive to exempt particular goods from a duty has been upheld as valid.<sup>23, 24</sup> Even the delegation of the power to determine the rate of a tax has been upheld as valid where the policy is laid down in the statute and the subordinate authority (e.g., a Municipal Board) is required to follow a quasi-judicial procedure in determining the rate.<sup>25</sup>

(d) As to what articles should be taxed is a question of policy and there cannot be any complaint of discrimination merely because the Legislature has decided to tax certain articles and not others.<sup>26, 25, 1</sup>

12. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1069).

13. *Syed Mohamed v. State of Madras*, A. 1963 Mad 105 (113) affirmed by *Syed Mohamed v. State of Andhra*, (1954) S.C.R. 1117 A. 1954 S.C. 314.

14. *Sukhlal v. Jain* (1957) 62 C.W.N. 309 (314).

15. *Steelsworth v. State of Assam*, (1962) Supp. (2) S.C.R. 589.

16. *Khandige v. Agricultural I.T.O.* A. 1963 S.C. 591 (594).

17. *Gopal v. State of U.P.*, A. 1964 S.C. 370 (376).

18. *Khyberbari Tea Co. v. State of Assam* A. 1964 S.C. 925 (941).

19. *Sham Bhat v. Agricultural I.T.O.* A. 1963 S.C. 591 (596).

20. *British India Corpn. v. Collector*, A. 1963 S.C. 104 (107).

21. *East India Tobacco Co. v. State of A.P.*, A. 1962 S.C. 1733 (1735).

22. *Epari v. State of Orissa*, (1964) XV S.T.C. 461 (466) S.C.

23. *Orient Weaving Mills v. Union of India*, A. 1963 S.C. 98 (103).

24. *Ram Bux v. State of Rajasthan*, A. 1963 S.C. 351.

25. *Gopal v. State of U.P.*, A. 1964 S.C. 370 (376).

1. *Steelsworth v. State of Assam*, (1962) Supp. (2) S.C.R. 589.



(e) The freedom of the Legislature is conceded not only is the choice of the articles to be taxed but also as regards the manner and rate of taxation.<sup>2,3</sup>

**Equal protection may be denied by procedural laws as well.**

1. The guarantee of equal protection applies against substantive as well as procedural laws.<sup>4,5</sup> From the standpoint of the latter, it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence, without discrimination. Of course if the differences are of a *minor* or *insubstantial* character, which have not prejudiced the interests of the person or persons affected, there would not be a denial of equal protection.<sup>6</sup>

2. In order to find out whether there has been a substantial departure from the normal procedure, the test to be applied is not the degree of inequality, but the *reality* of it. Thus, there is a substantial difference in the procedural right of the accused to equality of treatment where the impugned Act deprives the accused *inter alia*, of—(a) the safeguards of committal procedure (b) the trial with the help of jury or assessors, (c) the right to *de novo* trial in case of transfer, (d) the right to redress in higher Courts,—which are offered to other accused of the same class, under the general law of criminal procedure.<sup>7</sup>

3. But a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification having regard to the objective which the legislation has in view and the policy underlying it. Thus in a law which provides for the extermination of undesirable persons who are likely to jeopardize the peace of the locality it is not an unreasonable discrimination to provide that the suspected persons shall have no right to cross-examine the witness who depose against him, for the very object of the legislation which is an extraordinary one would be defeated if such a right were given to the suspected person.<sup>8</sup>

4. If persons who are similarly situated in relation to the object of the impugned legislation may be made subject to a procedure which is substantially different from the ordinary procedure at the option of the executive, the law which authorises the special procedure must be held to be discriminatory.<sup>9,10</sup> But—

(i) There is no discrimination if the two procedures relate to different powers in respect of different matters.<sup>10</sup>

(ii) There is no question of a law being discriminatory unless it empowers the administrative authority, at its discretion to impose a more onerous procedure than the ordinary one. Where one procedure is prescribed for everybody but the parties are allowed to follow another procedure if they *voluntarily* so elect, the law cannot be said to be discriminatory.<sup>10a</sup>

(iii) There is no discrimination where there is only one procedure prescribed (not alternative procedures to be applied at the discretion of the

2. *Khverbari Tea Co v State of Assam* A 1964 SC 925

3. *Jagannath v. State of U P.* (1963) 1 SCR 220

4. *Lachmandas v. State of Bombay.* (1952) S.C.R. 710 (726)

5. *State of W B. v Anwar Ali* (1952) SCR 284. A 1952 SC 75.

6. *Oasim Razvi v. State of Hyderabad* (1953) S.C.R. 589. A 1953 S.C. 156.

7. *Parshottam v Desai.* (1955) 2 S.C.R 887 (894)

8. *State of W. B v Anwar Ali* (1952) SCR 284. A 1952 SC 75; *Lachmandas v State of Bombay.* A. 1952 SC 235. (1952) S.C.R. 710

9. *Balammal v State of Madras.* (1968) SC, IC A 489/65 d. 234 (58).

10a. *Dhirendra v. Lalal Remembrancer.* (1952-54) 2 CC, 111 (116): (1955) 1 S.C.R. 224. A. 1954 S.C. 424.

administrative authority), but *additional* power is conferred upon the authority for the enforcement of that one procedure in some cases which are rationally classified, e.g., for the recovery of State dues.<sup>11</sup>

### Provision for Special Court or tribunal, how far offends against Art. 14.

This topic has been dealt with by the Supreme Court in a number of cases, and the position resulting therefrom may now be stated as follows:

1. A law which authorises the trial of *any* cases by Special Courts or by a procedure which differs substantially from the ordinary procedure to the prejudice of the accused,<sup>12</sup> offends against Art. 14.<sup>13-14</sup>

(a) Such legislation is discriminatory if it leaves it to the uncontrolled discretion,<sup>12-15, 17</sup> of the Executive to select particular cases under the discriminatory procedure, but not so, if the Legislature itself lays down the policy and the standards according to which the selection is to be made by the administrative authority.<sup>16</sup>

(b) The policy may be gathered from the Preamble<sup>18, 19</sup> or even from the general tenor of the enactment.

2. But there is no infringement of the Article if certain *offences*<sup>16</sup> or *classes of offences*<sup>18</sup> are prescribed by the Legislature to be triable by a Special Court or under such special procedure, according to a reasonable basis of classification.

3. There is no discrimination unless the procedure prescribed by the impugned legislation is substantially different from the normal procedure.<sup>20, 21</sup> Minor deviation from the general standard would not constitute discrimination.<sup>21, 22</sup>

4. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 of the Constitution must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. Merely because the Government is not compellable to allot all cases of offences set out in the Schedule to the Act to a Special Judge but is vested with a discretion in the matter, it cannot be said that the provision offends against Article 14 of the Constitution. If the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority in accordance with the standard indicated or the underlying policy and object disclosed, is not a sufficient ground for condemning it as arbitrary and therefore obnoxious to Art. 14.<sup>19</sup>

5. As to the basis upon which offences may be classified *reasonably*

11. *Kedarnath v. State of W. B.* (1951) S.C.R. 30. A. 1951 S.C. 401.

12. *State of Orissa v. Dhircandra, A.* 1961 S.C. 1715.

13. *Kathi Ranning v. State of Saurashtra* (1952) S.C.R. 435. A. 1952 S.C. 123.

14. *Parmalal v. Union of India* A. 1957 S.C. 397 (407). (1957) S.C.R. 233.

15. *Habeeb v. State of Hyderabad* (1953) S.C.R. 661. A. 1953 S.C. 287.

16. *M. K. Gokalan v. State of M. P.* (1952-54) 2 C.C. 109; (1955) 1 S.C.R. 168.

17. *State of W. B. v. Anwar Ali* (1952) S.C.R. 284 (325); A. 1952 S.C. 75.

18. *Kansari Haldar v. State of W. B.* A. 1960 S.C. 457.

19. *Kedarnath v. State of W. B.*, (1953) S.C.R. 30; (1952-54) 2 C.C. 100 (104-5); A. 1953 S.C. 4041.

20. *Kangshari v. State of W. B.*, A. 1960 S.C. 457.

21. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (314, 328, 352).

22. *Qasim Razvi v. State of Hyderabad*, (1953) S.C.R. 569 (601, Bose J.)

for trial by a Special Court or by a procedure substantially different from the ordinary procedure, it has been held that—

The necessity for a '*speedier trial*' is too vague, uncertain and elusive a criterion to form a rational basis for classification, particularly when the Legislature itself does not indicate what are the offences which, in its opinion, require a speedier trial.<sup>21</sup> The same may be said against 'more convenient disposal' of certain unspecified cases.<sup>22</sup>

But speedier trial of *specified* offences<sup>19-23</sup> shall be a rational basis for classification if the speedy trial has an intimate rational relation to the object of the legislation, such as 'public safety' or 'maintenance of public order' in a dangerously disturbed area;<sup>24</sup> or the effective suppression of the widely prevalent offence of corruption and illegal gratification in the public services during the post-war period.<sup>20</sup>

On the other hand—

(i) Provision for 'public safety' or 'maintenance of public order' is a rational basis for special treatment.<sup>24</sup>

Thus, for ensuring 'public safety and maintenance of public order' in a 'dangerously disturbed area', it is competent for the Legislature to provide that specified offences which were ordinarily triable under the warrant procedure should in such area be tried according to the summons procedure.<sup>25</sup>

(ii) Emergent conditions, such as the condition of Hyderabad just after the 'police action' in Hyderabad, may offer a reasonable basis for trial of particular offences or classes of offences under a special procedure.<sup>22</sup>

(iii) On the other hand, if there is no substantial difference in the procedure to be followed by a Special Magistrate or Court as compared with the normal procedure, there is no violation of Art. 14 merely 'because the law empowers the Government to appoint a person as a Special Magistrate to try an *individual case* (e.g. s. 14 of the Criminal Procedure Code).'<sup>25-2</sup>

### Who can complain of the violation of equal protection.

(a) Only a person who has been aggrieved by the discrimination alleged, can challenge the validity of a law on the ground of violation of Art. 14.<sup>3</sup>

Thus,

A person who has never applied for a licence under a statute cannot complain that the statute is discriminatory and a licence would have been refused to him if he had applied.<sup>3</sup>

(b) The Petitioner cannot complain unless he belongs to the class of persons who are alleged to have been discriminated against.<sup>4</sup> Thus—

Where the contention was that s. 3 (2) (c) of the Foreigners Act, 1916 read with s. 2 (a), discriminated between different classes of British subjects *inter se*, it was held that a foreigner who was not a British subject was not entitled to challenge the validity of the Act on this ground.<sup>5</sup>

23. *Gopi Chand v. Delhi Administration*, A. 1959 S.C. 609.

24. *Kathi Ranning v. State of Sourashtra*, (1952) S.C.R. 435 (449).

25. *M. K. Gopalan v. State of M. P.*, (1955) 1 S.C.R. 168 (171).

1. *State of Punjab v. Joginder*, A. 1963 S.C. 913.

2. *Kishori v. Union of India*, A. 1962 S.C. 1139.

3. *Glass Chatons Assn. v. Union of India*, A. 1961 S.C. 1514 (1517); *Mangal Singh v. Union of India*, A. 1967 S.C. 944 (946).

4. *Ramakrishna v. State of Bihar*, A. 1967 Pat 30.

5. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1295).

### Presumption that the classification is reasonable.

(i) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.<sup>6</sup>

(ii) A legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it.<sup>7</sup> In order to sustain the presumption of constitutionality, therefore, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.<sup>8-9</sup>

(iii) But where the statute shows *on the face of it* that the Legislature made *no attempt at all to make a classification* but singled out a particular individual or class without having any difference peculiar to that individual or class, the presumption of reasonableness in favour of the Legislature is instantly rebutted and the person challenging the statute cannot be called upon to adduce further or external evidence to discharge his onus.<sup>10</sup> In such a case, the presumption of constitutionality is of no avail and the Court is bound to invalidate the statute as violating the guarantee of equal protection.<sup>11</sup>

### Burden of proof and pleading.

(A) 1. The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the law as a violation of the guarantee of equal protection.<sup>12</sup> Further, if any state of facts can be reasonably conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.<sup>13</sup>

2. The allegations must be specific, clear and unambiguous<sup>14</sup> and must give particulars. Throwing out vague hints that there may be other instances of like nature which the impugned legislation has left out, is not enough; such instances must be specified and it must be proved that the selection by the Legislature has been arbitrary<sup>15</sup> and has no reasonable relation to the object to be achieved by the statute.<sup>16</sup>

3. It is for the Petitioner to show that the persons or objects as between whom the Legislature is alleged to have discriminated, are similarly situated.<sup>17-20</sup>

The principle applies also where an administrative action is challenged as violative of Art. 14.<sup>19</sup> Thus, where a licence has been cancelled or

6. *State of Bombay v. Bahara* (1950-51) C.C. 308 (316), A. 1951 S.C. 318.

7. *Harnam Singh v. R. T. A.* (1952-54) 2 C.C. 129 (131), (1954) S.C.R. 371.

8. *Ramkrishna Dalma v. Tendolkar*, A. 1958 S.C. 536 (1959) S.C.R. 279.

9. *Hans Quareshi v. State of Bihar*, (1958) S.C.A. 783 (800), A. 1958 S.C. 731.

10. *State of Bombay v. Bahara*, (1951) S.C.R. 682 (708), *Am Prasad v. State of Bihar*, (1953) S.C.R. 1129, *State of Rajasthan v. Manohar*, (1954) S.C.R. 996.

11. *Ameeronissa v. Mahboob*, (1953) S.C.R. 404 (417).

12. *State of U. P. v. Kartar Singh*, A. 1964 S.C. 1135.

13. *Harnam Singh v. R. T. A.*, (1952-54) 2 C.C. 129 (131), (1954) S.C.R. 371.

14. *V. S. Rice Mills v. State of A. P.*, A. 1964 S.C. 1781 (1788).

15. *Cochin Devaswom Bd. v. Vamana*, (1966) S.C. [C.A. 11/64]; *Ramnath v. State of Rajasthan*, A. 1967 S.C. 603 (607).

16. *Board of Trustees v. State of Delhi*, A. 1962 S.C. 458 (471).

17. *Ameeronissa v. Mahboob*, (1953) S.C.R. 404 (417).

18. *V. S. Rice Mills v. State of A. P.*, A. 1964 S.C. 1781 (1788).

19. *Srikanth v. State of Rajasthan*, (1955) 2 S.C.R. 531.

20. *Syed Mohammad v. State of Andhra*, (1954) S.C.R. 1117; (1952-54) 2 C.C. 122; A. 1954 S.C. 314.

restricted on the ground of malpractice, the person aggrieved can succeed only if he establishes that there are persons who are guilty of the same malpractice and yet no similar action has been taken against them.<sup>19</sup>

(B) 1. But where the statute shows *on the face of it* that the Legislature made no attempt at all to make a classification but singled out a particular individual or class without having any difference peculiar to that individual or class, the presumption of reasonableness in favour of the Legislature is instantly rebutted and the person challenging the statute cannot be called upon to adduce further or external evidence to discharge his onus.<sup>21</sup> In such a case, the Court is bound to invalidate the statute as violating the guarantee of equal protection,<sup>17</sup> unless the State is able to establish a reasonable basis of classification by the extraneous evidence or by facts of which the Court may take judicial notice.<sup>22</sup>

2. Applying the above principle to an administrative order it has been held that where a statute authorises the Executive to grant exemptions in favour of particular individuals or objects, indicating the policy according to which such exemption should be granted, but the order does not state on its face any ground to show that it has been made in conformity with the policy laid down by the Legislature, the Court is entitled to require the Executive to state the reasons and then to strike down the order if it finds that the reasons so stated are extraneous to the policy laid down by the statute.<sup>1</sup>

### How the presumption may be rebutted.

The presumption that the classification made by a law is reasonable may be rebutted not only (a) referring to the contents of the law itself but also by (b) extraneous evidence.

#### 1. *Intrinsic evidence.*

1. The presumption may be rebutted by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class, and yet the law hits only a particular individual or class.<sup>24</sup> The presumption is of no avail when a law is discriminatory on the face of it and it is patent that the Legislature made no attempt to make a classification at all.<sup>24-25</sup>

2. It is true that the presumption should always be that the Legislature understands and correctly appreciates the needs of its own people and that its discriminations are based on adequate grounds, but to carry the presumption to the extent of holding that there must be some *undisclosed and unknown* reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clause a mere 'rope of sand', in no manner restraining State action.<sup>25, 1</sup>

While good faith and knowledge of existing conditions on the part of the Legislature are to be presumed,<sup>2</sup> if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the Court cannot go to the extent of holding that there must be some undisclosed reasons for the discrimination.<sup>3</sup>

21. *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.

22. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (552); (1959) S.C.R. 279.

23. *Irani v. State of Madras*, A. 1961 S.C. 1731 (1738).

24. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 860.

25. *State of West Bengal v. Anwar Ali*, (1952) S.C.R. 284 (335).

1. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (552); (1959) S.C.R. 279.

2. *State of Rajasthan v. Manohar*, (1952-54) 2 C.C. 133 (135); (1954) S.C.R. 988.

3. Where the discrimination is apparent on the face of the statute, the onus of showing the just relation and basis of discrimination is upon the party who supports the alleged discrimination. The grounds for differentiation must be placed and supported by evidence,<sup>3</sup> or affidavit.<sup>4</sup>

#### II. *Extraneous evidence.*

1. The petitioner may also prove by adducing evidence<sup>5</sup> that the classification made by the law was without any reasonable basis and that the subject selected by the law had no feature to distinguish from other subjects similarly situated so as to justify a special treatment.<sup>1, 8</sup>

2. On the other hand, where the basis of classification is not apparent on the face of the law, it may be established by the State not only by material evidence<sup>6</sup> or by bringing to the notice of the Court facts of which the Court can take judicial notice<sup>6</sup> but also by making an affidavit,<sup>5</sup> stating the circumstances which led to the making of a statutory instrument, e.g., a notification.<sup>3</sup> Similarly, parliamentary proceedings may be referred to for showing the background in which an enactment was made.<sup>7</sup>

#### Law conferring discretionary power upon the Executive.

1. A legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection if it confers upon the executive or administrative authority an *unguided* or uncontrolled discretionary power in the matter of application of the law.<sup>8-9</sup> For, where the selection is left to the absolute and unfettered discretion of the administrative authority, with nothing to guide or control its action the difference in treatment rests solely on arbitrary selection by that authority.<sup>8, 10</sup>

Thus, -

(a) A law which authorises the Executive to select,<sup>11</sup> cases for special treatment or to grant exemption from its operation without providing any definite guide<sup>12</sup> or standard for such differentiation is, on the face of it, discriminatory.

(b) If the Legislature, while enacting a special law for dealing with a special problem, authorises the Executive, at its option, to proceed against a person either under the special law or under the general law which would otherwise have been applicable, the conferment of arbitrary power upon the Executive to apply the more stringent provisions of the special law against any person at its pleasure must be held to offend against equal protection.<sup>11-13</sup>

II. 1. If, however, a law indicates the policy which inspired it, the mere fact that it does not itself make a complete and precise classification of the subject-matter, but leaves the selective application of the law or the extension of its provisions to new objects according to local conditions<sup>14</sup> to

3. *State of Rajasthan v. Manohar*, (1964) S.C.R. 996.

4. *Syed Mohammad v. State of Andhra*, (1954) S.C.R. 1117, (1952-54) 2 C.C. 132; A. 1954 S.C. 314.

5. *Ramkrishna v. Tendolkar*, (1959) S.C.R. 279.

6. *Kedarnath v. State of W. B.*, (1954) S.C.R. 30.

7. *Cf. Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

8. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284, (310; 315-6; 329; 355); A. 1952 S.C. 75.

9. *Saraj Mall v. I. T. I. Comm.*, A. 1954 S.C. 545.

10. *Satwant v. A. P. O.*, A. 1967 S.C. 1836 (1845).

11. *Saghir Ahmad v. State of U. P.*, (1952-54) 2 C.C. 248 (260); 1955) 1 S.C.R. 707; A. 1954 S.C. 728.

12. *Meenakshi Mills v. Viswanath*, A. 1955 S.C. 13.

13. *Balamurali v. State of Madras*, (1968) S.C. [C.A. 489/65, d. 23.4.68.

14. *State of Orissa v. Dharendra*, A. 1951 S.C. 1715; *Kathi Ranning v. State of Saurashtra*, (1952-54) 2 C.C. 73; (1952) S.C.R. 435; A. 1952 S.C. 123.

be made by the executive authority in accordance with the policy indicated, there is no contravention of Art. 14 by the law itself,<sup>15</sup> unless, of course, the policy itself is discriminatory.<sup>16</sup> Thus,

(a) The validity of a law which provided that—

"A Special Judge shall try such offences or classes of offences or such cases or classes of cases as the Government...may, by general or special order in writing direct" was upheld on the ground that the law had laid down a definite legislative policy, *viz.*, "to provide for public safety, maintenance of public order and preservation of peace and tranquillity", and the Executive had to exercise its power in conformity with this legislative policy, if it failed, the act of the Executive would be liable to be challenged, but the Act itself could not be challenged as discriminatory.<sup>17</sup>

(b) Similarly, it has been held that the Industrial Disputes Act cannot be invalidated on the ground of contravention of Art. 14, for having authorised the Government to refer a dispute either to a Board of Conciliation or to a Court of Enquiry or to a Tribunal, at its discretion, inasmuch as the policy of the Act was expressed to be for the purpose of "investigation and settlement of industrial disputes" and the Government was to decide what step would be conducive to this end, having regard to the exigencies of each particular case.<sup>18</sup>

(d) Where the maximum penalty that may be imposed for an offence is laid down by a statute and the authority is vested with a discretion to fix the quantum of the penalty subject to that maximum having regard to the gravity of the offence in relation to the object of the Act, it cannot be said that an unguided discretion has been vested in the authority.<sup>17</sup>

2. Discretionary power is not necessarily discriminatory when the legislative policy<sup>18, 19</sup> is clear from the statute, and the discretion is vested in the Government or other high authority as distinguished from a minor official,<sup>20, 21</sup> or when the Rules framed under the Act lay down the principles or factors to be taken into consideration in exercising the discretion.<sup>22</sup>

3. The bare possibility that the discretionary power may be abused is no ground for invalidating the statute,<sup>23</sup> but if the administrative authority misuses the power by making an arbitrary selection without regard to the policy laid down by the Legislature, the administrative act or order will be struck down as discriminatory.<sup>24</sup>

### Power to grant exemptions.

1. A law which confers power on the Government to exempt any particular person<sup>24</sup> or object<sup>25</sup> from its operation is not bad for contravention of Art. 14, if the policy of the Legislature is clear from the statute.

But even though the statute may not, in such a case, offend against Art. 14, an individual order issued under the statute may so offend if it

15. *Ramkrishna v. Tendolkar*, (1959) S.C.R. 279, *Jyoti Prasad v. Union Territory*, A. 1961 S.C. 1602 (1609); *Nirmala Textile Mills v. 2nd Punjab Tribunal*, (1957) S.C.R. 335; A. 1957 S.C. 329.

16. *Bhikusa v. Kamgar Union*, (1963) Supp. 1 S.C.R. 524.

16a. *Bhikusa v. Union of India*, (1964) 1 S.C.R. 860 (876).

17. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151 (1158).

18. *Biswambhar v. State of Orissa* (1954) S.C.R. 842.

19. *Amar Singhji v. State of Rajasthan*, (1955) 2 S.C.R. 303.

20. *Metajog v. Bhari*, A. 1965 S.C. 44 (48); (1965) 2 S.C.R. 925 (632).

21. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538; Ref. on the Kerala Education Bill, A. 1958 S.C. 968.

22. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (441); A. 1956 S.C. 676.

23. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (557); (1959) S.C.R. 279.

24. *Imdar Singh v. State of Rajasthan* A. 1967 S.C. 510; (1967) S.C.R. 605.

is made on grounds which are not germane or relevant to that policy<sup>25</sup> or is otherwise *mala fide*.<sup>26</sup>

II. If, however, the Act does not lay down any principle or policy for the guidance of the authority in exercising the discretion,<sup>2</sup> the Act itself will offend Art. 14,<sup>1</sup> e.g., a taxing statute which authorises the Government to exempt from the tax 'any land or class of lands', without indicating the policy according to which the selection for exemption was to be made.<sup>1</sup>

### How the policy behind the statute is to be determined.

It is clear that where the Legislature does not itself make the classification, but leaves it to be made by the administrative authority, it must lay down the policy or the standard according to which the delegate must make the classification.

(a) The policy of a law may be gathered from the Preamble,<sup>2,5</sup> read in the light of the circumstances in which it was passed,<sup>6-7</sup> or its object,<sup>4</sup> as established by affidavits or by facts of which the Court can take judicial notice,<sup>4</sup> with its various provisions read together.<sup>4a</sup>

Discretionary power has also been held not to be arbitrary where the conditions for its exercise are laid down in the Rules made under the Act.<sup>8</sup>

(b) Where the standard or guide furnished by the statute is *vague* or *uncertain*, it amounts to the absence of any guide at all and the law must be struck down as conferring unguided power upon the Executive to discriminate.<sup>9-13</sup>

But—

(i) Whether the standard offered by the statute is vague or not is to be determined upon an examination of the Act read as a whole.<sup>21</sup>

(ii) The standard prescribed by the Act cannot be held to be vague so as to offer no reasonable basis of classification, if its precise import can be gathered from the history of the legislation and the circumstances which prevailed at the time of its enactment, and to ascertain these facts, the Court may take affidavits on behalf of the State.<sup>12,13</sup>

### Denial of equal protection may take place in the administration of law.

1. Equal protection may be denied not only by legislation but also by the administration of a law. The principles to be applied where an administrative act is challenged should not be confused with those which are to be applied when the law itself under which the administrative act is purported to be done is challenged.

25. *Irani v. State of Madras*, A. 1961 SC 1731.

1. *Kunnathal v. State of Kerala*, A. 1961 SC 552.

2. *Ajit Singh v. State of Punjab*, (1967) SC 1W P 187 '66 d. 212 67 1.

2. *Inder Singh v. State of Rajasthan*, A. 1957 SC 510 (1957) SCR 605 (621).

3. *Ramkrishna v. Tendolkar* (1959) SCR 279.

4. *Jyoti Prasad v. Union Territory of Delhi*, A. 1961 SC 1602. *Gopikrishan v. Collector* (1967) 2 SCR. 340 (345).

4a. *Ram Bachan v. State of Bihar*, A. 1967 SC. 1404 (1407).

5. *Irani v. State of Madras*, A. 1961 SC 1731 (1737).

6. *Kathi Ranning v. State of Saurashtra*, (1952-4) 2 CC. 73 (82, 85); (1952) S.C.R. 435.

7. *Pannalal v. Union of India*, A. 1957 SC. 397 (410); (1957) S.C.R. 233.

8. *Tika Ramji v. State of U. P.*, (1956) SCR 393 (441); A. 1956 SC. 676.

9. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 234 (238); A. 1952 SC. 75.

10. *Gopi Chand v. Delhi Administration*, A. 1959 SC 609; (1959) 2 SCR. 87.

11. *Balakrishna v. Union of India*, A. 1958 SC. 232 (237); (1958) S.C.R. 1052.

12. *Kathi Ranning v. State of Saurashtra* (1952) S.C.R. 435; A. 1952 SC. 123.

13. *Munafior v. Potti*, (1955), 2 S.C.R. 1196 (1237).



2. When the statute itself is not discriminatory and the charge of violation of equal protection is only against the official who is entrusted with the duty of carrying it into operation,—the charge will fail if the power has been exercised by the officer in good faith within the limitations imposed by the Act and for the achievement of the objects the enactment had in view; if, however, the person who alleges discrimination succeeds in establishing that the step was taken *intentionally* for the purpose of injuring him, or in other words, that it was a *hostile* act directed against him, the executive act complained of must be annulled, even though the statute itself be not discriminatory. In short, if the Act is fair and good, the authority who has to administer it will be generally protected. To this rule, however, there is an exception, which comes into play when there is evidence of *mala fides* in the application of the Act.<sup>14</sup>

(a) In short, when a law is challenged as discriminatory, the relevant consideration is the effect of the law and not the intention of the Legislature. But when a law is itself non-discriminatory but its administration is challenged as discriminatory, the question of intention of the administrative authority becomes material. In such a case, the administrative action cannot be said to have offended Article 14 unless it was '*mala fide*' or actuated by a hostile intention,<sup>15</sup> as distinguished from mere oversight.<sup>16</sup>

In the result mere violation of a law by the Executive does not amount to a violation of equal protection.<sup>16</sup>

(b) Such *mala fide* administration is never presumed, but has to be proved. On the other hand, the presumption is that public officials will discharge their duties honestly and in accordance with the rules of law.<sup>17</sup> This presumption is heightened when the law vests a discretion in high officials or authorities<sup>18</sup> as distinguished from minor officials or in the Government itself.<sup>19</sup>

(c) If, however, the Executive exercises its power in disregard of the policy indicated by the Legislature, then the exercise of the power by the Executive can be annulled as discriminatory and being in contravention of Art. 14.<sup>20</sup> The result is the same as if the Executive had inflicted discrimination in the absence of legislative support altogether.<sup>21</sup> In this case, no question of reasonableness of legislative classification arises, and the executive order is directly hit by Art. 14 read with Art. 12.<sup>22</sup> The administrative order being patently *ultra vires*, no question of the *bona fides* of the authority arise in such a case.<sup>22</sup> *e.g.* where the licensing authority creates a monopoly in favour of a person by excluding all others from the trade, while the law did not authorise the creation of such monopoly.<sup>23</sup>

#### A retrospect on classification and judicial review thereof.

The foregoing principles have been summarised by the Supreme Court itself thus—

1. Where the statute itself indicates the persons or things to whom

14. *State of W. B. v Anwar Ali*, (1952-54) 2 C.C. 49; A. 1952 S.C. 75 (1952) S.C.R. 284.

15. *Kedarnath v State of W. B.*, (1952-54) 2 C.C. 100 (106) (1954 S.C.R. 30

15a. *Ramnath v. State of Rajasthan*, A. 1957 S.C. 608 (608).

16. *State of J. & K. v Ghulam Rasool*, A. 1961 S.C. 1301.

17. *Pannalal v. Union of India*, A. 1957 S.C. 397 (408) (1957) S.C.R. 223

18. *Matajog v. Bhari* (1955) 2 S.C.R. 925; A. 1956 S.C. 44.

19. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (551) (1959) S.C.R. 279.

20. *Kathi Renning v. State of Saurashtra*, (1952-54) C.C. 72 (81) (1952) S.C.R. 435

21. *Eidi Supply Co. v. Union of India*, (1956) S.C.R. 267; A. 1956 S.C. 279.

22. *Irani v. State of Madras*, A. 1961 S.C. 1731 (1738)

23. *Mamulal v. State of Assam*, A. 1962 S.C. 366 (392-3).

its provisions may apply either on the face of it or to be gathered from the surrounding circumstances known to or brought to the notice of the Court, the Court will examine whether the classification can be deemed to rest upon differentia distinguishing the persons or things grouped from those left out and whether such differentia has a reasonable relation to the object sought to be achieved irrespective of whether the statute is intended to apply to a particular person or thing or to a certain class of persons or things.<sup>24</sup>

2. Where the statute directs its provisions against an individual person or thing or to several individual persons or things but no reasonable basis of classification appears on the face of it or can be deduced from the surrounding circumstances, the Court will strike down the law as a case of naked discrimination.<sup>24</sup>

3. Where the statute makes no classification for applying its provisions but leaves it to the discretion of the Government to select and classify, the Court will not strike down the law out of hand but will examine and ascertain if the statute has laid down any principle or policy for guiding the exercise of discretion by Government in the matter of selection and classification, and if no such principle or policy is found the statute<sup>25</sup> will be struck down as providing for the delegation of arbitrary or uncontrolled power to the Government so as to enable it to discriminate between persons and things similarly situate and together with it any executive action taken under such law.<sup>24</sup>

4. Where the statute has made no classification and leaves to the discretion of the Government to select and classify the persons or things to whom the provisions are to apply but at the same time it lays down a principle or policy for guiding the exercise of the discretion, the Court will uphold the law as constitutional.<sup>24 25</sup>

5. Where the statute leaves it to the discretion of the Government to select and classify the persons or things to whom the provisions shall apply and also indicates the principle or policy to guide the exercise of the discretion, but the Government has not followed such principle or policy, the action of the Government will be struck down, but the statute itself will not be condemned as unconstitutional.<sup>24</sup>

### **Discrimination by judicial acts.**

1. While Art. 14 extends to all State action including even acts of the Judiciary, and would hit arbitrary or wilful discrimination by a Court<sup>1 2</sup> the Article does not guarantee uniformity of decisions or of the exercise of judicial discretion. Every judicial decision must of necessity depend on the facts and circumstances of the particular case before the Court and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.<sup>1</sup>

2. Though the vesting of unguided discretion in the Executive to direct the trial of particular persons under a special procedure may be discrimina-

24. *Ramkrishna v. Tendolkar*, A. 1958 SC 538 (548-549) (1959) S.C.R. 279

25. *Jyoti Prasad v. Union Territory*, A. 1961 SC 1609

1. *Saghir Ahmad v. State of U. P.* (1955) 1 SCR 707; A. 1954 SC 728

2. *Budhan v. State of Bihar*, (1952-54) 2 C.C. 157 (160); A. 1955 SC 191 (1955) 1 S.C.R. 1045.

3. This aspect does not appear to have been considered in *Naresh v. State of Maharashtra*, A. 1967 SC 1 (14), or *Parbhani Transport v. R. T. A.*, A. 1960 SC 801, while holding that a judicial or quasi-judicial decision cannot offend Art. 14.

tory, it would not be so where the discretion is vested in judicial officers who have to exercise their discretion according to well-settled principles and subject to revision by superior courts.<sup>3</sup>

### **'The State shall not'.**

The word 'State' is to be understood in the sense used in Art. 12. Any State action, legislative or judicial, is void if it contravenes Art. 14.<sup>2</sup>

### **Discrimination in favour of the State itself.**

1. What is enjoined by Art. 14 is that the State shall not, by its acts, discriminate as between two individuals, who are similarly circumstanced. It has no application to any possible discrimination in favour of the State itself when the State enters into some transaction or business which is open to private individuals.<sup>4</sup> The State does not cease to be a State when it enters into a trade like any other trader.<sup>5</sup> Thus, the Government, carrying on the business of banking, may be given by law special facility for the recovery of its dues,—which are in fact, the dues of the entire people.<sup>6</sup>

2. In some cases, however, the reasonableness of classifying the State, separately, from individuals, has been justified on the merits, having regard to the object of the legislation.<sup>7</sup> e.g., a larger period of limitation in favour of the State as a litigant, under Art. 149 of the Limitation Act, 1908<sup>8</sup> special provisions for the summary recovery of money due to the Government,<sup>6-9</sup> including stringent action against the debtor.<sup>10</sup>

3. The majority of the Court in *State of W. B. v. Corporation of Calcutta*,<sup>11</sup> has, again, held that the common law doctrine of construction that a statute is not binding on the State would offend against the principle of equality, though the State can make an Act, exempting itself from its operation.

### **'Any person'.**

1. Any person, natural or artificial,<sup>12</sup>—whether he is a citizen or an alien,—is entitled to the protection of this article.

2. Government servants do not lose the protection of this Article by entering into Government service.<sup>13</sup>

3. Even a prisoner in a Jail is entitled to equal treatment under the Prison Rules.<sup>14</sup>

**Equal Protection and Service Conditions.**—See under Art. 309, *post*.

### **Decisions on the validity of some laws in relation to Art. 14:**

**Administration of Evacuee Property Act, 1950:**

*Held valid.*—S. 22 (b) <sup>15</sup>

**Aligarh Muslim University (Amendment) Act, 1965:**

*Held valid.*—S. 1.<sup>16</sup>

4. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707.

5. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225.

6. *Manna Lal v. Collector of Jhalwar*, (1961) 2 S.C.R. 962 (970).

7. *Kondala v. A. P. S. R. T. C.*, A. 1961 S.C. 82.

8. *Nav Rattanmal v. State of Rajasthan*, A. 1961 S.C. 1704 (1708) [Art. 112 of the Act of 1963].

9. *Purshottam v. Desai*, (1955) 2 S.C.R. 887.

10. *Collector of Malabar v. Ibrahim*, (1957) S.C.R. 970.

11. *State of W. B. v. Corpn. of Calcutta*, A. 1967 S.C. 997 (1008).

12. *Chiranjit Lal v. Union of India*, (1960) S.C.R. 869 (891).

13. *State of Orissa v. Dharendra*, A. 1961 S.C. 1715; *A. I. Station Masters v. General Manager*, A. 1960 S.C. 384 (387).

14. *Rambir Singh v. State of Punjab*, A. 1962 S.C. 510.

15. *Mohammad v. Deputy Custodian-General*, A. 1961 S.C. 1687.

16. *Anura v. Union of India*, A. 1968 S.C. 662.

**Andhra Pradesh Land Revenue (Additional Assessment) Act, 1922:**

*Held invalid.*—Whole Act.<sup>17</sup>

**Andhra Pradesh Sugarcane (Regulation of Supply & Purchase) Act, 1961:**

*Held valid.*—S. 21.<sup>18</sup>

**Andhra Pradesh General Sales Tax Act, 1957.**

*Held valid.*—Expl. III to s. 2 (1) (n).<sup>18a</sup>

**Arms Act, 1878:**

*Held invalid.*—S. 29.<sup>19</sup>

**Army Act, 1950:**

*Held valid.*—S. 125.<sup>20</sup>

**Assam State Acquisition of Zamindaries Act, 1951:**

*Held valid.*<sup>21</sup>

**Assam Acquisition of Land for Flood Control & Prevention of Erosion Act, 1955:**

*Held invalid.*<sup>22</sup>

**Banking Companies Act:**

*Held valid.*—Ss. 38 (1) (3) (b) (iii),<sup>23</sup> 34A.<sup>24</sup>

**Bar Councils Act, 1926:**

*Held valid.*—S. 4 (3).<sup>25</sup>

**Bihar Hindu Religious Trust Act, 1950:**

*Held valid.*—Ss. 2, 5-8.<sup>1</sup>

**Bihar & Orissa Municipal Act, 1922:**

*Held valid.*—Proviso to s. 82 (1)<sup>1</sup>; ss. 388;<sup>2</sup> 389.<sup>2</sup>

**Bihar Panchayat Raj Act, 1948:**

*Held valid.*—Ss. 62,<sup>3</sup> 68.<sup>3</sup>

**Bombay Land Requisition Act, 1948:**

*Held valid.*<sup>4</sup>

**Bombay Town Planning Act, 1954.**

*Held valid.*<sup>5</sup>

**Bombay Industrial Relations Act, 1947.**

*Held valid.*—Ss. 66 (2);<sup>6</sup> 73A;<sup>6</sup> 92;<sup>6</sup> 98.<sup>6</sup>

**Calcutta Municipal Act, 1951:**

*Held invalid.*—S. 237.<sup>7-24</sup>

**Central Exercise & Salt Act, 1944:**

*Held valid.*—Sch. I, item 4 (1); Cls (5)-(6).<sup>1</sup>

17. *State of A. P. v. Nalla Raja*, (1967) 3 S.C.R. 28 A 1967 SC 1458.

18. *Andhra Sugars Ltd. v. State of A. P.*, A. 1968 S.C. 599

18a. *T. V. T. & B. Firm v. C. T. O.*, A. 1968 S.C. 784

19. *Mchar Chand v. State*, A. 1959 All 660 (663).

20. *Ram Sarup v. Union of India*, A. 1964 S.C. 247 (251).

21. *Bhasrabendra v. State of Assam*, A. 1956 S.C. 503 (512)

22. *Dy. Commr. v. Durganath*, A. 1968 S.C. 394

23. *Joseph v. Reserve Bank of India*, (1963) 1 S.C.A. 472.

24. *All India Bank Employees v. N. I. Tribunal*, A. 1962 S.C. 171 (185).

25. *Manilal v. Union of India*, A. 1960 Bom. 83.

1. *Moti Das v. Sahi*, (1959) Supp. (2) S.C.R. 563.

2. *Ram Bachan v. State of Bihar*, A. 1967 S.C. 1404 (1407).

3. *Baldeo v. State of Bihar*, A. 1957 S.C. 612.

4. *Shah & Co. v. State of Maharashtra*, A. 1967 S.C. 1877 (1885).

5. *Maniklal v. Makwana*, A. 1967 S.C. 1373 (1383); *Gupta v. Corporation*, A. 1968 S.C. 303.

6. *Ahmedabad M. O. Assocn. v. Thakore*, A. 1967 S.C. 1091 (1096) (1967) 2 S.C.R. 437.

7-24. *Naseeb Arif v. Corp. of Calcutta*, (1959) 64 C. W. N. 1.

25. *Jaganath v. Union of India*, A. 1962 S.C. 148.

**Civil Procedure Code:**

*Held valid.*—Ss. 60;<sup>1</sup> 87B;<sup>2</sup> 133;<sup>3</sup> O. 21, r. 22;<sup>4</sup> O. 40; r. 2(2).<sup>4a</sup>

**Commissions of Inquiry Act, 1952:**

*Held valid.*—S. 3.<sup>5</sup>

**Companies Act, 1956:**

*Held valid.*—Ss. 237 (h);<sup>6</sup> 239;<sup>7</sup> 240.<sup>7</sup>

**C. P. & Berar Sales Tax Act, 1947:**

*Held invalid.*—S. 11 (4) (a).<sup>8</sup>

**Criminal Law Amendment Act, 1952:**

*Held valid.*—Act as a whole;<sup>9</sup> s. 6.<sup>10</sup>

**Criminal Procedure Code:**

*Held valid.*—Ss. 14(1);<sup>11, 12</sup> 30;<sup>1, 4</sup> 87B;<sup>9</sup> 146(1)(d);<sup>10</sup> 156;<sup>11</sup> 162(2);<sup>12</sup> 176;<sup>13</sup> 193(2);<sup>14</sup> 197;<sup>15</sup> 198B;<sup>16</sup> 269;<sup>17</sup> 207A;<sup>18</sup> 251A;<sup>19</sup> 260-264;<sup>40</sup> 337;<sup>20</sup> 350;<sup>21</sup> 411;<sup>22</sup> 417(1);<sup>23</sup> 421;<sup>24</sup> 488;<sup>25</sup> 497.

**Customs Act, 1962:**

*Held valid.*—S. 105.<sup>1</sup>

**Delhi & Ajmer-Merwara Rent Control Act, 1947:**

*Held valid.*—S. 71;<sup>2</sup> Sch. IV.<sup>2</sup>

**Displaced Persons (Compensation & Rehabilitation) Act, 1954:**

*Held valid.*—S. 12.<sup>2a</sup>

**Dungah Khwaja Saheb Act, 1955:**

*Held valid.*—Ss. 16;<sup>3</sup> 18.<sup>4</sup>

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1. *State of Madras v. Venkata*, A. 1957 A. P. 675
  2. *Mohanlal v. Man Singhji*, A. 1962 S.C. 73; *Narothan v. Union of India*, A. 1964 S.C. 1590.
  3. *Bashist v. Radhika*, A. 1952 Punj. 97.
  4. *Pichayaya v. Govt. of Andhra*, A. 1957 A. P. 136.
  - 4a. *Lala Kam v. Supreme Court*, A. 1967 S.C. 817.
  5. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (550); (1959) S.C.R. 279.
  6. *Barium Chemicals v. Company Law Board*, A. 1967 S.C. 295.
  7. *Narayanlal v. Mistry*, A. 1961 S.C. 29 (41).
  8. *Anandji v. Kusurji*, A. 1958 S.C. 565; (1968) 1 S.C.A. 663.
  9. *Asgarali v. State of Bombay*, A. 1957 S.C. 503.
  10. *Tujkhan v. State*, A. 1958 Raj. 1.
  - 11-25. *M. K. Gopalan v. State of M. P.*, (1952-54) 2 C.C. 109; A. 1954 S.C. 326
  - 1-8. *Budhan v. State of Bihar*, A. 1955 S.C. 191.
  9. *Bhimaji v. Kamrao*, A. 1955 Bom. 195.
  10. *Ranganmal v. Subbarayalu*, A. 1960 Mad. 169
  11. *Gopal v. State*, A. 1959 Assam. 231.
  12. *State v. Deoman*, (1961) 1 S.C.R. 14.
  13. *Rujangam v. State of Madras*, A. 1959 Mad. 294 (307).
  11. *Babu Ram v. State*, A. 1958 All. 838.
  15. *Matayog v. Bhatia*, (1955) 2 S.C.R. 925; A. 1956 S.C. 41.
  16. *Munishwaranand v. State of U. P.*, A. 1959 All. 21.
  17. *Dhirendra v. Legat Kemembancer*, (1952-54) 2 C.C. 111; (1955) 1 S.C.R. 224.
  18. *Hanumantha v. State of A. P.*, A. 1957 S.C. 927.
  19. *Bindeskuari v. Birju*, A. 1959 Pat. 46 (19).
  20. *Laxmipath v. State of Maharashtra*, (1967) S.C. [C. A. 50/64, d. 14.12.67].
  21. *Ghani v. State*, A. 1953 All. 316.
  22. *Shankar Lal v. Collector of Customs*, (1967) S.C. [G. A. 52/67, d. 12.12.67].
  23. *State v. Shankar*, A. 1958 All. 432; *Krishnayya, in re.*, A. 1957 A. P. 163.
  24. *Pratap Singh v. State of M. P.*, (1961) 2 S.C.R. 509.
  25. *Thamsi v. Kannu*, A. 1952 Mad. 529
  1. *Gopikisan v. Asstt. Collector*, A. 1967 S.C. 1298 (1301).
  2. *Rashen Lal v. Iswar Das*, A. 1962 S.C. 643 (654-5).
  - 2a. *Gujral v. Custodian*, A. 1968 S.C. 457.
  3. *Dungah Committee v. Hussein*, A. 1961 S.C. 1402.

**East Punjab Public Safety Act, 1949:**

*Held valid.*—S. 35.<sup>4</sup>

**Employees Provident Fund Act, 1952:**

*Held valid.*—Ss. 5;<sup>5</sup> 16.<sup>6</sup>

**Employees' State Insurance Act, 1948:**

*Held valid.*—Ss. 1(3);<sup>7</sup> 16(2).<sup>8</sup>

**Enemy Agents Ordinance (Jammu & Kashmir), 1949:**

*Held valid.*—Entire Ordinance.<sup>10</sup>

**Essential Commodities Act, 1955:**

*Held valid.*—S. 3.<sup>9</sup>

**Evidence Act:**

*Held valid.*—Ss. 27;<sup>11</sup> 114.<sup>12</sup>

**Factories Act, 1948:**

*Held valid.*—S. 85(1).<sup>13</sup>

**Forward Contracts Regulation Act, 1952:**

*Held valid.*—Ss. 1,<sup>14</sup> 15,<sup>14</sup> 17.<sup>11</sup>

**Gujarat Education Cess Act, 1962.**

*Held valid.*—Ss. 3, 12.<sup>15a</sup>

**Hindu Marriage Act, 1955:**

*Held valid.*—S. 11.<sup>15</sup>

**Hydrabad Atiyat Enquiries Act, 1952:**

*Held valid.*—S. 13(2).<sup>16</sup>

**Imports & Exports (Control) Act, 1947:**

*Held valid.*—S. 3(2).<sup>17</sup>

**Income Tax Act, 1922:**

*I. Held valid.*—Ss. 3;<sup>18</sup> 4(2);<sup>19</sup> 5(7A);<sup>19</sup> 5(7B);<sup>20</sup> 10(2)(vi-b), 2nd Prov.,<sup>21</sup> 16(3)(a)(i)-(ii);<sup>22</sup> 46(2);<sup>23</sup> 23A;<sup>23</sup> 33B;<sup>23</sup> 34(1A);<sup>23</sup> 33A;<sup>23</sup> 28(4);<sup>23</sup> 42(1);<sup>23</sup> 46(1);<sup>23</sup> 46(5A);<sup>23</sup> 51;<sup>23</sup> 52.<sup>23</sup>

4. *Gopi Chand v. Delhi Administration*, A. 1959 S.C. 609; (1959) Supp. (2) S.C.R. 87.

5. *Hindusthan Electric Co. v. Regional P. F. Commr.*, A. 1959 Punj. 27.

6. *M. P. Mineral Industries v. Regional P. F. Commr.*, A. 1959 Bom. 60.

7. *Anand v. Employees' S. I. Corpn.*, A. 1957 All. 136.

8. *Bharat Board Mills v. R. P. F. Commr.*, A. 1957 Cal. 702.

9. *Dewan Sugar Mills v. Union of India*, A. 1959 S.C. 626 (633).

10. *Rahman v. State of J. & K.*, A. 1950 S.C. 1.

11. *State of U. P. v. Doman*, (1961) 1 S.C.R. 14; A. 1960 S.C. 1125, reversing *Doman v. State*, A. 1960 All. 185 (F.B.).

12. *Gan Chand v. State of J. & K.*, A. 1957 J. & K. 32 (F.B.).

13. *Ram Chandra v. State of Bihar*, A. 1957 Pat. 247.

14. *Raghunath v. Union of India*, A. 1962 S.C. 263.

14a. *Ahmedabad Mfg. Co. v. State of Gujarat*, A. 1967 S.C. 1916.

15. *Lakshmi v. Revenue*, (1959) 1 M.L.J. 333.

16. *Sikander Jahan v. A. P. State Govt.*, A. 1962 S.C. 996.

17. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151; A. 1957 S.C. 648.

17a. *Ifoh v. C. I. T.*, A. 1968 S.C. 317.

18. *Jamulimma v. I. T. O.*, A. 1956 Mad. 387.

19. *Pannalal v. Union of India*, (1957) S.C.R. 233; A. 1957 S.C. 397.

20. *Bhagwan v. I. T. O.*, A. 1956 Punj. 118.

21. *Southern Roadways v. Union of India*, (1962) Supp. (2) S.C.R. 584.

22. *Halaji v. I. T. O.*, A. 1962 S.C. 123.

23. *Collector of Malabar v. Ebrahim*, (1957) S.C.R. 970; A. 1957 S.C. 688;

*Parashattam v. Desai*, (1955) 2 S.C.R. 667; A. 1956 S.C. 20.

24. *Spencer v. I. T. O.*, A. 1957 Mad. 133.

25. *Dawjee v. Jain*, A. 1957 Cal. 244.

1. *Rashid & Sons v. I. T. O.*, A. 1964 S.C. 1190.

2. *Sitoldore C. C. v. Union of India*, A. 1957 Cal. 319.

3. *Sivagaminatha v. I. T. O.*, A. 1956 Mad. 1; *Appa Rao v. I. T. O.*, A. 1959 A. P. 391.

II. *Held invalid*.—S. 34(3), 2nd Proviso.<sup>7</sup>

**Income-tax Act, 1961:**

*Held invalid*.—Part of s. 10(26).<sup>7a</sup>

**Income-tax Investigation Commission Act, 1947:**

*Held invalid*.—Ss. 5(4);<sup>8</sup> s. 5(1) (after amendment of s. 34 of the Income-tax Act in 1954).<sup>9</sup>

*Held valid*.—S. 5(1).<sup>10</sup>

**Indian Administrative Service (Seniority of Special Recruits) Regulations, 1960:**

*Held valid*.—Reg. 3.<sup>10b</sup>

**Indian Administrative Service (Regulation of Seniority) Rules, 1954:**

*Held valid*.—R. 3(3)(b).<sup>10a</sup>

**Indian Penal Code:**

*Held valid*.—Ss. 354;<sup>11</sup> 409, as applied to public servants;<sup>12</sup> 497.<sup>13</sup>

**Industrial Disputes Act, 1947:**

*Held valid*.—Ss. 1;<sup>14a</sup> 10;<sup>14</sup> 25FFF;<sup>15</sup> 36(4).<sup>16</sup>

**Jammu & Kashmir Commission of Inquiry Act, 1962.**

*Held valid*.—S. 3.<sup>16a</sup>

**Jammu & Kashmir Enemy Agents Ordinance:**

*Held valid*.<sup>17</sup>

**Kerala Agrarian Relations Act, 1961:**

*Held invalid*.—In its application to *ryotwari* lands which have come to the State of Kerala from the State of Madras.<sup>18</sup>

*Held valid*.—As to the rest.<sup>19</sup>

**Land Acquisition Act, 1894:**

*Held valid*.—Ss. 6,<sup>20</sup> 17,<sup>20</sup> 21, 23, as amended in Madras in 1961.<sup>21a</sup>

**Limitation Act, 1908:**

*Held valid*.—Art. 149.<sup>22</sup>

**Madhya Bharat Taxes on Income (Validation) Act, 1964:**

*Held valid*.<sup>1</sup>

4. *Abdul v. Commr., of I. T.*, A. 1958 Mad 1.

5. *Narayanappa v. I. T. O.*, A. 1960 Mys. 40 (43).

6. *Murlidhar v. I. T. O.*, A. 1960 Assam 76 (83).

7. *Prakash v. Dwarkadas*, A. 1956 Bom 530; *Nair v. I. T. O.*, A. 1958 Ker. 248.

7a. *I. T. O. v. Lawrence Singh*, A. 1968 S.C. 658.

8. *Suresh Mall v. Visvanatha*, A. 1954 S.C. 545.

9. *Muthiah v. I. T. Commr.*, A. 1956 S.C. 269.

10. *Muskar v. Venkatachalam*, A. 1956 S.C. 246; (1955) 2 S.C.R. 1196.

10a. *Saksena v. Union of India*, A. 1968 S.C. 754 (760).

10b. *Saksena v. Union of India*, A. 1968 S.C. 754 (761).

11. *Girdhar v. State*, A. 1963 M.B. 147.

12. *Om Prakash v. State of U. P.*, (1957) S.C.R. 423.

13. *Yusuf v. State of Bombay*, (1954) S.C.R. 930.

13a. *Hindusthan Antibiotics v. Workmen*, A. 1967 S.C. 948.

14. *Niemla Textile Mills v. Punjab Industrial Tribunal*, (1967) S.C.R. 335; A. 1957 S.C. 329.

15. *Hathising Mfg. Co. v. Union of India*, A. 1960 S.C. 923.

16. *Rangaswamy v. Industrial Tribunal*, A. 1963 Mad. 447.

16a. *State of J. & K. v. Gulam Md.*, A. 1967 S.C. 122.

17. *Rehman v. State of Kashmir*, A. 1960 S.C. 1.

18. *Kunhikoman v. State of Madras*, A. 1962 S.C. 723.

19. *Nambudiri v. State of Kerala*, (1961) S.C. [Petn. 105/61].

20. *Jswaral v. State of Gujarat*, A. 1968 S.C. 870 (881).

21. *Vairavulu v. Sp. Dy. Collector*, A. 1965 S.C. 1017.

22. *Nay Rationnal v. State of Rajasthan*, A. 1961 S.C. 1704.

**Madras Buildings (Lease & Rent Control) Act, 1849:**

*Held valid.*—S. 13.<sup>23</sup>

**Madras Commercial Crops Market Act, 1933:**

*Held valid.*—Ss. 1;<sup>24</sup> 5.<sup>25</sup>

**Madras General Sales Tax (Special Provisions) Act, 1963:**

*Held invalid*—S. 2(1).<sup>12</sup>

**Madras Prohibition Act, 1937:**

*Held valid.*—S. 4(2).<sup>2</sup>

**Madras Sugar Factories Control (Mysoze Amendment) Act:**

*Held valid.*—S. 14.<sup>3</sup>

**Mines Act, 1952:**

*Held valid.*—S. 76.<sup>4</sup>

**Motor Vehicles Act, 1939:**

*Held valid*—Ss. 14(5);<sup>5</sup> 57A;<sup>6</sup> 53(2);<sup>7</sup> 68C;<sup>8</sup> 96,<sup>9</sup> Ch. IV-A.<sup>10</sup>

**Mysore House Rent & Accommodation Control Act, 1951:**

*Held valid.*—S. 3(3)(a).<sup>11</sup>

**Nathadwara Temple Act, 1959:**

*Held valid.*<sup>12</sup>

**Orissa Private Lands of Rulers (Assessment of Rent) Act, 1958:**

*Held valid.*—Ss. 5, 6.<sup>13</sup>

**Orissa Motor Vehicles (Regulation of Stage and Public Carriers' Services) Act, 1947:**

*Held valid.*<sup>14</sup>

**Osmania University Act, 1959:**

*Held invalid.*—S. 13A.<sup>15</sup>

**Payment of Bonus Act, 1965:**

*Held valid.*—Ss. 10.<sup>16</sup>

*Held invalid.*—Ss. 33;<sup>17</sup> 34.<sup>18</sup>

**Presidency Towns Insolvency Act, 1909:**

*Held valid.*—S. 9(e).<sup>19</sup>

**Prevention of Corruption Act, 1947:**

*Held valid.*—S. 4(1).<sup>16</sup>

23. *Irani v. State of Madras*, A. 1961 S.C. 1731.

24. *Shanmugha Oil Mill v. Market Committee*, A. 1960 Mad. 160.

1. *Rajkumar Mills v. State of M. P.*, (1965) S.C. [C.A. 660/64 d. 198.65].

1a. *Abdul Shkoor v. State of Madras*, A. 1961 S.C. 1729.

2. *Krishna v. State of Madras*, A. 1957 S.C. 297.

3. *Indian Sugar & Refineries v. State of Mysore*, A. 1958 Mys. 61.

4. *Banwarilal v. State of Bihar*, A. 1961 S.C. 849.

5. *Dhanmull v. R. T. A.*, A. 1957 Mad. 587.

6. *S. N. T. Co. v. S. T. A.*, A. 1957 Cal. 638.

7. *Prakash v. State of U. P.*, A. 1959 All. 373 (376).

8. *Kondala v. A. P. S. R. T. C.*, A. 1961 S.C. 82 (87).

9. *Vanguard Ins. Co. v. Saria*, A. 1959 Puni. 297 (302).

10. *Sa'yanarayana Murthy v. A. P. S. R. T. C.*, (1960) 1 S.C.R. 642 (654).

11. *Jinadathappa v. Sharma*, A. 1961 S.C. 1523.

12. *Govindlalji v. State of Rajasthan*, (1964) 1 S.C.R. 561 (618).

13. *Ratnaprova v. State of Orissa*, (1964) S.C.D. 892.

14. *Ram Chandra v. State of Orissa*, A. 1966 S.C. 298.

14a. *Reddy v. Chancellor*, (1967) 2 S.C.R. 214.

14b. *Jalan Trading Co. v. Mill Mazdoor Sabha*, A. 1967 S.C. 691: (1967) 1

S.C.R. 15.

15. *Zecharia v. Srinivas*, A. 1957 Mad. 403.

16. *Gyden v. State of U. P.*, A. 1960 S.C. 548.



**Preventive Detention Act, 1950:***Held valid.*—Ss 3(1)(b);<sup>17</sup> Act as a whole.<sup>18</sup>**Provincial Insolvency Act, 1920:***Held valid.*—S. 6(e).<sup>19</sup>**Public Servants (Inquiries) Act, 1850:***Held valid.*<sup>19</sup>**Punjab Public Premises & Land (Eviction & Rent Recovery) Act, 1959:***Held invalid.*—S. 5.<sup>19a</sup>**Punjab Reorganisation Act, 1966:***Held valid.*—Ss. 13(1),<sup>20</sup> 20, 22.<sup>20</sup>**Rajasthan Jagirdars Debt Reduction Act, 1957:***Held invalid.*—S. 2(e).<sup>20</sup>**Rajasthan Passengers & Goods Taxation Act, 1959:***Held valid.*—S. 3.<sup>20</sup>**Rajasthan Public Demands Recovery Act, 1952:***Held valid.*—Entire Act.<sup>21</sup>**Rajasthan (Protection of Tenants) Ordinance, 1949:***Held valid.*—S. 7.<sup>22</sup>**Representation of the People Act, 1951:***Held valid.*—S. 51(4);<sup>23</sup> 86.<sup>24</sup>**Sea Customs Act:***Held valid.*—Ss 105;<sup>24a</sup> 167(8);<sup>25</sup> 178A + 183.<sup>25</sup>**Securities Contracts (Regulation) Act, 1956:***Held valid.*—S. 4.<sup>8</sup>**Slum Areas (Improvement and Clearance) Act, 1956:***Held valid.*—S. 19.<sup>4</sup>**Sugar Export Promotion Act, 1958:***Held valid.*—S. 1.<sup>5</sup>**Suppression of Immoral Traffic in Women and Girls Act, 1956:***Held invalid.*—S. 20.<sup>6</sup>*Held valid.*—S. 18.<sup>7</sup>**Taxation on Income (Investigation Commission) Act, 1947:***Held invalid.*—S. 5(4);<sup>7a</sup> s. 5(1);<sup>8</sup> 8A.<sup>9</sup>

17. *Hans Muller v Supdt* (1955) 1 SCR 1284

18. *Gopalan v State of Madras*, (1950) SCR. 88

19. *Kapur v Pratap Singh*, A. 1964 SC 295.

19a. *N. I. Caterers v State of Punjab* A. 1967 SC 1581.

20. *Mangal Singh v Union of India* A. 1977 SC 941

20a. *State of Rajasthan v Mukar Chand* A. 1964 SC. 1633

21. *Rehman v State of Kashmir*, A. 1960 SC 1

22. *Kunhikoman v State of Madras* A. 1962 SC 723

23. *Nambudiri v State of Kerala* (1961) SC [Petn. 105/61]

24. *Aurora v. State of U. P.*, A. 1958 All 126

24a. *Gobikrishnan v. Collector*, (1967) 2 S.C.R. 340 (346).

25. *Arjan v. State of Punjab*, A. 1959 Puni. 538 (543)

1. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151; A. 1957 S.C. 648.

2. *Babulal v. Collector of Customs*, (1957) S.C.R. 1110; A. 1957 S.C. 677.

3. *Madhubhai v Union of India*, A. 1961 S.C. 21

4. *Jyoti Pershad v. Union Territory*, A. 1961 S.C. 1602

5. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124.

6. *Shama v. State of U. P.*, A. 1959 All. 57 (63).

7. *Aggarwal v. Ram Kali*, A. 1968 S.C. 1 (5).

7a. *Suraj Mall v. Viswanatha*, A. 1954 S.C. 545; (1955) 1 S.C.R. 448.

8. *Meenakshi Mills v. Viswanatha*, A. 1955 S.C. 13; *Muthiah v. Commr. of I. T.*, (1955) 2 S.C.R. 1247.

9. *Bareshwar v. Commr. of I. T.*, A. 1959 S.C. 149; (1959) Supp. (1) S.C.R. 528.

**Tibbia College Act, 1952:**

*Held valid.*—S. 1.<sup>10</sup>

**Travancore-Cochin Land Tax, 1955:**

*Held invalid.*—Ss. 4;<sup>11</sup> 7.<sup>11</sup>

**U. P. Industrial Disputes Act, 1947:**

*Held valid*—S. 3(b).<sup>12</sup>

**U. P. Consolidation of Holdings Act, 1954:**

*Held valid.*—Ss. 29B;<sup>13</sup> 49.<sup>13</sup>

**U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953:**

*Held valid.*—S. 15.<sup>14</sup>

**Vindhya Pradesh Abolition of Jagirs & Land Reforms Act, 1952:**

*Held valid*—Ss. 22,<sup>15</sup> 37.<sup>15</sup>

**West Bengal Land Development Act, 1948:**

*Held valid.*—S. 7.<sup>16</sup>

**Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955:**

*Held valid*—Entire Act.<sup>17</sup>

**15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.**

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

**(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—**

(a) access to shops, public restaurants, hotels and place of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

**(3) Nothing in this article shall prevent the State from making any special provision for women and children.**

**(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.**

**Amendment.** Cl. (4) was inserted by the Constitution First (Amendment) Act, 1951.

**Effect of amendment.** See under cl. (4) above.

### Arts. 14-15.

Art. 15 is an instance of the right of equality which is generally stated in Art. 14. While Art. 14 is available to all persons, Art. 15 is available to citizens only.<sup>18</sup>

10. *Board of Trustees v. State of Delhi*, A. 1962 S.C. 158.

11. *Kunnathal v. State of Kerala*, A. 1961 S.C. 552.

12. *State of U. P. v. Basti Sugar Mills*, A. 1961 S.C. 420.

13. *Attar Singh v. State of U. P.*, A. 1959 S.C. 564.

14. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676.

15. *State of M. P. v. Moradkhawaj*, A. 1960 S.C. 796.

16. *State of W. B. v. Nabakumar*, A. 1961 S.C. (20) (1961) S.C.R. 368.

17. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (634).

18. *Devaraha v. State of A. P.*, A. 1961 S.C. 564 (569).

**Arts. 15 and 16.**

Art. 15 (1) is more general than Art. 16 (1) because its operation is not limited to public employment but extends to the entire field of State discrimination.<sup>19</sup> But in another sense it is less wide than Art. 16 because it does not include 'descent' amongst the grounds of discrimination.<sup>18</sup>

**Scope of Cl. (1): Prohibition of Discrimination.**

1. The scope of this clause is very wide. It is levelled against any State action relating to the citizens'<sup>18</sup> rights, whether political, civil or otherwise.<sup>20</sup> Thus, a provision for communal representation on the basis of separate electorates according to communities<sup>20</sup> offends against this clause and any election held in pursuance of such a law, after the commencement of the Constitution, must be held to be void. A delimitation of constituencies intended to benefit a particular community would offend against this clause.<sup>21</sup>

2. And in view of the wide definition of the word 'State' in Art. 12, the prohibition extends to all representative public bodies, such as municipal or local<sup>20</sup> bodies exercising 'authority' within the meaning of that Article.

3. The fundamental right conferred by this clause is conferred on a citizen as an *individual* and is a guarantee against his being subjected to discrimination in the matter of his rights, privileges and immunities pertaining to him as a citizen generally.<sup>20</sup> The right conferred by Art. 15 is *personal*, and when one single citizen is discriminated against on the ground of caste, religion, etc., it is no answer to his application that other persons of the same caste or religion have been given the opportunity or privilege which has been denied to him.<sup>22</sup>

**'The State.'**

It has been held<sup>23, 24</sup> that this Article applies to State-maintained but not State-aided educational institutions.

**'Discrimination.'**

'Discrimination', shortly speaking, means difference in treatment. The dictionary meaning of 'discriminate against' is "make an adverse distinction with regard to," "distinguish unfavourably from others".<sup>24</sup>

But the discrimination which is forbidden by this Article is only such discrimination as is based *solely* on the ground that a person belongs to a particular race or caste or professes a particular religion or was<sup>25</sup> born at a particular place or is of a particular sex, and on no other ground. A discrimination based on one or more of these grounds and *also on other grounds* is not hit by the Article.<sup>25, 1</sup> The offending ground must also be the 'immediate and direct' cause of the discrimination.<sup>2</sup>

**'Religion, race or caste.'**

1. In levying the cost of stationing an additional police force in an area on the ground that the inhabitants of the locality harboured dacoits and

19. *Devadasan v. Union of India*, A. 1964 S.C. 179.

20. *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184; (1952-54) S.C. 161.

21. *Bhopalsingh v. State of Rajasthan*, A. 1958 Raj. 41.

22. *Champakam v. State of Madras*, A. 1951 Mad. 120.

23. *University of Madras v. Shanta*, A. 1954 Mad. 57.

24. *Kathi Raning v. State of Savarashtra*, (1952) S.C.R. 435 (442).

25. *State v. Vitthal*, (1952) 54 Bom.L.R. 626.

1. *Anjali v. State of West Bengal*, (1953) 56 C.W.N. 801.

2. *Cl. State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568 (584).

caused riots, a notification under s. 15 (5) of the Police Act, 1861 granted exemption to the *Harijan* and *Muslim* inhabitants of the area. *Held*, that in the absence of a case that *all* members of the *Harijan* and *Muslim* communities were law-abiding and that there were no law-abiding persons belonging to the other communities inhabiting the area, the notification evidently discriminated against the members of the other communities on the ground of 'religion' or 'caste', and was contrary to art. 15 (1).<sup>3</sup>

2. But laws for the social reform of Hindus only, *e.g.*, prohibition of bigamy, have been held to be valid, since the classification was not based on religion only but the social advancement of the Hindus.<sup>4</sup>

3. Even where the persons in whose favour a discrimination is made belongs to the backward classes, the discrimination will be void if it is really based on caste considerations' and not economic or social backwardness.<sup>5</sup>

### 'Place of birth.'

1. These words occur in clauses (1) and (2) of Article 15 as well as in clause (2) of Article 16. These words in effect declare provincialism, to be unlawful. In no public matter is there to be any discrimination by any authority against a citizen of India on the ground of his *birth* in any particular part of India.<sup>6</sup>

2. Art. 15 (1), however, does not prohibit discrimination on the ground of *residence or domicile*;<sup>7</sup> hence, it is constitutionally permissible for a State to prescribe that residents of the State would be entitled to a concession in the matter of fees in a State Medical College,<sup>8</sup> or to prescribe that admission to a University shall be restricted to persons domiciled in a particular area in the State.<sup>9</sup>

3. But 'residence' cannot be a ground for disqualifying a person for appointment under a State, unless Parliament so prescribes<sup>10</sup> under Art. 16 (3).

### Provisions held to be violative of Art. 15 (1):

Abducted Persons (Recovery and Restoration) Act, 1949.—S. 2 (1) (a).<sup>1</sup>

Civil Procedure Code.—S. 60 (1) (c).<sup>12</sup>

Money Lenders (Regulation of Transactions Act, 1939—S. 4.<sup>13</sup>

Punjab Court of Wards Act.—S. 5.<sup>14</sup>

Punjab Security of Land Tenures Act, 1953—S. 19 E.<sup>15</sup>

### Scope of Clause (2).

1. Sub-clause (a) offers equal access to shops, restaurants, hotels and places of public entertainment, owned by *private* persons, State aid to such institutions is not a condition requisite for availability of this right in respect

3. *State of Rajasthan v. Pratap Singh*, A. 1960 1208: (1-61) 1 S.C.R. 222.

4. *State v. Narsu*, A. 1962 Bom. 84; *Srinivasa v. Saraswathi*, A. 1962 Mad. 193; *Chennamma v. Dyana*, A. 1953 Mys. 136.

5. *Balaji v. State of Mysore*, A. 1963 S.C. 649.

6. *Chitralekha v. State of Mysore*, A. 1964 S.C. 1823.

7. *State v. S. K. Husein*, A. 1951 Bom. 285.

8. *Joshi v. State of M. B.*, (1955) S.C.R. 1215 (1220): A. 1955 S.C. 334.

9. *Ramkrishna v. Osmania University*, A. 1962 A.P. 120.

10. *Cj. Pandurangrao v. A.P.S.C.*, A. 1963 S.C. 268 (272).

11. *Ajaib Singh v. State of Punjab*, A. 1952 Punj. 309.

12. *Rura Ram v. Gurbachana*, A. 1954 Punj. 254.

13. *Misra v. B. Das*, A. 1953 Pat. 259.

14. *Harbomendra v. State of Punjab*, A. 1953 Punj. 30.

15. *Bhagat Singh v. State of Punjab*, A. 1963 Punj. 319.

of such places. Sub-cl. (b) relates to places of public resort which are (i) either maintained by State funds, wholly or in part, or (ii) dedicated to the use of the general public. In the latter case, maintenance by State funds is not necessary.

2. In short, the prohibition cl. (2) is levelled not only against the State but also against private persons.

Thus, the validity of a custom which restricted the use of a village well to certain families has been tested with reference to Art. 15 (2) (b); and such custom has been held to be invalid<sup>16</sup>

### Scope of Clause (3): Special provision for women and children.

1. This clause is an exception to the rule against discrimination provided by clauses (1) as well as (2).<sup>17</sup> Thus, the provision of maternity relief for women workers [Article 42] will not be a contravention of the prohibition against discrimination under clause (1) of the present Article, nor will be the provision of free education for children [Article 45] or measures for provision against their exploitation [Article 39 (f)]. Similarly, the prohibition of separate accommodation, entrances, etc., for women and children at places of public resort will not be a violation of clause (2) of the present article

2. But the special provisions referred to in cl. (3) need *not* be restricted to measures which are *beneficial* in the strict sense. Thus, it would support a provision like that in s. 497 of the Indian Penal Code which says that in an offence of adultery, though the man is punishable for adultery, the woman is not punishable as an abettor.<sup>18</sup> Restrictions upon the right of alienation of women have similarly been upheld.<sup>19a</sup>

### Provisions which have been held to be valid in view of Art. 15 (3)

The following provisions, though discriminatory in favour of women or children, have been held to be valid, in view of Art. 15 (3):

- (i) Ss. 354, 497, 18 I P C
- (ii) Provision to s. 498 (1),<sup>19</sup> Criminal Procedure Code making special treatment for women and children in the matter of granting bail,<sup>19a</sup> or s. 488
- (iii) S. 10 of the Divorce Act, 1869<sup>20</sup>
- (iv) O. 25, r. (3) C P Code,<sup>21</sup> authorising the Court to demand security for costs from woman plaintiff
- (v) Reservation of seats for women in local body,<sup>17</sup> or educational institution<sup>22</sup>

### Scope of cl. (4): Special provision for backward classes.

1. The object of this clause, added in 1951, is to bring Arts. 15 and 29 in line with Arts. 16 (4), 40, and 340, and to make it constitutional for the State to *reserve* seats for backward classes of citizens. Scheduled Castes

16. *Armugha v. Narayana*, A. 1958 Mad 282.

17. *Dattatraya v. State of Bombay*, A. 1953 Bom 311

17a. *Kaer v. Jaggur*, A. 1961 Punj 489

17b. *Girdhar v. State*, A. 1963 M.B. 147.

18. *Yussef v. State of Bombay*, (1952 54) 2 C.C. 164 (1950) SCR 930.

19. *Choki v. State*, A. 1957 Raj 10.

19a. *Thamir v. Kannu*, A. 1952 Mad. 529

20. *Dwarka Bai v. Naman*, A. 1953 Mad 792.

21. *Mahadeb v. B. R. Sen*, A. 1951 Cal. 563.

22. *Sagar v. State*, A. 1968 A.P. 165 (174).

and Tribes in the public educational institutions,<sup>23</sup> as well as to make other special provisions as may be necessary for their advancement. The immediate object of this amendment was to override the decision in *State of Madras v. Champakam*,<sup>24</sup> to the effect that Art. 29 (2) is not controlled by Art. 46 and that the Constitution does not intend to protect the interest of the backward classes in the matter of admission to educational institutions. But though the amendment would validate reservation for the backward classes and Scheduled Castes and Tribes, it would not support the distribution of seats according to communities so as to discriminate between classes who are not backward, *inter se*; in short, the amendment would not sanction any communal order.

2. Cl. (4) is an exception to cl. (1)<sup>25</sup> which forbids discrimination on ground of 'race' or 'caste'.

(a) In *Jagwant v. State of Bombay*,<sup>1</sup> it was held that acquisition of land for the establishment of a Harijan colony offended against Art. 15 (1).  
 \* But this would be constitutional after the insertion of cl. (4) in Art. 15, as this is a provision for the 'advancement' of a backward class.

(b) For the same reason, if the members of a particular caste are, as a class, socially and educationally backward, nothing in cl. (1) prevents the State from making reservation for the advancement of such group of persons, even though they are identified by their caste.<sup>2</sup>

(i), If, however, the criterion adopted for determining their backwardness is fictitious, so that the preference given to them virtually amounts to a preference on the ground of caste *alone*, it would not be protected by cl. (4) and would be hit by cl. (1).<sup>2</sup>

(ii) Being an exception, cl. (4) cannot be interpreted as to nullify cl. (1) or to render it illusory. Hence, the reservation under cl. (4), in order to be valid, must not be so excessive as to practically deny a reasonable opportunity for employment to members of other communities.<sup>16, 20</sup>

Upon the foregoing reason, the following special provisions for backward classes have been struck down as a *fraud on the Constitution*—

(i) Reservation of 68% of seats in all technical institutions such as Engineering and Medical Colleges in Mysore,<sup>20</sup>

(ii) Exclusion of all other candidates if a single candidate from the Scheduled Castes or Tribes was available.<sup>2</sup>

(c) Though caste was a test for determining backwardness among Hindus, it was not obligatory to apply that test and a determination of backwardness based on other relevant considerations was not void merely because it ignored caste.<sup>1</sup>

3. Provision under Art. 15 (4) could be made by an executive order, without resorting to legislation<sup>2</sup> or without appointing a Commission under Art. 340 (1).<sup>2</sup>

### 'Backward classes.'

1. It is to be noted that while Art. 16 (4), simply mentions 'any backward class of citizens', Art. 15 (4) qualifies the expression by the

23. *Sudarsan v. State of A. P.*, A. 1958 A.P. 569.

24. *State of Madras v. Champakam*, (1951) S.C.R. 525.

25. *Devadasan v. Union of India*, A. 1964 S.C. 179.

1. *Jagwant v. State of Bombay*, A. 1952 Bom. 461.

2. *Balaji v. State of Bihar*, A. 1963 S.C. 649.

3. *Abdul Latif v. State of Bihar*, A. 1964 Pat. 393 (395).

4. *Chitrallekha v. State of Mysore*, A. 1964 S.C. 1823.

words 'socially and educationally'. In order to satisfy the requirement of Art. 15 (4), the class must be *both* socially and educationally backward.<sup>5</sup> Thus, mere educational backwardness is not enough if the class is not socially backward, and *vice versa*.

2. In the absence of a definition of the expression in the Constitution, the determination of which classes are 'backward' is left to the 'State' as defined in Art. 12.<sup>6</sup> It cannot be contended that this power rests solely with the President, acting under Art. 340. But this power of the State is subject to judicial review.

3. The Scheduled Castes and Tribes being mentioned together with the 'backward classes' in Art. 15 (4), it is evident that by the expression 'backward classes', the Clause refers to classes of persons other than the members of the Scheduled Caste and Tribes. At the same time, it is also clear that such classes may be classified as 'backward' as are in the matter of backwardness comparable to the Scheduled Castes and Tribes.<sup>7</sup>

4. The concept of backwardness is not relative in the sense that any classes who are backward in relation to the *most advanced* classes of the society should be included in it. If such tests were to be applied, there would be several layers or strata of backward classes and each one of them might claim to be classified as a backward class. In other words, Art. 15 (4) would not justify any further classification within backward class, as 'backward and more backward' classes.

5. Social backwardness is, in the ultimate analysis, the result of poverty.<sup>8</sup> The social backwardness which results from poverty is likely to be aggravated by considerations of caste but the classification of backwardness cannot be made solely on the basis of caste,<sup>9</sup> and there may be communities which may be backward in a particular State, such as the Muslims or the Christians, even though they may not recognise castes. Similarly, the occupation or habitation of classes of persons (e.g. people residing in rural areas are generally more backward than those in urban areas) may also contribute to the backwardness.

6. Caste is, of course, *one* of the relevant circumstances in determining backwardness, but if a group has been classified as backward on other relevant considerations, that classification cannot be challenged as invalid on the ground of omission to take caste into consideration.<sup>10</sup>

7. The Court can interfere if there is no principle according to which the State has classified a community as 'socially and educationally backward', or the principle adopted is *arbitrary*. Thus, the Court would strike down as discriminatory—

- (i) a classification of *all* communities in a State other than Brahmins as socially and educationally backward;<sup>11</sup> or
- (ii) a classification by which communities having a higher percentage of literacy are included as 'backward', while those having a lower percentage are excluded, or
- (iii) an order which classifies as many as 95% of the population as backward, thereby benefitting classes other than socially and educationally backward classes,<sup>12</sup> or
- (iv) an order which reserves a fixed percentage of seats for each of three classes—Scheduled Castes, Scheduled Tribes and

5. *Balaji v State of Mysore*, A. 1963 S.C. 649 (663).

6. *Chitralekha v. State of Mysore*, A. 1964 S.C. 1623 (1827).

7. *Ramakrishna v. State of Mysore*, A. 1960 Mys. 336.

*other Backward Classes* and then provides that "in case any seat reserved for the Scheduled Castes or the Scheduled Tribes remain unfilled, the same shall be filled by candidates of *other Backward classes*"—on the ground that the latter provision was in excess of the requirements for advancement of the Backward Classes and infringed upon the rights of the rest of the citizens under cl. (1).<sup>8</sup>

8. The Court can interfere where the provision made by the State under Art. 15 (4) does not, in fact, benefit the backward classes specified by the State,<sup>9, 10</sup> e.g., where the impugned order divides the backward classes into groups with a different percentage of reservation for each group and each group contains members other than really backward classes, as a result of which the really backward classes within a group would never have the benefit of the reservation, being unable to compete with the comparatively forward classes included within that group.

9. The Court can also interfere where the reservation for backward classes is so excessive that the national interests are likely to be jeopardised by reason of overlooking considerations of merit and efficiency.<sup>11</sup>

10. But the Court cannot interfere merely on the ground—

(a) that the list prepared by the State is not exhaustive of all the backward classes in the State,<sup>12</sup> or

(b) that the classification can be made according to other criteria, provided the criterion adopted by the State is reasonably related to the object of making provision for the advancement of socially and educationally backward classes.<sup>13</sup>

**Arts. 15 (4) and 29 (2).** See under Art. 29 (2), *post*.

**16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.**

Equality of opportunity in matters of public employment

**(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.**

**(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any Local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory<sup>12</sup> prior to such employment or appointment.**

**(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.**

**(5) Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the**

8. *Partha v. State of Mysore*, A. 1961 Mys. 220

9. *Raghuramulu v. State of A. P.*, A. 1958 A.P. 129

10. *Ramakrishna v. State of Mysore*, A. 1960 Mys. 338 (351)

11. *Baleji v. State of Mysore*, A. 1963 S.C. 649

12. The italicised words were substituted by the Constitution (Seventh Amendment) Act, 1956.



**affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.**

Amendment.—The italicised words in cl. (3) were substituted for the words “under any State.....that State”, by the Constitution (Seventh Amendment) Act, 1956.

### Scope of Article 16.

1. Clauses (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment, *under* the State. Clauses (3)-(5), however, lay down several *exceptions* to the above rule of equal opportunity. These are:—

(i) Though any citizen of India, irrespective of his *residence*, is eligible for any office or employment under the Government of India [Cl. (2)], residence may be laid down as a condition for particular classes of employment under a State or any local authority therein, by an Act of Parliament in that behalf [cl. (3)].

(ii) The State (as defined in Article 12) may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State [Cl. (4)].

(iii) Offices connected with religious or denominational institutions to a particular denomination [cl. (5)].

2. Cl. (4) only permits reservation for ‘backward classes’ of citizens who are not, in the opinion of the State, adequately represented in the services of the State. It does not permit reservation for any person who does not belong to the category of backward classes<sup>13</sup> nor does it enable the State to reserve posts on communal lines.<sup>14</sup> A distribution of offices amongst communities according to a fixed ratio or quota; or a provision for direct recruitment of persons ‘to remove communal disparity’<sup>14</sup> infringes cls (1) and (2) of Art. 16.

### CL. (1): ‘Equality of opportunity’.

1. Art 16 does not mean that Government are not, like other employers, entitled to pick and choose from amongst a number of candidates offering them selves for *employment* under the Government.<sup>15</sup> It is also open to the appointing authority to lay down such prerequisite conditions of service as would be conducive to proper discipline amongst Government servants.<sup>15</sup>

2. Arts. 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other.<sup>16</sup> In other words, Art. 16 is only an instance of the application of the general rule of equality laid down in Art. 14 and it should be construed as such. Hence,—

(a) Guards and Road-Side Station-masters being two distinct and separate classes a notification which prescribes a separate channel of promotion for Guards to higher grade Station-masters cannot be challenged as contravening Art. 16 (1).<sup>17</sup>

(b) For the same reason, the selective test adopted by the Government shall be violative of Art. 16 if there is no relevant connection between the

13. *Venkataramana v. State of Madras*, A. 1951 S.C. 229; (1950-51) C.C. 37.

14. *State of J. & K. v. Jagar Nath*, A. 1950 J. & K. 14.

15. *Banarsidas v. State of U. P.*, (1956, S.C.R. 357 (361-2).

16. *General Manager v. Rangachari*, A. 1962 S.C. (41).

17. *All India Station Masters' Association v General Manager*, A. 1960 S.C. 384.

test and the efficient performance of the duties and obligations of the particular office.<sup>18</sup>

**'Employment or appointment to an office under the State'.**

1. The word 'employment' is to be read *cjusdem generis* with the word 'appointment' and in relation to the expression 'under the State'. These words denote that the Article has no application unless there is a relationship of employer and employee<sup>19-21</sup> or an element of subordination to the State or local authority, referred to in cl (3). The Article has, therefore, no application in the matter of election of a Municipal Councillor who cannot be said to be subordinate to the local authority.<sup>1-14</sup> Similarly, it cannot possibly apply to the admission of students to a State maintained or aided institution<sup>15</sup> or to the engagement of contractors for the supply of goods for a price<sup>13</sup>

2. But, subject to the above, the words 'employment' and 'appointment' connote two different conceptions. While 'appointment' refers to appointment to an 'office' and therefore implies the conception of tenure, duration, emoluments, and duties and obligations, fixed by law or some rule having the force of law, these elements are absent in the case of 'employment' which means a contract for temporary purpose, e.g., the engagement of labourers or professional experts by bilateral contracts.<sup>16</sup> But the word 'employment' in Art. 16 (1) is not wide enough to include contracts which involve no element of service, e.g., contracts for the supply of goods to Government at for a price<sup>13</sup>

**'Matters relating to employment or appointment'.**

These words have been held<sup>17</sup> to be wide enough to include all matters in relation to employment *both prior and subsequent*, such as the initial appointment, the conditions of service pertaining to the office to which the appointment is made, e.g., salary, periodical increments, promotion, terms of leave, gratuity, pension, age of superannuation<sup>17</sup>

**Equality in the matter of appointment.**

1. What Art 16 (1) guarantees is an equal opportunity to all citizens to apply for employment under the State<sup>18</sup>. It extends not only to appointments to the organised public services and ex-cadre posts held under contractual terms but even to customary village offices to which appointments are made by the State and the offices are held under the State<sup>19</sup>. It also extends to all 'employment' under the State where there is no question of appointment to an office, provided there is a relationship of employer and employee and an element of subordination to the State. It would not, accordingly, extend to contracts for supply of goods to the Government<sup>13</sup>

2. The right guaranteed by Art. 16 (1) includes—

(a) The right to make an application for any post under the Government<sup>18</sup>

(b) Art. 16 (1) further guarantees a right to be considered on the merits for the post for which an application has been made<sup>18, 21</sup>

18. *Sukhnandan v. State of Bihar*, A. 1957 Pat 617.

19-25. *Achutan v. State of Kerala*, A. 1959 SC 490 (492).

1-14. *Dattatraya v. State of Bombay*, A. 1913 Bom 311.

15. *Om Prakash v. The State*, A. 1951 Puni 93.

16. *Sukhnandan v. State of Bihar*, A. 1957 Pat 617.

17. *General Manager v. Rangachari*, A. 1962 SC 36 (40-41).

18. *Krishna Chamber v. General Tractor Organisation*, A. 1962 SC 602 (604) (1962) 3 S.C.R. 187.

19. *Rama Rao v. State of A. P.*, A. 1961 SC. 564 (570).

20. *Achuthan v. State of Kerala*, A. 1959 SC. 490 (492).

21. *High Court v. Amal Kumar*, A. 1962 S.C. 1704.

This guarantee is violated where the Government imposes an arbitrary ban upon the appointment or re-appointment<sup>18, 19</sup> of a particular individual, in the sense that even though he applies for a post, his application will not be considered on the merits, and such has no relation to his suitability for the appointment to that post.<sup>18, 19</sup> It is immaterial whether such arbitrary ban is imposed for the purposes of initial appointment or is imposed at the termination of an appointment<sup>19</sup>

3. If the State lays down the conditions or qualifications for appointment to a post or to employment under the State, in general, such conditions must be applicable to all citizens<sup>21</sup> (subject, of course, to the exceptions specified in cls (3) (5) of Art 16).

4. The conditions or requisites laid down by the State for employment must have a *reasonable relation* to the suitability for a post or for employment in the public service in general e.g., in the interests of discipline.<sup>22</sup>

A. The test or condition adopted by the Government will be violative of Art. 16 if there is no relevant connection between the test prescribed and the interests of the public service<sup>22</sup> Thus—

(a) It has been held that the following are not relevant considerations for preferring a person for appointment or promotion to the exclusion of others:

That he has been a 'political sufferer'<sup>24</sup>

(b) Similarly, it is not legitimate to exclude a person merely for his political view,<sup>25</sup> not associated with any illegal conduct<sup>1</sup>

B. On the other hand, the following has been held to be a relevant condition which may be imposed without violating Arts 14-16:

Knowledge of the State language in the case of a State service.<sup>2</sup>

5. But—

(a) What Art 16 (1) guarantees is an equality of opportunity and not any right to be appointed to the post for which he applies<sup>3</sup> or any other post under the State.

Hence,

(i) Even after a candidate has passed the tests or requisites for appointment to a particular post, Government may refuse to appoint him on any ground which has a reasonable relation to such appointment, e.g., the antecedents or character of the candidate<sup>4, 5</sup>

This does not mean that where a candidate challenges the action of the Government to exclude him as arbitrary and discriminatory, the Government has no obligation to disclose the reasons for such exclusion or to show that the exclusion has not been arbitrary, by a proper averment.<sup>6</sup>

22. *Banaridas v State of U P* (1956) S.C.R. 357 (361).

23. *Cf Pandurangao v. A. P P. S. C.*, A. 1963 S.C. 268 (272). (1963) 1 S.C.R. 707

24. *Cf Sukhnandan v State of Bihar*, A. 1957 Pat 617.

25. *Cf Ravindra v State*, A. 1961 All. 361.

1. *Balakrishna v. Union of India*, A. 1958 S.C. 232 (238).

2. *Raghunadha v State of Orissa*, A. 1955 Orissa 113. [It is to be noted, however that the condition of *residence*, unless imposed by Parliament, under Art 16 (3), will be void].

3. *Krishna Chandra v Central Tractor Organisation*, A. 1962 S.C. 602 (604): (1962) 3 S.C.R. 187.

4. *Sadanandan v State of Kerala*, A. 1963 Ker. 59.

5. *Andradhyaya v. State of Mysore*, A. 1961 Mys 247.

6. *Raghunadha v. State of Orissa*, A. 1955 Orissa 113.

(ii) Nor is there any obligation upon the Government, after having prescribed an open competition, to appoint the candidate who has stood first at such test, for, Art. 16 (1) does not take away from the Government to pick and choose from amongst a number of candidates, which every employer has.<sup>7</sup> There will be a violation of the Article only if the choice of the inferior candidate is prompted by irrelevant or extraneous considerations, or the man at the top has not been considered at all,<sup>8</sup> or the relevant Rule gives an arbitrary power to appoint any candidate whom 'it considers suitable' for the post or cadre, ignoring the claims of candidates successful at the open competition.<sup>9</sup>

(b) The equality of opportunity guaranteed by Art 16 (1) need not be an absolute equality.<sup>10</sup>

It does not prohibit the prescription of *reasonable* rules for selection to any employment or appointment to any office.<sup>11</sup> It is open to the appointing authority to lay down such prerequisite conditions for appointment as 'would be conducive to efficiency of or proper discipline amongst Government servants.'<sup>12</sup>

Just as Government may make it a condition that only those who had a satisfactory record in the past would be considered for promotion, so it is open to Government to lay down that only those part time servants who had been amenable to proper discipline during their part time employment should be considered eligible for appointment on a permanent basis. There is no denial of equal opportunity involved in such choice in the matter of recruitment.<sup>13</sup>

(c) Art 16 (1) does not bar the recruitment of temporary employees on special terms by contract.<sup>14</sup>

(d) Equality of opportunity in the matter of appointment can be predicated only as between persons who are seeking the same employment.<sup>15</sup> It will, for example, make no sense to say that because for employment as professors of colleges a higher university degree is required than for employment as school teachers, equality of opportunity is being denied.<sup>16</sup>

6. Where recruitment to a service or certain posts is from different sources, e.g., direct recruitment and promotion from lower posts, it would be for the Government to determine, having regard to the requirements and needs of a particular post what ratio, as between the different sources, would be adequate and equitable.<sup>17</sup> Unless the ratio is so unreasonable as to amount to a discrimination, it is not possible for the Court to strike it down or suggest a different ratio.<sup>18</sup>

### Whether 'appointment' includes promotion.

1. It is now **settled**<sup>19</sup> that the word 'employment or appointment' are wide enough to include the matter of promotion, including promotion to selection posts.<sup>20</sup>

2. But Art 16 (1) will be infringed only if equality of opportunity for promotion is denied to Government servants holding different posts

7. *Banarsidas v State of U. P.* (1956) S.C.R. 357.

8. *High Court v Amalkumar*, A. 1952 S.C. 1704 (1711).

9. *State of Mysore v Jayaram* A. 1958 S.C. 346 (348).

10. *General Manager v Rangachari* A. 1962 S.C. 36.

11. *Satish v. Union of India*, A. 1953 S.C. 250.

12. *All-India Station Master's Association v General Manager*, A. 1960 S.C. 384.

13. *Govind v. Chief Controller*, A. 1967 S.C. 839 (843).

in the *same grade*,<sup>14</sup> <sup>15</sup> or *integrated grade* consisting of recruits from different sources absorbed into one cadre.<sup>16</sup>

3. It does not prohibit the creation of different grades in the government service.<sup>14</sup>

4. It is competent for the State to classify the employees for purposes of promotion.<sup>1</sup> In such a case, the Court can interfere only if the differences between the two groups of recruits are not sufficient to give any preference to one against the other, or, in other words, there is no reasonable nexus between such differences and the nature of the office or offices to which recruitment is being made.<sup>1</sup>

5. Nor does the article prevent the Government from laying conditions of efficiency<sup>18</sup> or other qualifications for securing the best service,<sup>19</sup> for being eligible for promotion, including general academic qualifications even where the post is technical.<sup>20</sup>

6. Just as Government may make it a condition that only those who had a satisfactory record in the past would be considered for promotion, so it is open to Government to lay down that only those part time servants who had been amenable to proper discipline during their part time employment should be considered eligible for appointment on a permanent basis. There is no denial of equal opportunity involved in such choice in the matter of recruitment.<sup>16</sup>

7. Mere seniority in the Gradation List does not give any *right*<sup>21</sup> to be promoted to a selection grade or selection post where promotion is to be made on the basis of merit and seniority would count only if the merits of two officers are equal.<sup>21</sup> Otherwise, in the matter of promotion to a selection grade or post, the senior officer cannot complain of violation of Art. 16 if only his case has been *considered* along with the other eligible candidates.<sup>22</sup>

The position, however, will be different where, under the relevant statutory rules a junior officer, on appointment, acquires a right to be promoted to a higher post by mere seniority.<sup>1</sup>

8. Where an employee is superseded on the ground of adverse remarks in his confidential report, it cannot be held to be discriminatory merely because such remarks had not been communicated to the Petitioner, unless there is an intentional or purposeful discrimination.<sup>24</sup>

### Fixation of seniority and pay.

The protection of Art. 16 (1) extends also to the matter of fixation of seniority, for purposes of promotion<sup>23</sup> etc., of employees within the same cadre. Thus,—

I Where the cadre consists of persons recruited or promoted from the *same source*, their seniority inter se should be governed by the period of continuous appointment in or promotion to the grade in respect of which the seniority is to be fixed.<sup>2</sup> In such a case, the introduction of the

14. *Kishori v Union of India*, A 1962 S.C. 1139.

15. *Electricity Bd v Mohan Lal* A. 1967 S.C. 1857 (1861).

16. *Roshan Lal v Union of India*, A. 1967 S.C. 1889 (1893).

17. *Govind v Chief Controller*, A. 1967 S.C. 839 (842).

19. *Rudraradhya v State of Mysore*, A. 1961 Mys. 247 (252).

20. *State of Mysore v Narasing Rao*, A. 1968 S.C. 349.

21. *Saksena v Union of India*, A. 1968 S.C. 754 (759).

22. *Sant Ram v State of Rajasthan*, A. 1967 S.C. 1910 (1914-5).

23. *Wadhwa v Union of India*, A. 1964 S.C. 598.

24. *Prakash v. Oil & Natural Gas Commn.*, (1967) S.C. [W.P. 233/66, d. 22.8.67].

25. *Mervyn v. Collector of Customs*, A. 1967 S.C. 52 (56).

'carry-forward' rule, by which a certain quota is fixed annually for a certain class of persons and it is carried forward from year to year, would offend against Art. 16 (1).<sup>1</sup> In short, all persons selected on the same footing should be treated equally.<sup>2</sup>

II. But where the cadre consists of persons recruited from different sources, *e.g.*, direct recruits and promotees, there is no violation of Art. 16 (1) if the seniority is fixed by *rotation* as between the two sources, because the recruits are already divided into two classes from the time of their recruitment.<sup>2b, 2</sup>

But no discrimination is permissible after recruits from different sources have once been integrated into one grade or service.<sup>3</sup>

III. But whether the classification is reasonable or not will depend upon the circumstances of each case,<sup>2</sup> existing at the time of recruitment.<sup>2</sup> Even where the differential treatment is founded on the fact that the recruits belong to two different groups or classes, i. the differences between the two groups are not *sufficient* to give any preferential treatment to one group or there is no reasonable nexus between such differences and the recruitment, the Court may strike it down as violative of Art. 16 (1);<sup>2b</sup> the burden, of course, is upon the party attacking the classification to show that it is unreasonable.<sup>4</sup> Thus, where certain persons were promoted on an *ad hoc* basis pending selection by the Public Service Commission, they cannot claim a preferential treatment by virtue of such promotion alone.<sup>2</sup>

IV. Mere seniority in the Gradation List does not confer any right on a person to be promoted to selection posts, to which promotion is made on the basis of seniority cum merit,<sup>4</sup> except where—

(i) the merits of the officers concerned are equal and no other criterion is available,<sup>4</sup> or

(ii) there is a statutory right.<sup>5</sup>

V. The foregoing principles have been applied to the matter of different scales of 'pay'.<sup>6</sup>

### Whether 'appointment' includes termination of service.

1. Since *General Manager v. Rangaiahari*,<sup>11</sup> it is settled that the words 'matters relating to employment' "must include all matters in relation to employment both *prior* and *subsequent*", including the terms and conditions of service and such matters as the age of superannuation.

2. The rule that employment under the State is held at pleasure does not militate against the application of Art. 16 (1) to the matter of termination of such employment where there has been an arbitrary discrimination in terminating the services of a particular employee,<sup>16-18</sup> say, on the ground that he has a particular colour or height, or that he belongs to another

1. *Devadasan v. Union of India*, A. 1964 S.C. 179.

2. *Govind v. Chief Controller*, A. 1967 S.C. 839.

3. *Roshan Lal v. Union of India*, A. 1967 S.C. 1587.

4. *Sant Ram v. State of Rajasthan*, A. 1967 S.C. 1910.

5. *Cf. State of Mysore v. Bellary*, A. 1965 S.C. 868 (871); *Wadhwa v. Union of India*, A. 1964 S.C. 598.

6. *Unikat v. State of Rajasthan*, (1967) S.C./C.A. 274/67, d. 5.4.67.

7-15. *General Manager v. Rangaiahari*, A. 1962 S.C. 36 (40-41).

16. *Kunj Behari v. Union of India*, A. 1963 S.C. 518 (527).

17. *Pandurang v. Union of India*, A. 1959 Bom. 134. [This proposition was assumed to be correct, on appeal, in *Union of India v. Pandurang*, A. 1962 S.C. 630 (632)].

18. *Sukhmandan v. State of A. P.*, A. 1959 617.

State<sup>19</sup> or on the ground that he should make room for 'political sufferers',<sup>20</sup>—which are wholly irrelevant to the requirements of the service.

But the fact that an employee has been retrenched on the ground that he has been detained under the law of preventive detention<sup>20</sup> or is engaged in 'subversive activities'<sup>21</sup> is not an arbitrary or discriminatory ground unless it is shown that those who are retained are similarly situated.<sup>20</sup>

3. Where a temporary employee is retrenched owing to the abolition of one of several temporary posts of the same kind, qualifications, length of service and the like of those holding similar temporary posts may be relevant in considering whether there has been discrimination against the particular employee. He may, accordingly, complain of discrimination, if a person junior to him is retained, while he is retrenched.<sup>22</sup>

When, however, the services of a temporary servant are dispensed with on the ground that his work or conduct is unsatisfactory, he cannot complain of discrimination merely because persons junior to him or less qualified than him have been retained.<sup>20</sup>

4. There is nothing in Art. 16 to prohibit the classification of Government servants into temporary and permanent servants and to provide for a different mode of termination of service for the former class, e.g., by service of a notice.<sup>22</sup>

5. Art. 16 (2) would invalidate a law or a rule or an order<sup>23</sup> if it authorises discrimination in the matter of appointment under the State on any of the grounds specified therein, e.g., descent,<sup>24</sup> caste,<sup>25</sup> or religion even though it professes to make a reservation in the interests of the backward classes.<sup>26</sup>

### 'Office under the State'.

The ordinary meaning of these words in Art. 16 (1) is not to be cut down by anything in Part XIV of the Constitution.<sup>1-4</sup> It would comprise any office to which appointment is made by the State<sup>6</sup> and which is subject to the disciplinary control of the State, including hereditary offices which had their origin in custom, even though such office may not be a 'civil post' within the meaning of Art. 310 (1).<sup>4</sup>

### Scope of Cl. (2).

This clause emphatically brings out in a negative form what is guaranteed affirmatively by cl. (1). It prohibits discrimination on certain grounds and thus assures the effective enforcement of the right of equality of opportunity guaranteed by cl. (1). The words 'in respect of any employment' used in cl. (2) must, therefore, include all "matters relating to employment" as specified in cl. (1).<sup>6</sup>

The scope of cl. (2) is thus co-extensive with that of cl. (1).

### 'Only'.

If the discrimination is on any ground other than those specified in

19. *Janakraman v. State of A. P.*, A. 1959.

20. *Union of India v. Pandurang*, A. 1962 S.C. 630.

21. *Balakrishna v. Union of India*, 1958 S.C. 232 (238).

22. *Champaklal v. Union of India*, A. 1964 S.C. 1854 (1860).

23. *Venkataramana v. State of Madras*, A. 1951 S.C. 229.

24. *Rama Rao v. State of A. P.*, A. 1961 S.C. 565 (573).

25. *Venkataramana v. State of Madras*, A. 1951 S.C. 229.

1. *Sukhnandan v. State of Bihar*, A. 1957 Pat. 617.

2. *Satish v. Union of India*, A. 1953 S.C. 250.

3. *Union of India v. More*, A. 1962 S.C. 630.

4. *Dasaratha v. State of A. P.*, 1961 S.C. 564 (569): (1961) 2 S.C.R. 931.

5. *Ramappa v. Sangappa*, (1959) S.C.R. 1167.

6. *General Manager v. Rangachari*, A. 1962 S.C. 36 (41).

this clause, it is not hit by it, e.g., a condition in the rules for recruitment to the State Judiciary that the candidates must be Advocates practising in the State.<sup>7</sup>

### 'Descent'.

An Act providing for the appointment to an office under the State (viz., that of a village munsif) has been set aside as being discriminatory on the ground of 'descent' only inasmuch as it directed that the person considered best qualified from "among the family of the last holder of the office" should be selected, thereby debarring other citizens from the opportunity of being appointed to the office.<sup>8</sup> Any Custom contrary to Art. 16 (1) would be void.<sup>9</sup>

### Scope of Clause (4): Reservation for backward classes.

1. Clause (4) is in the nature of an exception to clauses (1) and (2).<sup>9</sup>

2. Clause (4) however, does not cover the entire field covered by clauses (1)-(2).<sup>10</sup> Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by clauses (1) and (2) do not fall within the mischief of the exception clause (4).<sup>20</sup> Thus, as regards the conditions of service relating to employment such as salary, increment, gratuity, pension and age of superannuation, there can be no exception even in regard to the backward classes of citizens. The only matter which clause (4) covers is a provision for the reservation of appointments in favour of a backward class of citizens.<sup>9</sup>

3. Being an exception clause, clause (4) should be strictly construed and in a manner that does not render the guarantee in clause (1) altogether nugatory or illusory. Thus, in the interests of the backward class of citizens the State cannot reserve *all* the appointments under the State or even a *majority* of them.<sup>11</sup>

In other words, the doctrine of equality of opportunity [cl (1)] shall be reconciled in favour of backward classes [cl (4)] in such a way that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.<sup>12</sup>

4. It follows that the Court will interfere where the percentage of reservation is *not reasonable*, having regard to the employment opportunities of the general public to the cadre of service in question, the population of the entire State, the strength of the different communities, the extent of their backwardness and the like.<sup>12</sup>

5. Art 16 (4) has also to be interpreted in the background of Art 335<sup>13, 14</sup> (see *post*).

It follows that Art 16 (4) is an *enabling provision* and confers a discretionary power on the State to make a reservation of appointments in favour of backward classes of citizens which, in its opinion, is not adequately represented in the services of the State.<sup>13, 14</sup> In short, it confers no constitutional right upon members of the backward classes nor any corres-

7. *Bhaktavatsalam v. P. S. C.*, A. 1956 Andhra 14.

8. *Dasoratha v. State of A. P.*, A. 1961 SC 564; (1961) 2 S.C.R. 931.

9. *General Manager v. Rangachari*, A. 1962 S.C. 36 (42).

10. *Rajendran v. Union of India*, A. 1968 SC 507 (511).

11. *General Manager v. Rangachari*, A. 1962 S.C. 36 (42-45).

12. *Tylokinnath v. State of J. & K.*, A. 1967 S.C. 1283 (1285).

13-14. *Rajendran v. Union of India*, A. 1968 SC. 507 (512-3).



ponding duty upon the State to make reservations for them either at the stage of recruitment or at the stage of promotion. Prohibition of reservation for promotion to the higher posts requiring a higher degree of efficiency would not, therefore, violate Art. 16 (4).<sup>14</sup>

### "Appointments or Posts".

1. A question has arisen as to whether the word 'posts' refers to posts within the regular services under the State or to posts outside the regular services (which are known as ex-cadre posts). There are articles in the Constitution where the word 'post' means posts outside the regular services, e.g. Art 310 (1) or Art 311 (1).<sup>15</sup> The Madras High Court<sup>17</sup> attributed the same meaning to the word 'posts' in Art. 16 (4) but the majority of the Supreme Court in *General Manager v Rangachari*<sup>18</sup> has negated that Madras view and has held that both words 'appointments' and 'posts' refer to the services in respect of which the State is of opinion that the backward class is not adequately represented.

2. But even then a controversy remains as to whether both the words 'appointments' and 'posts' refer to the initial appointment or included what are known as 'selection posts' i.e. posts to which appointment is made by promotion from persons already appointed to a service. On this point Wanchoo J<sup>17</sup> was of the view that both the words refer to the initial appointment and that while the word 'appointments' empowers the State to fix a certain percentage of initial appointments to the vacancies as they arise, the word 'posts' empowers the State to reserve a certain percentage of posts outside the total number of posts in the service in order to achieve a quicker result of making the representation of the backward classes adequate in the service as a whole. But a majority of three (Gajendragadkar, Sarkar and Das Gupta JJ)<sup>21</sup> held that the word 'posts' was inserted in order to provide for the reservation of selection posts so that clause (4) would enable the State not only to reserve posts of the lower grade but also posts to which appointment is made by selection on the basis of merit.<sup>18</sup>

### 'Backward class'.

1. Two conditions<sup>19</sup> are necessary to attract cl (4) of this Article (i) a class of citizens who are backward socially and educationally (ii) the said class is not adequately represented in the services under the State. Economic conditions and occupation were factors to be taken into consideration in determining social backwardness; caste may also be a relevant consideration but could not be sole or dominant test for this purpose.<sup>20</sup>

2. While the State has necessarily to ascertain whether a particular class of citizens are backward or not, it has not the final say on the question;

15. *Balaji v State of Mysore*, A. 1963 SC 649.

16. *General Manager v Rangachari*, A. 1962 SC 36 (47-48).

17. *Rangachari v General Manager*, A. 1951 Mad 35.

18. The Author submits that *prima facie*, the word 'posts' in Art 16 (4) is used in the same sense as in Art 310, 311 or 335 and refer to posts outside the services. On this point the Author is inclined to agree with Ayyangar J. It is further submitted that the argument that the inadequacy of representation in a particular service cannot reasonably be supposed to be balanced by appointment to a post outside that service is not an insurmountable barrier to the construction suggested by the Madras High Court as well as by Ayyangar J. in as much as clause (4) of Art 16 speaks of "not adequately represented in the services under the State" and takes the representation of the backward classes with reference to the State as a whole including particular services as a part thereof instead of confining its attention to particular services irrespective of the question of the State as a whole.

19. *Triloknath v. State of I. & K.*, A. 1967 SC 1283 (1285).

20. *Chiralekha v. State of Mysore*, A. 1964 SC. 1823: (1964) 4 S.C.R. 368.

it is a justiciable issue.<sup>19</sup> While ordinarily a Court may accept the decision of the State in that regard, it may be struck down if that decision is based on irrelevant considerations,<sup>19</sup> or constitutes an abuse of the power.<sup>19</sup>

3. As to whether a particular class is adequately represented in the services under the State, the opinion of the State may be accepted by the Court as final, except where there is an abuse of power.<sup>19</sup>

4. The Scheduled Castes and Tribes obviously come under this class.<sup>21</sup>

### 'Provision'.

This word, read with the word 'State', cannot mean provision by the Legislature only. On the other hand, it is an enabling provision and it is not obligatory for the Government to make any such provision.<sup>22</sup>

### Arts. 16 (4) and 335.

While cl. (4) is apparently without any limitation upon the power of reservation conferred by it, it has to be read together with Art. 335 which enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State the policy of the State should be consistent with "the maintenance of efficiency of administration".<sup>16</sup>

### Arts. 14 and 16.

1. Art. 16 is only an incident of the general concept of equality enshrined in Art. 14, in the matter of appointment and promotion.<sup>23</sup> It follows, therefore, that a reasonable classification of employees is permissible under Art. 16, and that the equality guaranteed by Art. 16 (1) is only an equality between members of the same class of employees.<sup>23, 25</sup>

2. Art. 16 thus permits of a classification between—

(i) direct recruits and promotees,<sup>1, 2</sup> and 'special recruits'.<sup>3</sup>

(ii) higher and inferior classes or grades in the same service calling for different degrees of efficiency and responsibility.<sup>23, 25</sup>

(iii) Employees of the Railway and employees of the Central Secretariat.<sup>23</sup>

3. Such classification would, however, be unconstitutional—

If no guide is offered by the relevant provision which leaves to the Government or an executive officer the power to select any 'suitable' person to a higher cadre, thus giving them an arbitrary power of patronage.<sup>4</sup>

2. The provisions in Arts. 14 and 16 are supplementary to each other<sup>5</sup> and have, therefore, to be read together.<sup>6</sup> Hence, reservation of appointments for members of backward classes cannot be said to be violative of Art. 14, because that is provided in Art. 16 (4). But the two provisions must be read together. If, therefore, the reservation is so excessive as practically to deny a reasonable opportunity of employment to members of other communities, it would be a contravention of Art. 14.<sup>7</sup>

21. *Rangachari v. General Manager*, A. 1961 35 (39); *Devarajiah v. Padmanna*, A. 1958 Mys. 84; *Desu v. A.P. P.S.C.* A. 1967 AP 353 (360).

22. *Kesava v. State of Mysore*, A. 1956 Mys. 20 (24, 28).

23. *Rajendran v. Union of India*, A. 1968 SC 507 (511).

24-25. *State of Mysore v. Narasingha Rao*, A. 1968 S.C. 349 (351).

1. *Mervyn v. Collector of Customs*, A. 1967 SC 52.

2. *Jaisinghani v. Union of India*, A. 1967 SC. 1427.

3. *Saksena v. Union of India*, A. 1968 SC 751 (761).

4. *State of Mysore v. Jayaram*, A. 1968 S.C. 346 (348-349).

5. *General Manager v. Rangachari*, A. 1962 S.C. 36 (40-41).

6. *Devadasan v. Union of India*, A. 1964 S.C. 179; (1964) 4 S.C.R. 680.

**Constitutionality of laws in relation to Art. 16:**

**Indian Administrative Service (Regulation of Seniority) Rules, 1954:**

*Held valid.*—R. 3 (3) (b).<sup>7</sup>

**Indian Administrative Service (Seniority of 'Special Recruits) Regulations, 1960:**

*Held valid.*—Reg. 3 (3).<sup>7</sup>

**Mysore Recruitment of Gazetted Probationers' Rules, 1959:**

*Held invalid.*—Last para. of r. 9 (2).<sup>8</sup>

**Rajasthan Civil Service (Rationalisation of Pay Scales) Rules and Schedules (1956):**

*Held valid.*<sup>9</sup>

**17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.**

Abolition of Untouchability.

**'In accordance with law'.**

Under the present Article, read with Art. 35 (a) (iii), Parliament has enacted the Untouchability (Offences) Act, 1955, which must be read along with the present Article.

**'Untouchability'.**

The word 'untouchability' has not, however, been defined by the Act just as there is no definition in the Constitution. A Single Judge of the Mysore High Court<sup>10</sup> has held that 'untouchability' in the Act refers to the social disabilities historically imposed on certain classes of people by reason of their *birth* in certain castes and would not include an instigation of social boycott by reason of the *conduct* of certain persons. The word 'Harijan' *prima facie* refers to an untouchable

**18. (1) No title, not being a military or academic distinction, shall be conferred by the State.**

Abolition of titles.

**(2) No citizen of India shall accept any title from any foreign State.**

**(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.**

**(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.**

*Right to Freedom*

**19.<sup>11</sup> (1) All citizens shall have the right—**

- |  |  |
|--|--|
| Protection of certain rights regarding freedom of speech, etc. | <b>(a) to freedom of speech and expression;</b>              |
|  | <b>(b) to assemble peaceably and without arms;</b>           |
|  | <b>(c) to form associations or unions;</b>                   |
|  | <b>(d) to move freely throughout the territory of India;</b> |

7. *Saksena v. Union of India*, A. 1968 S.C. 754 760).

8. *State of Mysore v. Jayaram*, A. 1968 S.C. 346 (349).

9. *Menon v. State of Rajasthan*, A. 1968 S.C. 81 (84).

10. *Deverajiah v. Padmanna*, A. 1961 Mad. 35 (39).

11a. Inserted by the Constitution (Sixteenth Amendment) Act, 1963, with effect from 6-10-63.

- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India<sup>18</sup> the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or<sup>18</sup> public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or<sup>18</sup> public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

#### Amendments.

I Clauses (2) and (6) of Art. 19 were amended by s. 3 of the Constitution (First Amendment) Act, 1951.

(A) In cl. (2), the changes effected were—

(i) Introduction of several new grounds of restriction upon the freedom of speech, — (1) Friendly relations with foreign States, (2) Public order, (3) Incitement to an offence.

(ii) Deletion of the ground 'tends to overthrow the State'.

(iii) Widening the scope of the expression relating to 'security of the State', by substituting the words "any matter which offends against or undermines the security of the State" by the words "in the interests of the security of the State".

(iv) Substitution of the words "libel, slander" by the word 'defamation'.

(v) Insertion of the expression 'reasonable restrictions', to govern all the above grounds.

(vi) The foregoing changes were given retrospective effect, by the words—"shall be deemed always to have been enacted in the following form".

(B) In cl. (6), a new ground of restriction upon the freedom of trade, profession etc. was introduced, viz., the carrying on of a trade, business, industry or service, by the State or by a corporation owned or controlled by the State. No law relating to such function shall be void by reason of the fact that it ousts the private citizens from that trade or industry, either partially or exclusively.

*This Amendment Act came into force on 18-6-51.*

II. By the *Constitution (Sixteenth Amendment) Act, 1963*, which came into force on the 6th October, 1963 Cls. (2), (3) and (4) have been amended in order to include the maintenance of the sovereignty and integrity of India as a ground of restriction of the fundamental rights of expression, assembly and association, guaranteed by sub-cl. (a)-(c) of Cl (1) a of Art. 19.

### **Object of Art. 19 (1): A guarantee against State action.**

Art. 19 (1) guarantees certain fundamental rights, subject to the power of the State to impose restrictions on the exercise of those rights. The Article was thus intended to protect these rights against *State action* other than in the legitimate exercise of its power to regulate private rights in the public interest. Violation of rights of property by individuals is not within the purview of the Article.<sup>12, 19</sup>

### **Arts. 19, 21-22.**

1. The rights conferred by Art. 19 are the rights of free men and a person whose personal liberty has been taken away under a valid law of punitive (Art. 21) or preventive (Art. 22) detention cannot complain of the infringement of any of the fundamental rights under Art. 19.<sup>20, 21</sup>

#### **'All citizens'.**

1. The rights conferred by Art. 19 are not available to any person who is not a 'citizen of India'.<sup>2</sup>

2. Hence, a person cannot complain of the infringement of any of the rights conferred by Art. 19, if his citizenship of India has been validly terminated by law made by Parliament in pursuance of the power conferred by Art. 11.

3. Citizenship itself is not a fundamental right guaranteed by the Constitution,<sup>11</sup> and is subject to the legislative competence of Parliament under Art. 11.<sup>23</sup>

4. By the mere fact that a person enters Government service, he does not cease to be a citizen of India or disentitle himself to the rights conferred by this Article,<sup>24</sup> though the nature of duties which Government servants have to discharge might necessarily involve restrictions on some of these freedoms within the purview of Cls. (2) to (6).<sup>24</sup>

12-19. *Samdasani v. Central Bank of India*, A. 1952 S.C. 59: (1950-51) C.C. 68.

20. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731: (1959) S.C.R. 629.

21. *Collector of Malabar v. Hajee*, (1957) S.C.R. 970.

22. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1298).

23. *Ichhar Ahmed v. Union of India*, A. 1962 S.C. 1052.

24. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166.

### Whether a corporation can be a citizen within the meaning of Art. 19.

It is now settled<sup>25</sup> that the rights conferred by Art. 19 are confined to natural persons who are citizens and that a corporation, not being a citizen,<sup>1</sup> cannot claim *any* of the rights included in that Article, even though their share-holders are citizens.<sup>2</sup>

### Nature of the rights that are guaranteed by Art. 19.

1. From its several clauses, it will appear that Art. 19 is confined to what are known as *civil* rights— as distinguished from *political* rights, such as the right to vote<sup>3</sup> or hold any political office.

2. Again, Art. 19 refers to what are known as natural or common law rights as distinguished from rights which are *created* by a statute,<sup>4-6</sup> e.g.—

The right to stand as a candidate at an election.<sup>4</sup>

Art. 19 (1) guarantees—

"those great and *basic* rights which are recognised and guaranteed as the *natural rights inherent in the status of a citizen of a free country*".<sup>8</sup>

It does not, accordingly, include a right to burn a copy of the national Constitution.<sup>7</sup>

3. A right which is created by a statute must be exercised subject to the conditions imposed by that statute and no question of infringement of fundamental rights arises in such cases.<sup>4</sup>

The following, for instance, are rights the authority for which is to be found in some statutory grant and not in Art. 19 of the Constitution:

(i) The right of a lawyer to practise before a Court.<sup>5</sup>

(ii) The right to hold a public office.<sup>9</sup>

(iii) The right to vote or to stand as a candidate for election to a municipal body,<sup>10</sup> or to the Legislature.<sup>11</sup>

4. Where a right is created by statute, it can be taken away by the Legislature, but when a right is 'fundamental' it cannot be taken away by the Legislature and can be subjected to such restrictions only as are permitted by the Constitution itself e.g., on the grounds specified in cls. (2)-(6) of Art. 19.<sup>12</sup>

5. The rights guaranteed by Art. 19 are also to be distinguished from *contractual* rights. While the right to carry on any business or to hold property and to enter into contracts as are incidental to such rights is a fundamental right [cf. Art. 19 (1) (f)], the rights arising under a contract are

25. *State Trading Corpn., v. U. T. O.*, A. 1963 S.C. 1811 (1817); *B. I. S. N. Co. v. Jasjit*, A. 1961 S.C. 1541 (1154); *Barium Chemicals v. Company Law Board*, A. 1967 S.C. 295 (305).

1. As defined in s. 2 (1) (f) of the Citizenship Act, 1955.

2. *Tata Engineering Co. v. State of Bihar*, A. 1965 S.C. 40 (48).

3. *Ponnuswami v. Returning Officer*, A. 1952 S.C. 64.

4. *Jamuna Prasad v. Lachhi Ram*, (1955) 1 S.C.R. 608; A. 1954 S.C. 686.

5. *Devata Singh v. Chief Justice*, A. 1962 S.C. 201.

6. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587.

7. *Natarajan, in re*, A. 1965 Mad. 11 (14).

8. *B. C. Mitra v. Chief Justice*, A. 1954 S.C. 524.

9. *Babulal v. State of Maharashtra*, A. 1961 S.C. 884 (888).

10. *Sakhwant v. State of Orissa*, A. 1955 S.C. 166.

11. *Ponnuswami v. Returning Officer*, (1952) S.C.R. 218.

12. *Pannalal v. Union of India*, (1957) S.C.R. 233 (261).

not guaranteed by our Constitution,<sup>13</sup> so that they are liable to be curtailed or superseded by legislation.<sup>13, 14</sup>

### **Burden of proof when infringement of a right under Art. 19 is alleged.**

Though the general presumption in favour of the constitutionality of the law arises when a restriction imposed by the law is impugned under Art. 19, if the Petitioner succeeds in showing that the impugned law *prima facie* violates any of the rights coming under any of the sub-clauses of cl. (1) of that Article, the onus then shifts upon the Respondent to show that the legislation comes within the permissible limits imposed by any of the clauses (2) to (6) as may be applicable to the case, and also to place materials before the Court in support of that contention.<sup>15, 21</sup> If the Respondent does nothing in that respect, it is not for the Petitioner to prove negatively that it is not covered by any of the permissive clauses.<sup>16</sup> If, however, the Respondent shows that the impugned law is covered by one of the permissible grounds of restriction, *e.g.*, interests of the general public, public order or the like, then the onus to show that the restriction is unreasonable would shift back to the Petitioner. This is, of course, subject to the modification that if the restriction appears to be *prima facie* unreasonable, substantive evidence to establish its unreasonableness would not be required.<sup>15</sup>

### **Who can impose restrictions under cl. (2)-(6).**

The restrictions may be imposed by any of the authorities who are included in the definition of 'State' in Art. 12, who are competent to make a 'law' as it is understood in the wider sense referred to in Art. 13 (3) (a), will have to be tested by the permissive limits prescribed in cl. (6) of Art. 19, *e.g.*, restriction imposed upon the right to use the public highways, including the right to run vehicles over them.<sup>17</sup>

2. While in the earlier cases<sup>18, 19, 20</sup> the Supreme Court held that what is sought to be protected by sub cl. (d) of Art. 19 (1) is only a specific and limited aspect of the right of free movement, *viz.*, the right of free movement throughout the Indian territory, regarded as an independent and additional right apart from the general right of locomotion emanating from the freedom of person, which is dealt with in Art. 21,<sup>19</sup> in *Kharak Singh v. State of U P*,<sup>21</sup> the majority of the Court held that the right guaranteed by Art. 19 (1) (d) denoted nothing more than a right of locomotion and that the expression 'throughout the territory of India' merely denoted the geographical area of the guaranteed movement.<sup>21-</sup>

### **'Law'.**

1. From the language of cl. (2) (6) it is clear that the restrictions referred to in these clauses can be imposed only by law,<sup>21</sup> including, of course, *intra vires*<sup>23</sup> subordinate legislation. But without legislative authority,

13. *Raghubar v. Union of India*, A. 1962 S.C. 273 (274).

14. *State of Bihar v. Kameswar*, A. 1952 S.C. 252.

15. *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594 (598).

16. *Saghir Ahmad v. State of U P*, (1955) 1 S.C.R. 707 (726).

17. *Khyerbari Tea Co. v. State of Assam*, A. 1964 S.C. 925 (939).

18. *Chintamanrao v. State of M. P.*, (1950-51) C.C. 64; (1950) S.C.R. 750; *Seshadri v. District Magistrate*, (1955) 1 S.C.R. 686.

19. *Gopalan v. State of Madras*, (1950) S.C.R. 88.

20. *Khare v. State of Delhi*, (1950) S.C.R. 519.

21. *Kharak Singh v. State of M. P.*, A. 1963 S.C. 1295; (1964) 1 S.C.R. 332 (344).

22. *There is a return to the Gopalan interpretation in Satwant v. Asstt. Passport Officer*, A. 1967 S.C. 1836.

23. *Narendra v. Union of India*, A. 1960 S.C. 480.

the Executive cannot impose any restriction upon any of the fundamental rights guaranteed by Art. 19 (1).<sup>24,25</sup>

2. It is, however, not required to make a law *solely* for the purpose of imposing the restriction. A restriction may be imposed by a general law, if the other conditions are satisfied.<sup>1</sup>

### The limitations in cls. (2)-(6).

(i) There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control - Art. 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.<sup>2</sup>

(ii) Whether any law has in fact transgressed the limitations specified in cls. (2) (6) of Art. 19 is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by cls. (2) to (6) whichever is applicable, the Court will declare the same to be unconstitutional and, therefore, void under Art. 13. Here there is scope for the application of the "intellectual yardstick" of the Court.

(iii) In order to justify a restriction under cls. (2)-(6), the law which imposes the restriction must be otherwise *valid*. A restriction which is not authorised by a valid law cannot be saved by any of these clauses.<sup>2a</sup>

(iv) In the case of subordinate legislation, the procedure required by the statute must be complete before it can be defended under cls. (2)-(6). Thus, cl. 4 of the Non Ferrous Metal Control Order, 1958 has been invalidated on the ground that a notification as required by s. 3 (5)-(6) of the Essential Commodities Act, 1955 had not been made.<sup>23</sup>

### The restriction must be related to one of the grounds specified in the limitation clauses

1. Once it is held that Art. 19 is applicable and a fundamental right enumerated therein has been infringed the only thing which can save the law from constitutional invalidity is if it comes within any of the exceptions enumerated in cls. (2) to (6) of Art. 19.<sup>3</sup>

24. *Ganapati v. State of Ameer* (1955) 2 S.C.R. 1065, *Yasin v. Town Area Committee*, (1952) S.C.R. 572: (1952-54) 2 C.C. 212; A. 1952 S.C. 115.

25. See also *Wazir v. State of H.P.*, A. 1954 S.C. 415: (1955) 1 S.C.R. 408. *Bishan Das v. State of Punjab*, A. 1961 S.C. 1570. [But this aspect does not seem to have been considered in *Dwarka v. State of Bihar*, A. 1954 S.C. 249].

1. *Babulal v. State of Maharashtra*, A. 1961 S.C. 884 (888).

2. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (253-4), Mukherjea J.

2a. *Yasin v. Town Area Committee*, (1952) S.C.R. 572: (1952-54) 2 C.C. 212; A. 1952 S.C. 115.

3. *Gopalan v. State of Madras*, (1950) S.C.R. 88: (1950-51) C.C. 74 (76), Kania C.J., affirmed by *Ram Singh v. State of Delhi*, (1951) S.C.R. 451: (1950-51) C.C. 158 (160).



2. The restrictive clauses in cls. (2)-(6) are exhaustive<sup>4</sup> and are to be strictly construed.<sup>5</sup> The fundamental rights declared by the various sub-clauses of cl. (1) cannot be curtailed on any ground outside the relevant provisions of cls. (2)-(6).<sup>6</sup>

Thus—

(a) The Court must strike down any law which imposes a restriction upon the freedom of speech and expression or assembly<sup>6</sup> unless it falls within any of the grounds specified in Cl. (2) Art. 19.<sup>5, 9</sup>

(ii) A restriction upon the freedom of the Press cannot be justified on a ground permissible under any clause other than cl. (2), such as 'the interests of the general public' which is a valid ground for restricting the freedom of property or business.<sup>7</sup>

(b) Any restriction upon the citizen's right to carry on any occupation, trade or business under Art. 19 (1) (g) must be held to be void unless it is saved by cl. (6) of the Article.<sup>8</sup>

3. On the other hand, it cannot be claimed by a citizen that his right to exercise one of the freedoms should be unfettered by any restriction which the State would otherwise be entitled to impose in respect of another freedom. Thus, an association relating to a business cannot claim that it should be subjected only to such restrictions as are permissible under cl. (4) and should be immune from reasonable restrictions as may be imposed upon the business under cl. (6).<sup>9</sup> Similarly, in the case of commercial advertisement, it cannot be contended that any restriction which is legitimate under cl. (6) cannot be imposed on the ground that advertisement involves the exercise of the freedom of expression of the advertiser.<sup>10</sup>

4. The relationship between the impugned legislation and any of the relevant specified grounds must be *rational*<sup>12</sup> or *proximate*<sup>13</sup>. This also follows from the expression 'in the interests of'<sup>14, 15</sup> which occurs in each of the limitation clauses (2)-(6).

5. But once the connection between the restrictive legislation and the permissible ground is rational, the Legislature has the discretion as to the expediency of the stage at which the restriction is to be applied. Thus, it is not prevented to provide against threatened or apprehended injury as distinguished from an actual inquiry.<sup>16, 17</sup>

Thus—

The expression 'in the interests of public order' has a wider meaning than the expression 'for the maintenance of public order' and authorises the Legislature to impose restrictions on utterances which have a *tendency* to cause public disorder<sup>18</sup> or to excite religious disaffection which has a proximate tendency to cause public disorder.<sup>17</sup>

<sup>4</sup> *Sakal Papers v Union of India* A 1962 S.C. 305 (315)

<sup>5</sup> *Chorh v Joseph* A 1963 S.C. 812 (814)

<sup>6</sup> *Kameshwar v State of Bihar* A 1962 S.C. 1166 (1172)

<sup>7</sup> *Sakal Papers v. Union of India* A 1962 S.C. 305

<sup>8</sup> *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (578)

<sup>9</sup> *All India Bank Employees' Assocn v N I. Tribunal* A 1962 S.C. 171 (179).

<sup>10</sup> *Hamdard Dawakhana v Union of India*, A 1960 S.C. (563); (1960) 2 S.C.R. 671.

<sup>11</sup> *Subdt v Ram Manohar* A 1960 S.C. 633.

<sup>12</sup> *Ci R. v. Basudev* A 1950 P.C. 67 633.

<sup>13</sup> *Sodhi Shamser v. State of Punjab*, A. 1954 S.C. 276.

<sup>14</sup> *Ci. Kartar Singh v. State of Punjab* A 1956 S.C. 541

<sup>15</sup> *Supdt. v Ram Manohar*, A 1960 S.C. 623, affirming *Ram Manohar v Supdt.*, A. 1955 All. 193.

<sup>16</sup> *Virendra v. State of Punjab*, A. 1957 S.C. 896 (899) • (1958) S.C.R. 308.

<sup>17</sup> *Ranjit Lal v. State of U. P.*, A. 1957 S.C. 620; (1957) S.C.R. 860.

### What constitutes a restriction.

1. When a law is impugned as having imposed a restriction upon a fundamental right, what the Court has to examine is the *substance* of the legislation, without being beguiled by the mere appearance of the legislation.<sup>18</sup> The Legislature cannot disobey the constitutional prohibitions by employing an *indirect* method.<sup>19</sup> The legislative power being subject to the fundamental rights, the Legislature cannot indirectly take away or abridge the fundamental rights which it cannot do directly.<sup>20</sup>

2. On the other hand, the *effects* of the legislation are relevant for this purpose only in so far as they are the direct<sup>20</sup> and inevitable consequences or the effects which could be said to have been in the contemplation of the Legislature. In other words, Art 19 (1) can be invoked only when a law is made *directly* infringing a fundamental right.<sup>21</sup> The *possible, indirect or remote* effects of a legislation upon any particular fundamental right cannot be said to constitute a restriction upon that right.<sup>18</sup> Thus if a law which imposes a valid restriction upon a fundamental right *incidentally* interferes with the exercise of some other right, it cannot be said to constitute a restriction upon the latter right.<sup>19</sup>

3. A restraint cannot be said to be a 'restriction within the meaning of Art. 19 unless it is 'imposed' by law and which the citizen has no option but to obey. Where the restraint is self-imposed inasmuch as the operation of the law is attracted by reason of a contract which the citizen is free to enter into at his own will or choice, he cannot complain of the unreasonableness of the law.<sup>22</sup>

### What is 'reasonable' restriction.

1. The termination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision of the Court.<sup>22a</sup>

2. Though the Court starts with the assumption that the Legislature is the best judge of what is good for its community by whose suffrage it comes into existence, the ultimate responsibility of determining the reasonableness of the restriction from the point of view of the interests of the general public rests with the Court and the Court cannot shirk this solemn duty cast on it by the Constitution.<sup>23</sup>

3. The expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-cl. of cl. (1) of Art. 19 and the social control permitted by any of the cl. (2) to (6). It connotes that the limitation imposed on a person in the enjoyment of a right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public.<sup>24</sup> In order to be reasonable the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object.<sup>21, 25</sup>

4. It follows that the reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of

18. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (619)

19. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554

20. *Gopalan v. State of Madras*, (1950) S.C.R. 68 (101).

21. *Kochuni v. State of Madras*, (1960) 3 S.C.R. 887 (914).

22. *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1299).

22a. *Chintamanrao v. State of M. P.*, (1952) S.C.R. 759; A. 1951 S.C. 118

23. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731 (1959) S.C.R. 629.

24. *Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 803; (1952-4) 2 C.C. 221 (223); A. 1954 S.C. 224.

25. *Arunachala v. State of Madras*, A. 1959 S.C. 300 (303).

the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations.<sup>23</sup>

5. It is the *effect* of a law which constitutes the test of its reasonableness; its object, whether good or bad, is immaterial for this purpose.<sup>21</sup>

6. The test of reasonableness, wherever prescribed, should be applied to each case. No set pattern of reasonableness can be laid down as applicable to all cases. The *nature of the right* alleged to have been infringed, the *underlying purpose* of the restrictions imposed, the *extent and urgency of the evil* sought to be remedied thereby, the *disproportion* of the imposition, the *prevailing conditions* at the time should all enter into the judicial verdict.<sup>2</sup>

7. The standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time.<sup>2</sup>

Similarly, a restriction which may be reasonable in relation to one fundamental right may not be reasonable in relation to another right, though enumerated in the same clause (1) of Art. 19.<sup>3</sup>

8. In adjudging the validity of a restriction, the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote,<sup>4</sup> and the situation which presented itself to the Legislature when the impugned law was enacted.<sup>4</sup> For the same reason, corresponding laws of other countries, made under different conditions, cannot be referred to for the purpose of determining the reasonableness of *our* laws.<sup>5</sup>

9. In judging the reasonableness of a law, the Court will necessarily see, not only the surrounding circumstances but all *contemporaneous legislation* passed as part of a *single scheme*. It is the reasonableness of the restriction and not of the law that has to be found out, and if the Legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account.<sup>6</sup> The Courts can take judicial notice of such Acts forming part of the same legislative plan, under which restrictions are imposed by one Act and countervailing advantages are created by another.<sup>6</sup>

10. The restriction must be reasonable from the *substantive* as well as *procedural standpoints*. It is not possible to formulate an effective test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the *actual contents* of the restrictions from the *manner of their imposition* or the *mode of putting them into practice*.<sup>7</sup>

11. The constitutional validity of a statute is to be determined on the basis of its provisions and on the ambit of its operation *as reasonably construed*. If so judged it passes the test of reasonableness, mere possibility of the powers conferred being abused is no ground for pronouncing it invalid, just as a statute which is otherwise unreasonable cannot be saved by its being administered reasonably.<sup>8</sup>

1. *State of Madras v. Row*, (1952) S.C.R. 597 (607): A. 1952 S.C. 196.

2. *Jyoti Pershad v. Union Territory of Delhi*, A. 1961 S.C. 1602 (1613).

3. *V. G. Rao v. State of M. P.*, A. 1952 S.C. 196 (200).

4. *Jyoti Pershad v. Union Territory of Delhi*, A. 1961 S.C. 1602 (1613).

5. *Hamdard Dawakhana v. Union of India*, (1960) 2 S.C.R. 671.

6. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1132).

7. *Khare v. State of Delhi*, (1950) S.C.R. 519; *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 (742).

8. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316.

**Substantive and Procedural Reasonableness.**

The substantive and procedural aspects of reasonableness may be illustrated as follows:

**(A) Substantive aspect.**

1. In determining the substantive reasonableness, the Court has to take into consideration various factors, such as the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion of the imposition*, the prevailing conditions at the time.<sup>9</sup>

2. A law which imposes a restriction in *excess* of the mischief sought to be prevented, is unreasonable, from the substantive standpoint.<sup>10-11</sup>

3. Even a decision as to the reasonableness of a restriction imposed on one of the rights conferred by Art. 19 (1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on *another* right, because the reasonableness must depend on the cumulative effect of the varying facts and circumstances of each case.<sup>9</sup> Similarly, what is reasonable in a temporary statute may not be reasonable as regards a permanent statute.<sup>7</sup>

3. A penal law which is so vague and uncertain that it gives no notice to the accused as to what act or conduct would constitute the offence, or which imposes vicarious criminal liability, is unreasonable from the substantive point of view.<sup>10</sup>

4. In a law providing for externment, whether the law itself is permanent or temporary or the period of externment authorised is a long or a short one, constitutes the substantive aspect of the restriction.<sup>12</sup>

5. Restrictions, which are imposed for securing the objects which are enjoined by the Directive Principles of State Policy included in Part IV of the Constitution, may be regarded as 'reasonable' restrictions within the meaning of cl. (2)-(6) of Art. 19.<sup>13</sup> Thus—

(i) Art. 47 has been relied upon to uphold the reasonableness of a law of prohibition imposing restrictions upon the possession, sale etc. of intoxicating liquors.<sup>14</sup>

(ii) Art. 43 has been relied upon to sustain the reasonableness of the restrictions imposed by the Minimum Wages Act, 1948,<sup>14</sup> or of the exemption of co-operative societies from payment of excise duty.<sup>15</sup>

(iii) Art. 48 has been referred to to uphold the reasonableness of the prohibition of slaughter of cows and calves.<sup>16</sup>

**(B) Procedural aspect**

1. The *method* of imposing a restriction<sup>17 18</sup> and the procedure provided for putting it into operation constitute its procedural aspect. Even though a restriction may be reasonable in substance, the Court has to see whether the method of imposing it is also reasonable.<sup>17</sup>

9. *State of Madras v. Row*, (1952) S.C.R. 597 (607, 611).

10. *State of M. P. v. Baldeo*, A. 1961 S.C. 293 (298).

11. *Chintamunrao v. Madhya Pradesh*, (1950) S.C.R. 759 (1950-51) C.C. 64.

12. *Khare v. State of Delhi*, (1960) S.C.R. 519.

13. *State of Bombay v. Balsara*, (1951) S.C.R. 682: (1950-51) C.C. 308.

14. *Bejoy Cotton Mills v. State of Assam*, A. 1955 S.C. 33.

15. *Orient Weaving Mills v. Union of India*, A. 1962 S.C. 1145.

16. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

17. *Vijendra v. State of Punjab*, (1957) S.C.R. 308.

18. *Khare v. State of Delhi*, (1960) S.C.R. 519.

2. Whether a restriction upon the exercise of a fundamental right is to be imposed on hearing the person affected or on the subjective satisfaction of the authority, constitutes the procedural test.<sup>19</sup>

Thus, a law which empowers the Executive,

- (i) to impose a collective fine,<sup>20</sup> or
- (ii) to suppress an association,<sup>21</sup> or
- (iii) to restrict the enjoyment of the proprietary rights of an individual,<sup>22</sup>

on subjective satisfaction is, *prima facie*, unreasonable from the procedural standpoint.

**How far it would be reasonable to make the exercise of a fundamental right dependent on the subjective satisfaction of the Executive.**

1. In determining the reasonableness of the restriction imposed by a law, one of the tests which has been applied by our Courts is—whether the restriction is to be imposed by the authority who is empowered by the Legislature, subjectively or objectively. A 'subjective' decision is the decision of the person who makes it, solely on his own satisfaction, and the reasonableness of his satisfaction cannot be tested by the Court. An objective decision, on the other hand, is one which is arrived at by the application of some external standard other than the personal satisfaction of the authority who makes the decision and because it is made according to an objective standard the reasonableness of the decision can be tested by the Court, on the application of the same objective standard, for instance, whether a particular conclusion follows from the evidence placed before the authority.<sup>23</sup>

2. No absolute answer can, however, be given to the question whether a restriction would invariably be unreasonable if the authority is empowered to impose it on its subjective satisfaction.

The answer to this question depends on the *nature* of the right and the *circumstances calling for the restriction*.<sup>24</sup> Thus, it has been held that—

(1) (a) A law providing *externment* or *internment*<sup>25</sup> for the security of the State is not an 'unreasonable' restriction of the freedom of *movement* guaranteed by Art. 19 (1) (d) merely because it leaves the necessity of making the order of externment in any case, to the subjective satisfaction of a particular officer. The Supreme Court viewed the necessity of externment in the same light as the law of preventive detention.<sup>24</sup>

Nevertheless, if the statute does not provide adequate safeguards for the protection of innocent citizens or does not require the administrative authority to be satisfied as to the existence of the conditions precedent laid down in the statute before making his order, the law must be struck down as invalid.<sup>26</sup>

(b) Similarly, in the case of a business or occupation which is *inherently dangerous* or harmful to the community, it would not be unreasonable to subject the right to carry on such business or occupation to

19. *Khare v. State of Delhi*, (1950) S.C.R. 519.

20. *Ajablal v. State of Bihar*, A. 1956 Pat. 137 (140).

21. *State of Madras v. Row*, (1952) S.C.R. 597.

22. *Raghbir v. Court of Wards*, (1953) S.C.R. 1049.

23. *Benarasi v. State of Pepsu*, A. 1957 Pepsu 5 (9).

24. *Gopalan v. State of Madras*, (1950-51) C.C. 74: (1950) S.C.R. 88.

25. *State of M. P. v. Baldeo*, A. 1961 S.C. 293 (296).

the supervision or contrl of an officer acting in his discretion,<sup>1</sup> and give him final power to determine the fitness of persons entitled to a licence to carry on such trade.<sup>2</sup>

(c) Similar view has been taken as regards a law which empowers the State to take emergent action relating to private property in the interests of public safety, *e.g.*, to pull down a dangerous building;<sup>3</sup> or to wind up a banking company in order to save the depositors.<sup>4</sup>

(d) A law which authorises the head of the Police or a magistrate to make temporary orders prohibiting processions whenever he considers it necessary for the preservation of public order is not unreasonable on the ground that the power is to be exercised by the Police officer on his subjective satisfaction.<sup>5-6</sup>

(e) Similar view has been taken as regards a law which empowers the State Government or its delegate (on its subjective satisfaction) to prohibit, for a limited period, the publication in or importation into, a particular area, of matters prejudicial to the maintenance of *communal harmony* affecting or likely to affect *public order*, because the mischief to be averted demands quick and effective decision.<sup>7</sup>

In such cases, mere *possibility* of abuse of the power by the Executive is no test for determining the reasonableness of the restriction imposed by the law itself.<sup>8-9</sup>

3. In some cases, it has been held that the very fact that the discretionary power has been vested in the Government or a high official shows that the restriction imposed by the statute is reasonable.<sup>10</sup> The test has been carried further to hold that where the Government is empowered to delegate the power to any officer, it should be presumed that it will delegate the power to proper and responsible officers.<sup>11</sup>

There is a presumption that a public authority will act honestly and reasonably in the exercise of its statutory powers.<sup>12-13</sup> The presumption is, of course, rebuttable. If, however, the statutory power or discretion is *shown* to have been abused by the authority, by exercising it contrary to the policy laid down by the law, the person aggrieved shall have his remedy against the illegal order, but that would be no ground for invalidating the statute itself.<sup>9</sup>

(II) On the other hand, the Supreme Court has held<sup>14</sup> that in the absence of emergent or extraordinary circumstances, the exercise of a basic right like the right of *association or property*<sup>14</sup> or to reside in any part

1. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873; (1952-4) 2 C.C. 227 (229).
2. *Ghansal v. State of Delhi*, A. 1955 Punj. 97.
3. *Nathubhai v. Municipal Corpn.*, (1958) 60 Bom.L.R. 515 (531).
4. *Joseph v. Reserve Bank of India*, A. 1962 S.C. 1371.
5. *Bapurao v. State*, A. 1956 Bom. 300 (302).
6. *Babulal v. State of Maharashtra*, A. 1961 S.C. 884.
7. *Virindra v. State of Punjab*, A. 1957 S.C. 896 (901).
8. *Khare v. State of Delhi*, (1950-51) C.C. 52. (1960) S.C.R. 519.
9. *Hari-hankar v. State of M. P.*, (1952-54) 2 C.C. 510 (513).
10. *Matajog v. Bhari*, A. 1958 S.C. 44 (48).
11. *Commr. of Commercial Taxes v. Ramkishan*, A. 1968 S.C. 69 (66).
12. *State of Madras v. Row*, (1952) S.C.R. 597; (1952-4) 2 C.C. 169 A. 1952 S.C. 196; *State of W. B. v. Anwarali*, (1952-54) 2 C.C. 50; (1952) S.C.R. 284; *Tika Ramji v. State of M. P.*, A. 1966 S.C. 675; (1956) S.C.R. 393.
13. But to enlarge this presumption where the officer empowered is of a higher status may not be warranted or safe, for, the greater the power the greater may be the temptation to be arbitrary.
14. *Raghubir v. Court of Wards*, (1952-54) 2 C.C. 187; A. 1963 S.C. 373.

of India<sup>15</sup> or to carry on a lawful business<sup>16-17</sup> could not be reasonably made dependent upon the subjective satisfaction of the Government or any of its officers, without offering any standard for guidance.<sup>17</sup>

Thus, the formula of subjective satisfaction of the Government and its officers with an advisory Board to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances (e.g., in a law providing internment or externment for the security of the State), and within the narrowest limits, and not to curtail a right like the freedom of association, in the absence of any emergent or extraordinary circumstances.<sup>12</sup>

### **Delegation of the power to grant exemptions from a law.**

1. The vesting of an unrestricted discretion in the Executive to grant *ad hoc* exemptions from the operation of a law is *prima facie* unreasonable.<sup>17a</sup>

2. But when the policy according to which a discretion is to be exercised by an officer is clearly expressed in the statute, it cannot be said to be an unrestricted or unregulated discretion.<sup>18</sup> Nor can it be said to be unrestricted where the discretion is to be exercised according to conditions laid down in the Rules made under the statute and is, further, subject to an administrative appeal to a higher authority, say, the State Government.<sup>11</sup>

3. In taxing laws, even an unguided power to exempt particular objects from the liability has been upheld as reasonable on the ground that the interests of raising revenue for State purposes require a great deal of flexibility so that the Government may be empowered to select goods for exemption having regard to the legitimate claims of such goods for special treatment, without detriment to the interests of the public revenue.<sup>19</sup>

### **The discretion is not unguided or unfettered where the Legislature has laid down the policy or standard.**

1. When the policy<sup>19-20</sup> according to which or the purpose<sup>20</sup> for which a discretion is to be exercised by an officer is clearly expressed in the statute, it cannot be said to be an unrestricted or unregulated discretion.<sup>16</sup>

2. Nor can it be said to be unrestricted where the discretion is to be exercised according to conditions laid down in the statute<sup>21</sup> or the Rules made under the statute, which provide adequate safeguards.<sup>22</sup>

3. The entire statute is to be read in order to find out the purpose for which or the standard according to which the power is to be exercised.<sup>23</sup>

In the expression 'subversive activities prejudicial to national security' in the Safeguarding of National Security Rules, the words 'subversive activities' are no doubt vague or comprehensive enough to include a variety of activities which are not susceptible of easy definition or ascertainment. But, read in the context of the words 'prejudicial to national security', they would afford an ascertainable standard to the Governor to take action under the Rules.<sup>24</sup>

15. *Ebrahim v. State of Bombay*, (1954) S.C.R. 933; (1952-4) 2 C.C. 181.

16. *Ganapati v. State of Ajmer*, (1955) 1 S.C.R. 1065 (1069).

17. *Harichand v. Mizo Di. Council*, A. 1967 S.C. 829 (838); *Maneklal v. Makwana*, A. 1967 S.C. 1373 (1383).

17a. *Dwarkan Prasad v. State of U. P.*, (1952-54) C.C. 221 (223).

18. *Harishankar v. State of M. P.*, A. 1954 S.C. 465.

19. *Oriens Weaving Mills v. Union of India*, A. 1963 S.C. 98.

20. *Virtendra v. State of Punjab*, A. 1957 S.C. 896.

21. *Mineral Development Ltd. v. State of Bihar*, A. 1960 S.C. 468.

22. *Orient Weaving Mills v. Union of India*, A. 1963 S.C. 98.

23. *Harishankar v. State of M. P.*, A. 1954 S.C. 465.

24. *Balakrishna v. Union of India*, A. 1958 S.C. 222 (237).

**Possibility of abuse, no test of reasonableness.**

Conversely, where the vesting of the discretionary power by the Legislature is justified, the mere possibility of abuse of the power by the Executive is no test for determining the reasonableness of the restriction imposed by the law.<sup>25-1</sup>

If, however, the statutory power or discretion is shown to have been abused by the authority, the person aggrieved shall have his remedy against the illegal order,<sup>2</sup> but that would be no ground for invalidating the statute itself.<sup>3</sup>

**Vesting of discretion in superior authorities.**

In some cases, it has been suggested that the rank of the administrative authority in whom the discretionary power is vested is a factor to be taken into consideration in determining the reasonableness of the restriction imposed by the statute which vests such discretionary power to regulate the exercise of a fundamental right under Art 19 (1).<sup>2,4</sup>

**Right to appeal as a condition of reasonableness.**

1. Where discretionary power is vested in an administrative authority, the Courts insist upon certain safeguards in order to uphold the reasonableness of the restrictions imposed upon a fundamental right under Art. 19 by the statute which vests such power. One of these safeguards is a provision for appeal from the decision of the administrative authority to a superior authority.<sup>4a</sup> Where such provision has been made by the statute, it cannot be said that the discretion is unfettered.<sup>5</sup>

2 But while in the case of rights such as the right of association,<sup>6</sup> speech or assembly<sup>7</sup> or of property,<sup>8</sup> the Supreme Court has insisted upon a judicial supervision, whether by suit or by appeal, or revision,<sup>7</sup> in the matter of rights like that of business,<sup>9</sup> the Court has considered the requirement of procedural reasonableness to be satisfied if the statute provides for an administrative appeal to a higher administrative authority or to the Government itself.

3. But where no higher administrative authority is prescribed by the statute, the mere fact that the inferior authority is required to give reasons for his decision, is not sufficient to satisfy the requirement of procedural reasonableness.<sup>4a</sup>

4\* In cases where urgency of action is needed restriction of rights of speech<sup>10</sup> or property<sup>11</sup> has been upheld as reasonable

25. *Khare v State of Delhi* (1950-51) L.C. 52 (1950) S.C.R. 519

1. *Virendra v State of Punjab* A 1957 S.C. 906 (901)

2. *Harishankar v State of M. P.* (1952-53) 2 C.C. 510 (513) (1955) 1 S.C.R. 380.

3. *Collector of Customs v. Sampathu* A 1982 S.C. 316 (332)

4. *Kishan Chander v State of M. P.* (1964) 1 S.C.R. 76 (774)

4a. *Cf. Hari Chand v. Mizo Di Council* A 1967 S.C. 829 (833).

5. *Tikar Ramji v State of U. P.* (1956) S.C.R. 393; A 1956 S.C. 676; *Patel v. Union of India*, (1960) S.C.J. 224 (230).

6. *State of Madras v. Row*, (1952) S.C.R. 597 (607).

7. *Babulal v. State of Maharashtra*, A 1961 S.C. 884 (890).

8. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049 (1055); *Jagannath v State of Orissa*, (1954) S.C.R. 1046 (1051); *Sadasiv v. State of Orissa*, A. 1956 S.C. 432; *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1045.

9. *Dwarka Prasad v State of U. P.* (1954) S.C.R. 803 (813).

10. *Virendra v. State of Punjab*, (1958) S.C.R. 308.

11. *Joseph v. Reserve Bank of India*, A. 1962 S.C. 1371.



### **Barring access to Courts as a condition of unreasonableness.**

1. In general, it may be stated that a provision which denies access to the Courts against a law affecting the fundamental right of an individual constitutes an unreasonable restriction upon his fundamental right.<sup>12</sup>

2. It follows that a law which makes an administrative decision which restricts a fundamental right "conclusive" and immune from challenge in any court amounts to an unreasonable restriction upon such fundamental right, e.g., the right to trade, because it makes the administrative decision non-justiciable however arbitrary or capricious it might be.<sup>13</sup>

### **Whether mere retrospectivity would make a restriction unreasonable.**

1. A restriction which is reasonable does not cease to be so merely because it is given retrospective effect,<sup>14, 15, 16, 1</sup> even where it takes away an existing right.<sup>2</sup>

2. But the retrospectivity of a statute is an element which may be properly taken into consideration in determining the reasonableness of the restriction imposed by the statute.<sup>17, 18</sup> Thus,

The Court has struck as unreasonable the abridgement of a vested right of property with retrospective effect, without sufficient justification, e.g., the cutting down of the statutory purchase price payable to a landlord for the compulsory transfer of his interest to his tenants, by resorting to an indirect device.<sup>19</sup>

3. Since freedom of contract is not guaranteed as a fundamental right by our Constitution, it cannot be held that a restriction imposed upon a contractual right or the effacement of a subsisting contract would *ipso facto* be unreasonable, if done with retrospective effect.<sup>20</sup>

The Court has thus upheld the reasonableness of imposing regulations relating to an essential commodity with retrospective effect, so as to affect rights accrued under subsisting contracts.<sup>20</sup>

4. Mere retrospectivity in the imposition of a tax does not render the taxation an unreasonable restriction upon the right of property guaranteed by Art 19 (1) (f).<sup>21</sup> [See *post*].

But the retroactivity of a taxing law may be unreasonable if it operates as an arbitrary burden upon the assessee who are retrospectively hit by the impugned legislation.<sup>22</sup>

### **Reasonableness of throwing burden of proof on the accused.**

1. There is nothing unreasonable in putting the burden of proof upon an accused person if he has to account for facts within his own know-

12. *Commr. H. R. F. v. Lakshmindra*, A. 1962 S.C. 1371.

13. *Corporation of Calcutta v. Calcutta Tramways Co.*, A. 1931 S.C. 1279.

14. *Sadhu Ram v. Custodian-General*, (1955) 2 S.C.R. 1113 (1116), A. 1956 S.C. 43.

15. *Srikrishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

16. *Hatisingh Mfg. Co. v. Union of India*, (1960) 3 S.C.R. 528 (536).

17. *State of W. B. v. Subodh Gopal*, A. 1954 S.C. 92 (104); (1954) S.C.R. 587. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (621); (1959) S.C.R. 12.

18. *Narattamdas v. State of M. P.*, (1964) 7 S.C.R. 820 (825) 2; *Epari v. State of Orissa*, (1964) 7 S.C.R. 186.

19. *Jayvantsinghji v. State of Gujarat*, A. 1962 S.C. 621 (832-3).

20. *Raghubar v. Union of India*, A. 1962 S.C. 263 (274).

21. *Chhotabhai v. Union of India*, A. 1962 S.C. 1006.

22. *Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667 (1675).

ledge<sup>23, 24</sup>; it may, however, be unreasonable if he is required to account for facts within the knowledge of other persons.<sup>25</sup>

2. But even a rule of onus of the latter kind (e.g., which requires a *bona fide* purchaser to prove the origin of the goods purchased by him), has been upheld as 'reasonable' in view of the consideration that drastic legislation was required to stop the widespread smuggling of gold which was undermining our national economy;<sup>24</sup> or to root out the rampant evil of gambling.<sup>25</sup>

3. At any rate, throwing the onus upon the accused cannot be said to be unreasonable where the law provides for adequate safeguards to be complied with before applying the presumption against the accused, e.g.,—(a) the existence of credible information; (b) the seizure of articles which bear out the information; (c) proof to the satisfaction of the Court that there are *reasonable* grounds for holding that the articles seized are incriminating articles.<sup>25</sup>

### <sup>9</sup> Special provision for enforcement of civil liability.

The provision of a special procedure for the recovery of a civil liability, such as statutory compensation due to employees, does not, *per se*, constitute an unreasonable restriction upon a fundamental right say, under Art. 19 (1) (g).<sup>1</sup>

### Reasonableness of taxing laws.

1. Taxation is an independent power of the State, and there is no fundamental right to be immune from taxation.<sup>2</sup> Hence, the exercise of none of the fundamental rights guaranteed by Art. 19 (1) can claim *absolute* immunity<sup>4</sup> from taxation.

2. On the other hand, a taxing law, like all other laws, is subject to Art. 13,<sup>5-8</sup> and must be void if it contravenes any of the fundamental rights included in Part III.<sup>6-7</sup>

3. Of course, where the constitutionality of a taxing law is challenged on the ground guaranteed by Art. 19 (1), all the relevant circumstances, substantive and procedural, should be taken into consideration to determine the reasonableness or otherwise of such law.<sup>8</sup>

#### I. Substantive reasonableness

1. While a taxing law cannot be held to be unreasonable merely because it is excessive or imposes a heavy burden on the right of property or of business,<sup>9-10</sup> it will be struck down as an unreasonable restriction upon the right guaranteed by Art. 19 (1) (f) if it is *confiscatory* in its character and effect.<sup>11</sup> In other words, where the State instead of acquiring an individual's property, so imposes a tax as to virtually eliminate the owner or to compel him to part with the taxed property in favour of the State in

23. *Abdul Hakim v. State of Bihar*, A. 1961 S.C. 448 (458).

24. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316 (322).

25. *Kishan Chander v. State of M. P.*, (1984) 1 S.C.R. 765 (744).

1. *Hafsling Mfg. Co. Union of India*, A. 1960 S.C. 923 (931).

2. *Virendra v. State of Punjab*, A. 1957 S.C. 896.

3. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587.

4. *Ramailal v. I. T. O.*, A. 1951 S.C. 97.

5. *Kochunni v. State of Madras*, (1960) 3 S.C.R. 887; A. 1960 S.C. 1080.

6. *Kunnathal v. State of Kerala*, A. 1961 S.C. 552.

7. *Baleji v. I. T. O.*, A. 1962 S.C. 123 (128).

8. *Baleji I. T. O.*, A. 1962 S.C. 123.

9. *Jagannath v. Union of India*, A. 1962 S.C. 148.

10. *Srinivasamurthy v. State of Mysore*, A. 1959 S.C. 894 (896).

order to pay off the tax imposed, it must be held to constitute an unreasonable restriction upon his fundamental right to hold the property.<sup>11</sup>

2. In other words, if a tax is imposed not for the purpose of raising revenue, but with the deliberate object of destroying a fundamental right, it might be held to impose an 'unreasonable restriction' on the exercise of that right.<sup>12, 13</sup>

3. It follows, therefore, that a distinction should be made between a tax imposed for purposes of revenue such as income tax<sup>14</sup> or stamp duty<sup>15</sup> or sales tax,<sup>16</sup> and a tax levied for the purpose of regulation, such as a license fee.<sup>17</sup> As fee is levied for realising the cost involved in the regulation, e.g., licensing,<sup>17</sup> its reasonableness or *vires* cannot be justified as a fee where it has no reasonable relation to such cost and its object is to raise revenue.<sup>17</sup> Hence—

Where a license fee is fixed at an amount without any regard to the costs involved in rendering the services, e.g., where the fee both for granting an application for a licence as well as for its renewal is fixed at Rs. 50/- it ceases to be a fee, and becomes *ultra vires* where the legislative power was only to levy a 'fee'. The imposition must, accordingly, be held to constitute an unreasonable restriction upon the freedom of trade.<sup>18</sup>

4. When a tax operates upon a fundamental right guaranteed by Art. 19 (1) but is imposed without authority of law,<sup>19, 20</sup> or is *ultra vires* owing to contravention of some mandatory provision of the Constitution (e.g., Art. 286), the Court may annul the tax as an 'unreasonable restriction',<sup>21, 22</sup> for, nothing which is illegal can be 'reasonable'.

5. On the other hand, mere retroactivity in imposition does not, *per se*, render the taxing law unreasonable.<sup>23</sup>

## II. Procedural Reasonableness

Since the assessment of tax is, in its nature, a quasi-judicial function, a taxing law may be annulled as constituting an unreasonable restriction upon the fundamental right of property or business—

(a) If it empowers the Executive to make an assessment, without providing for any machinery or procedure for making the assessment,<sup>24</sup> or if the procedural provisions are vague.<sup>1</sup>

(b) If it empowers the Executive to make the assessment without a notice or a hearing being offered to the assessee.<sup>25, 1</sup>

11. *Kunnathal v State of Kerala*, A. 1961 SC 552.

12. *Yasin v. Town Area Committee*, (1952) SCR 572 (578) · A 1952 SC. 115.

13. *Express Newspapers v Union of India*, A 1958 (614)

14. *Ramjilal v. I T O*, A. 1951 SC 97.

15. *Anantakrishnan v State of Madras*, A 1952 Mad 395 (404-5).

16. *In re Siram Reddy*, A 1960 AP. 216 (253).

17. *Chandrakant v. Jasjit*, A 1962 SC. 204 (209).

18. *Chandrakant v. Jasjit*, A. 1962 S.C. 204.

19. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (578): A. 1952 SC. 115

20. *Kailash Nath v. State of U. P.*, A. 1957 S.C. 790.

21. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1077): A. 1953 S.C. 252.

22. *Himmatal v. State of M. P.*, (1954) S.C.R. 1122: (1952-54) 2 C.C. 242: A. 1954 S.C. 403.

23. *Chotabhai v. Union of India*, A. 1962 S.C. 1006.

24. *Kunnathal v. State of Kerala*, A. 1961 552.

25. *Ct D. C. Mills v. Commr., of I. T.*, (1955) 1 S.C.R. 941.

1. *State of A. P. v. Nalla Raja*, (1967) 3 S.C.R. 28 (46).

**Whether restriction includes prohibition.**

1. It is now settled<sup>2-4</sup> that no inflexible answer to this question is possible and that it is the nature of the business or property which is an important element in determining how far the restriction may reasonably go.

Thus—

In the case of dangerous or noxious trades, such as production or trading in liquors<sup>2,4</sup> or adulterated foodstuffs; or cultivation of narcotic plants, or trafficking in women,<sup>2</sup> occupation of a tout,<sup>6</sup> it would be a 'reasonable restriction' to prohibit the occupation, trade or business altogether. Similar view has been taken of business in essential commodities.<sup>4</sup>

On the other hand—

(i) In the case of an ordinary trade or calling, not only an express prohibition but any restriction which has the practical effect of a total stoppage<sup>7</sup> of the business, would be unreasonable.

(ii) A total prohibition imposed upon the freedom of speech and expression would be *prima facie* unconstitutional.<sup>8</sup>

2. Laws imposing restrictions on fundamental rights must be strictly construed,<sup>9</sup> and the greater the restriction, the more the need for strict scrutiny by the Court.<sup>4</sup>

**What constitutes a total prohibition.**

Whether a restriction, in effect, amounts to a prohibition, is a question of fact, to be determined according to the circumstances of each case,<sup>4</sup> having regard to the ambit of the right<sup>10</sup> and the effect of the restriction upon the exercise of that right.<sup>6</sup> Thus—

(a) Where the prohibition is only with respect to the exercise of the right in a particular area or relating to particular matters, there is no total prohibition of the right.<sup>11</sup>

(b) On the other hand, if the effect of a restriction is to prevent the Petitioner from exercising his right at all, it amounts to a total prohibition, though it may not be couched in that shape.<sup>6</sup>

**Reasonableness for the purposes of Arts. 14 and 19.**

Though the Court has to find out the reasonableness of a classification when a statute is challenged on the ground of violation of Art. 14, the scope of inquiry as to the reasonableness under Art. 14 is not the same as that under Art. 19. Of course, there is an area where the requirements of the two articles may converge, for instance, where a statute vests unguided or uncanalised discretion in an administrative authority to affect the rights

2. *Cooverjee v. Excise Comm.*, (1954) S.C.R. 873. (1952-4) 2 C.C. 227; *Collector of Customs v. Sampathu*, A. 1962 S.C. 316 (325).
3. *Karam Das v. Union of India*, (1956) S.C. [unrep].
4. *Narendra v. Union of India*, (1960) S.C.J. 214 (221-2); A. 1960 S.C. 430: (1960) 2 S.C.R. 375.
5. *State of U. P. v. Kartar Singh*, A. 1964 S.C. 1135; (1964) 6 S.C.R. 679 (687).
6. *Sant Ram, in re*, (1960) 3 S.C.R. 499. A. 1960 S.C. 932 (935).
7. *Rashid Ahmed v. Municipal Board*, (1950-51) C.C. 61; (1950) S.C.R. 566.
8. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.
9. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (899).
9. *Rajasthan S. R. T. C. v. Laxmi Motor Works*, (1968) S.C.J.A. 1381/67, d. 4-1-68.
10. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.
11. *Ch. Krishna Kumar v. Municipal Committee*, (1957) S.C. [unrep.]

of citizens the statute may be held to offend Art. 14 on the ground that the power to classify conferred by it is unreasonable; at the same time, the restriction imposed by the statute may be held to be an unreasonable restriction on the citizen's fundamental rights under Art. 19 because the power to restrict those rights has been conferred upon an administrative authority, acting upon his unfettered discretion.<sup>12</sup>

It does not follow, however, that a statute which has been upheld under Art. 14 must also be held to constitute a 'reasonable' restriction under Art. 19, because even where the statute offers a guidance to the administrative authority it may still be held to be an unreasonable restriction if the restraint which is sought to be imposed under the guidance offered by the statute is excessive or uncalled for or otherwise unreasonable having regard to the various circumstances, substantive and procedural, according to which the reasonableness of a restriction under Art. 19 have to be determined.<sup>13</sup>

### 'In the interests of.'

1. This expression occurs in all the cls. (2) (6).

2. The expression is of a wide connotation, and is wider than words like 'for the maintenance of'. 'In the interest of' authorises the Legislature to restrict an act or utterance which not only produces the mischief aimed at, e.g., breach of public order or security of the State, but also those which have a *tendency* to cause that effect,<sup>14</sup> but which may not actually lead to a breach of public order. Thus, the incitement of religious disaffection with a deliberate intent has a proximate tendency to cause public disorder; hence, s. 295A of the I. P. C. must be held to be a reasonable restriction 'in the interests of public order'.<sup>14</sup>

3. On the other hand, the expression postulates a proximity of relationship.<sup>15</sup>

Thus, a limitation imposed in the interest of public order to be a reasonable restriction, should be one which had a proximate or reasonable connection<sup>16</sup> or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.<sup>15</sup>

### Interests of the general public'.

This expression occurs in both cls. (5) and (6) of Art. 19.

1. The words 'general public' refer to the *rest* of the citizens, with reference to a free citizen who claims the right in question. It does not refer to any group or class of people as distinguished from the people generally. That is the very reason why specific mention of the interests of any 'Scheduled Tribe' has been necessary in cl. (5).<sup>17</sup>

2. This does not mean, however, that a legislation may be in the interests of the general public only if it is in the interests of the public of the *whole* of the Republic of India.<sup>18</sup> Legislation may be essential to

12. This view of the author, expressed at p. 88 of the previous Edition, now finds support from *Maneklal v. Makuana*, A. 1967 S.C. 1373 (1382).

13. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316 (325).

14. *Ranjit Lal v. State of U. P.*, A. 1957 S.C. 620; (1957) S.C.R. 880.

15. *Supdt. v. Ram Manohar*, A. 1960 S.C. 633, affirming *Ram Manohar v. Supdt.*, A. 1955 AII. 193.

16. *Cf. Arumachala v. State of Madras*, A. 1959 S.C. 300 (303).

17. *Cf. Gopalan v. State of Madras*, (1950) S.C.J. 174 (182), *Kania C.J.*: (1950) S.C.R. 88.

18. *Jagan Prasad v. N. R. Sen*, A. 1962 Cal. 273 (278).

redress some urgent grievance in a particular State, though such legislation would be wholly unnecessary in any other State. The fact that such legislation would not affect citizens of other States would not make it impossible to say that it was in the interests of the general public. Legislation affecting a particular class or a particular area would only directly affect the members of that class or the inhabitants of the area. But the removal of some serious abuse or grievance or discontent is a matter *indirectly* affecting the public generally.<sup>19</sup> A legislation may be 'in the interests of the general public' even though it affects the interests of particular individuals, or even causes hardship to particular individuals,<sup>20</sup> owing to the peculiar conditions in which they are placed.<sup>21</sup>

Thus, the following are restrictions imposed in the interests of the general public—

- (a) Prevention of wasteful expenditure by landlord,<sup>22</sup>
- (b) Regulation of hours or days of work in shops and commercial establishments,<sup>23</sup>
- (c) Protection of tenants against excessive rent and unreasonable eviction<sup>24 25</sup>
- (d) Protection of slum dwellers against eviction<sup>1</sup>
- (e) Protection of the debtors from excessive interest,<sup>2</sup>
- (f) Limiting the number of rickshaws plying within the limits of municipal corporation,<sup>3</sup>
- (g) Externment of dangerous persons from a particular locality<sup>4</sup>
- (h) Provision that refund of sales tax paid under error of law shall be made to the purchasers and not the assessee, where the law empowered the assessee to collect the tax from the purchasers<sup>5</sup>
- (i) Rooting out gambling<sup>6</sup>

3. This expression, in cls (g) and (h) of Art 19, authorises the state to impose restriction not only on the ground of public order but also on grounds of social or economic policy<sup>7</sup> or on the ground of 'the common good, e.g., securing the objects mentioned in part IV of the constitution (Directive principles).<sup>7</sup>

4. Though the court respects the determination of the Legislature as to what is good for the community, by whose suffrage it came into existence, that determination is not final since the Constitution vests in the Court the ultimate responsibility for determining whether a restriction upon a fundamental right is in the interests of the public and the Court must not shirk this solemn duty cast on it by the Constitution.<sup>8</sup>

19. *Sampuran v. Competent Officer*, A 1955 Pepsu 148, *Jamnalal v. Kishandas*

20. *Narendra v. Union of India*, A 1960 SC 430.

21. *Hathising Manufacturing Co v Union of India*, A 1960 SC. 923 (928), *Hamf v State of Bihar*, (1959) SCR 629

22. *Bijay Cotton Mills v State of Ajmer*, (1955) 1 SCR 712 (755)

23. *Kuldip v State of Punjab*, A 1961 SC 1559 (1563).

24. *Aamnath v. Sukumar*, A 1954 Pat 211

25. *Bhagathi v. State of Punjab*, A 1954 Punj 167 (F.B.)

1. *Jyoti Pershad v Union Territory* A 1961 SC 1961 SC 1602 (1613)

2. *Raghunath v Union of India*, A 1954 Punj 261.

3. *Satyaranjan v Commr of Police*, A 1955 Cal 417

4. *Gurbachan v. State of Bombay*, (1952) SCR. 737; A 1952 S.C. 221.

5. *Narendra v Union of India*, A 1960 SC. 430; *B. C. Mills v State of Ajmer*, (1955) 1 S.C.R. 752

6. *Orient Paper Mills v State of Orissa*, A 1961 SC. 1438.

7. *Kashan Chaudh v State of M. P.*, (1964) 1 SCR 765; A. 1965 S.C. 765.

8. *Quareishi v. State of Bihar*, A. 1956 S.C. 731 (744).

### Conflict between different rights guaranteed by Art. 19 (1).

1. A citizen is entitled to each and every one of the freedoms guaranteed by cl. (1) together, and the Constitution does not prefer one of these freedoms of another.<sup>9</sup>

2. It may be that an Article embodying a fundamental right may exclude another by necessary implication, but before such a construction is accepted, every attempt should be made to harmonise the two articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other.<sup>10</sup>

3. It follows that the State cannot—

(a) make a law which directly restricts one freedom even for securing the better enjoyment of another freedom; or

(b) restrict one freedom by placing an otherwise permissible restriction upon another freedom;<sup>11</sup>

(c) impose restriction upon a particular freedom on any ground outside the grounds enumerated in the relevant clause in cls. (2)-(6) of Art. 19. Thus, freedom of speech can be curtailed only on the ground of public order and the like as mentioned in cl. (2) and not "in the interests of the general public" which is a legitimate ground in cl. (5).<sup>12</sup>

### Suspension of Art. 19 during Emergency.

As will be more fully explained under Art. 358, that Article suspends the operation of Art. 19 during the operation of a Proclamation of Emergency made under Art. 352. The effect of Art. 358 is that it suspends the restrictions on the powers of the State to make any law in contravention of the provisions of Art. 19 only during the pendency of the Proclamation. It does not lay down that the validity of any law, which has already been made, cannot be challenged on the ground of violating the provisions of Art. 19.

In the word—

(a) Laws made *prior* to the coming into operation of the Proclamation of Emergency are not protected from the challenge of unconstitutionality on the ground of contravention of Art. 19.<sup>11</sup>

(b) But any law or order made after the coming into operation of the Proclamation of Emergency cannot be challenged, *during the continuance of the Emergency*, on the ground of contravention of Art. 19.<sup>12</sup> Even after the Emergency is over, the constitutionality of acts done or omitted to be done during the Emergency cannot be challenged on the same ground.<sup>13</sup> The net result of Art. 358 is thus to remove the fetters created on the legislative and executive powers by Art. 19 and if the legislatures make laws or the executive commits acts which are consistent with the rights guaranteed by Art. 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter.<sup>14</sup>

But there is no bar to such law being challenged on grounds other than the contravention of Art. 19, e.g., on the ground of its being *ultra vires*.<sup>14</sup>

9. *Sahel Papers v. Union of India*, A. 1962 S.C. 305 (313): (1962) 2 S.C.R. 842 (863).

10. *Kachur v. States of Madras & Kerala (II)*, A. 1960 S.C. 1080 (1089): (1960) 3 S.C.R. 887 (905).

11. *State of M. P., v. Bharat*, A. 1967 S.C. 1170 (1173).

12. *Mahmud Singh v. State of Punjab*, A. 1964 S.C. 381.

13. *Keshu Ram v. State of Punjab*, A. 1964 Punj. 307.

14. *Chaman v. State of Punjab*, A. 1968 Punj. 74 (77).

### After the Proclamation ceases to operate.

As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative (except as to things already done or omitted during the period of the Proclamation of Emergency) to the extent to which they conflict with the rights guaranteed under Art. 19 because as soon as the emergency is lifted, Art. 19 which was suspended during the emergency is automatically revived and begins to operate<sup>14</sup>

### CL. (1) (a): Freedom of Speech and Expression.

1. This freedom means the right to express one's convictions and opinions freely, by word of mouth, writing, printing, picture, or in any other manner (addressed to the eyes or the ears). It would thus include not only the freedom of the Press, but the expression of one's ideas by any visible representation, such as by gestures and the like. Expression, naturally, presupposes a second party to whom the ideas are expressed or communicated. In short, freedom of expression includes the freedom of propagation of ideas, their publication and circulation<sup>15</sup> the right to acquire and impart ideas and information about matters of common interest<sup>16</sup>

2. It was suggested in the *Hamdard case*<sup>17</sup> that the right to advertise for commercial purposes was not included in the freedom of expression in Art. 19(1). If that were so it was not necessary to go into the reasonableness of the restrictions imposed upon the right in that case, which the Supreme Court did<sup>18</sup>

This view like the doctrine of *res extra commercium*, requires a further consideration. These doctrines follow the American decisions<sup>19</sup> which support a total prohibition of the exercise of these rights. But there is no need to resort to such a doctrine in India since total prohibition has been held justified in particular circumstances,<sup>20</sup> as included within the expression 'reasonable restrictions'

A better view would be to include such rights within the ambit of cl. (1) of Art. 19 and then determine what restrictions imposed upon them could be held to be reasonable in the circumstances of a particular case.

3. Like the other freedoms cl. (1)(a) refers to the common law right of freedom of expression and does not apply to any right created by statute, e.g. the right to contest an election which is to be exercised subject to the restriction imposed by statute<sup>21</sup>

4. The faint suggestion made in *State of Orissa v. Matrubhumi*,<sup>22</sup> that once a restriction is held to be related to one of the foregoing grounds, such as defamation or contempt of court the reasonableness of the restriction could not be questioned has no substance. There is no difficulty in interpreting cl. (2) or any of the other limitation clauses of Art. 19. In order to be justified as a valid restriction upon any of the rights guaranteed by cl. (1), not only should such restriction be related to any of the permissible ground enumerated in the relevant limitation clause, but it must further be reasonable

14. *Ramesh Thakkar v. State of Madras* (1950) S.C.R. 594. (1950-51) C.C. 40 (40) A. 1950 S.C. 124

15. *Hamdard Dawakhana v. Union of India* (1960) 2 S.C.R. 671.

16. *E. v. Valentine v. Christensen*, (1941) 316 U.S. 52

17. *Narendra v. Union of India* A. 1960 S.C. 430

18. *Jamuna Prasad v. Lachmi Ram*, A. 1954 S.C. 686. (1955) 1 S.C.R. 608.

19. *State of Orissa v. Matrubhumi*, A. 1955 Orissa 36 (39).



(i) **Sovereignty and integrity of India.**—This ground has been added as a ground of restriction on the freedom of expression by the Sixteenth Amendment of the Constitution, with effect from the 6th October, 1963. The object was to enable the State to combat cries for secession and the like from organisations such as the Dravida Kazhagam in the South and the Plebiscite Front in Kashmir, and activities in pursuance thereof which might not possibly be brought within the fold of the expression 'security of the State'.

**CL. (2) : Grounds of restriction of the freedom of speech and expression.**

1. Any restriction imposed<sup>20</sup> upon the above freedom is *prima facie* unconstitutional, unless it can be justified under the limitation clause, i.e., clause (2). This clause authorises the State to impose restrictions upon the freedom of speech only on certain specified grounds so that if, in any particular case, the restrictive law cannot rationally<sup>20</sup> be shown to relate to any of these specified grounds, the law must be held to be void.<sup>21</sup>

Thus, while it would be legitimate for the State to punish utterances which incite violence or have a tendency to create public disorder, it cannot suppress even a very strong criticism of the measures of Government or acts of public officials which has no such tendency.<sup>22</sup>

2. Cl. (2), as amended by the **Constitution (First) Amendment Act**, enables the Legislature to impose restrictions upon the freedom of speech and expression, on the following grounds—

- (i) Sovereignty and integrity of India.
- (ii) Security of the State.
- (iii) Friendly relations with foreign States.
- (iv) Public order.
- (v) Decency or morality.
- (vi) Contempt of Court.
- (vii) Defamation.
- (viii) Incitement to an offence.

(ii) **'Security of State'**.—Security of the State means 'the absence of serious and aggravated forms of public disorder', as distinguished from ordinary breaches of 'public safety' or 'public order' which may not involve any danger to the State itself. Thus, security of the State is endangered by crimes of violence intended to overthrow the government, levying of war and rebellion against the government, external aggression or war, but not by minor breaches of public order or tranquillity, such as unlawful assembly, riot, affray, rash driving promoting enmity between classes and the like.<sup>23</sup> But incitement of violent crimes like murder, which is an offence against 'public order', may also undermine the security of the State.<sup>23</sup>

But the advocacy of revolutionary socialism as a panacea for present-day evils cannot be restricted under the present ground, unless the use of violence is suggested.<sup>23</sup>

(iii) **'Friendly relations with foreign States'**.—The subject of this exception to the freedom of speech and expression is to prevent libels against foreign States in the interests of maintaining friendly relations with them.

20. *Sadhi Shamsar v. State of Punjab*, A. 1954 S.C. 276.

21. *Ramesh Thakur v. State of Madras*, (1950) S.C.R. 594: (1950-51) C.C. 40 (47): A. 1950 S.C. 124.

22. *Kedar Nath v. State of Bihar*, (1962) Supp. (2) S.C.R. 709 (896, 899).

23. *State of Bihar v. Shaktisinh*, (1962) S.C.R. 654 (683): A. 1962 S.C. 389.

It is to be noted, however, that members of the Commonwealth of Nations, including Pakistan, are not 'foreign States' for the purposes of this Constitution, according to the Declaration of Foreign States Order, 1950. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

(iv) 'Public Order'.—1. This ground was introduced by the **Constitution (First) Amendment Act, 1951**, in order to meet the situation arising from the Supreme Court decision in *Ramesh Thappar's case*<sup>24</sup> that ordinary or local breaches of public order were no grounds for restricting the freedom of speech guaranteed by the Constitution.

Following this decision,<sup>24</sup> it was held in some cases that incitement to individual murder or promoting disaffection amongst classes did not tend to undermine the security of the State and was not, accordingly, punishable under the Constitution.

<sup>25</sup> It was to override the above judicial decisions that the ground 'public order' was inserted by the Constitution (First Amendment) Act.

After this amendment, the Supreme Court itself has, in *State of Bihar v. Shailabala*,<sup>25</sup> explained its decision in *Ramesh Thappar's case*,<sup>24</sup> saying that it was never meant in *Ramesh Thappar's case*<sup>24</sup> that individual crimes of violence like murder would not undermine the 'security of the State'.

2. As to the meaning of 'public order', generally, see under Entry 1 of Sch. VII, *post*

Though the scope of the several grounds specified in cl. (2) may sometimes overlap, they must ordinarily be intended to exclude each other. So, interpreted, 'public order', in the present context, is synonymous with 'public peace, safety and tranquillity'.<sup>25</sup>

3 It follows that—

(A) In the interests of public order, the State may impose restrictions on—

(a) The incitement of—

(i) Withholding of services by public employees or by persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community,<sup>1-4</sup> or by members of the police forces.<sup>5</sup>

(ii) Committing breach of discipline amongst employees of the class referred to above.<sup>4</sup>

(iii) Feelings of enmity or hatred between different sections of the community.<sup>6</sup>

(b) The use of loudspeakers likely to cause a public nuisance,<sup>7</sup> or to affect the health of the inmates of residential premises, hospitals and the like.<sup>8</sup>

(B) On the other hand, the following cannot be restricted or penalised in the interests of 'public order'—

Advocacy of non payment of Government dues without resorting to violence.<sup>9</sup>

24. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594.

25. *Subdt. v. Ram Manohar*, A. 1960 S.C. 633.

1-4. *State v. Ramanand*, A. 1955 Pat. 188 (195).

5. *Dalbir v. State of Punjab*, A. 1962 S.C. 1106.

6. *Virendra v. State of Punjab*, A. 1958 S.C. 986.

7. *Rajani v. State*, A. 1958 All. 380.

8. *State of Rajasthan v. Chawla*, (1959) Supp. (I) S.C.R. 904.

(iv) **'Decency or Morality'**.—This exception has been engrafted for the purpose of restricting speeches and publications which tend to undermine public morals.<sup>10</sup>

The question whether an utterance is likely to undermine decency or morality is to be determined with reference to the probable effects it may have upon the audience to which it is addressed.<sup>10</sup> The age, culture, and the like of the audience thus becomes a material question.

But the use of mere abusive language, which has no suggestion of obscenity to the persons in whose presence they are uttered, would not come under the present ground.<sup>9</sup>

On the other hand, a law against 'obscenity' would be protected under the present clause.<sup>10</sup> Obscene means 'offensive to modesty or decency; lewd, filthy, repulsive.'<sup>10</sup> But even an immodest representation may not be reasonably restricted in the interests of decency or morality if it conduces to the propagation of ideas or informations of public interest, e.g., in books on medical science.<sup>10</sup> In general, ideas having social importance will *prima facie* be protected unless the obscenity is so gross and decided that the interest of the public dictates the other way. The test of obscenity is thus a question of degree and varies with the moral standard of the community in question.<sup>10</sup>

The test of obscenity is whether the publication, read as a whole,<sup>10</sup> has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Each work must be examined by itself and a comparison with other works may not improve the quality of a book which is indecent or obscene.<sup>10</sup>

When obscenity and art are mixed, in order to protect the work, art must be so preponderating as to throw obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.<sup>11</sup> A balance should be maintained between freedom of speech and expression and public decency and morality, but when the latter is *substantially transgressed*, the former must give way.<sup>10</sup> The test to adopt in our country (regard being had to our community *mores*) is that obscenity without a *preponderating* social purpose or profit cannot have the constitutional protection of free speech and expression; and obscenity is dealing with sex in a manner appealing to the carnal side of human nature.<sup>11</sup>

(v) **'Contempt of Court'**.—In the exercise of his right of freedom of speech and expression, nobody can be allowed to interfere with the due course of justice or to lower prestige or authority of the Court.<sup>12</sup>

(vi) **'Defamation'**.—Just as every person possesses the freedom of speech and expression, every person also possesses a right to his reputation which is regarded a property. Hence, nobody can so use his freedom of speech or expression as to injure another's reputation. Laws penalising defamation do not, therefore, constitute infringement of the freedom of speech.<sup>12</sup>

(vii) **'Incitement to an offence'**.—The reasons that led to the insertion of this ground of restriction have already been explained (p. ...., ante). The ground, as stated, will permit legislation not only to punish or prevent incitement to commit serious offences like murder which lead to

9. *Kantar Singh v. State of Punjab*, A. 1966 S.C. 541.

10. *Ranjit v. State of Maharashtra*, A. 1965 S.C. 881 (885); (1965) 1 S.C.R. 68 (69, 74, 75), condemning 'Lady Chatterley's Lover' as 'obscene'.

11. *Ranjit v. State of Maharashtra*, A. 1965 S.C. 881 (889).

12. See C 8, Vol. I, pp. 639-43.

breach of public order, but also to commit any 'offence', which according to the General Clauses Act, means 'any act or omission made punishable by any law for the time being in force'. Hence, it is not permissible to instigate another to do any act which is prohibited and penalised by any law.<sup>13</sup> But mere instigation not to pay a tax may not necessarily constitute 'incitement to an offence'.<sup>14</sup>

**'In the interests of'**— See p 92, ante

### Restrictions in the interests of public order.

A. In the interests of public order, the State may impose restrictions on—

(a) 'The incitement of—

(i) Withholding of services by public employees or by persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community.<sup>15</sup>

(ii) Committing breach of discipline amongst employees of the class referred to above, or amongst members of the police forces or the forces charged with the maintenance of public order.<sup>16</sup>

(iii) Feelings of enmity or hatred between different sections of the community.<sup>17</sup>

(b) Insulting the religious feelings of any class of citizens, with a deliberate and malicious intention (s. 295A, I.P.C., s. 99A, Cr. P. C.);<sup>18</sup> or affecting the health of the inmates of residential premises, hospitals and the like.<sup>19</sup>

B. On the other hand, restrictions cannot be imposed, 'in the interests of public order', on utterances of the following kinds—

(i) Mere criticism of a party government.<sup>20</sup>

(ii) Criticism<sup>21</sup> of, or defamatory slogan against, a Minister.

(iii) Instigation of persons not to pay a tax or other imposition, not involving 'incitement to an offence'.<sup>22</sup>

(iv) Scurrilous attacks upon a Judge.<sup>23</sup>

### Mere disaffection cannot be penalised under the Constitution: Law of Sedition.

1. Criticism of a party Government is no ground for restricting freedom of speech and expression, unless it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of any offence.<sup>24</sup> 'Sedition' i.e., merely exciting 'disaffection or bad feelings towards the Government' is, therefore, no ground for restricting the freedom of speech and expression, under Art 19 (2).<sup>25</sup>

2. In the case of *Kedarnath v. State of Bihar*,<sup>24</sup> the Supreme Court has saved s. 124A of the I.P.C. from unconstitutionality by giving

13. *Ibid*, pp. 564-5.

14. *Supdt. v. Ram Manohar*, A. 1960 S.C. 633.

15. *State v. Ramanand*, A. 1956 Pat 188 (193).

16. *Dalbir v. State of Punjab*, (1962) 3 SCR 25 A 1962 S.C. 1106.

17. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620. (1957) S.C.R. 860.

18. *Raja v. State*, A. 1958 All. 360.

19. *State of Rajasthan v. Chawla*, (1959) Supp. (I) S.C.R. 904: A. 1959 S.C. 544.

20. *Ahmad v. State*, A. 1951 All. 459.

21. *Ram Nandan v. State*, A. 1959 All 101 (110).

22. *Ch. Korter Singh v. State of Punjab*, A. 1956 S.C. 541.

23. *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276.

23a. Or affecting the integrity or sovereignty of India.

24. *Kedar Nath v. State of Bihar*, A. 1962 S.C. 955: (1962) Supp. (2) S.C.R. 769.

25. *Ramesh Thapper v. State of Madras*, (1950) S.C.R. 594 (602): A. 1950 S.C. 124.

is a narrow construction, following the view of the Federal Court in *Niharendu v. K. E.*<sup>1</sup> and rejecting the interpretation given to it by the Privy Council in *K. E. v. Sadashiv*.<sup>2</sup> In *Niharendu's case*<sup>1</sup> the Federal Court held that "public disorder or the reasonable anticipation or likelihood of public disorder" was the gist of the offence of sedition and that in order to be punishable under s. 124A,—“the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency.”

But there had been a long line of decisions in India prior to that of the Federal Court as well as of the Privy Council itself where the word 'disaffection' in the section was interpreted literally, to mean mere absence of affection or ill-will, whether attendant with any incitement to violence or not. The Supreme Court has in *Kedarnath's case*<sup>3</sup> held that if the section was given the wide interpretation as in the Privy Council decision, it would be inconsistent with Art. 19 (2) inasmuch as it would then have no relation to the grounds of restriction permissible under clause (2) of Art. 19, viz., “the interests of the security of the State, or public order,” which are relevant in the present context. The Supreme Court<sup>3</sup> has, accordingly, interpreted s. 124A to mean that an utterance would be punishable under this section only when it is intended or has a reasonable tendency to create disorder or disturbance of the public peace by resort to violence. It has also been observed by the Supreme Court that the expression “the Government established by law” has to be distinguished from the persons for the time being engaged in carrying on the administration. The ‘Government established by law’ is the visible symbol of the State. What is punishable under s. 124A is, therefore, not a criticism of the Government in power, however strong it may be, but utterances which either intend or have a tendency to subvert the existing Government by means of violence.

3. In view of the above interpretation given by the Supreme Court<sup>3</sup> the question of constitutionality raised by the vague word 'disaffection' has been obviated. In cases of future prosecution under this section, the success of the State will, however, depend upon making out a case that the utterances complained of were either intended to cause disorder or violence or have a proximate or reasonable tendency to cause such disorder or violence.

### Criticism of a Minister or other high dignitaries.

As stated earlier the criticism or even vulgar abuse of a Minister<sup>4</sup> or scurrilous attacks upon a Judge<sup>5</sup> cannot be punished 'in the interests of the security of the State,'<sup>3</sup> nor even of 'public order'<sup>3</sup> unless there is a reasonable apprehension of breach of the peace to such an extent that it may be said that there is a rational connection between the utterances and breach of the peace. Merely because the public is 'annoyed' by reason of the utterances is not enough. The remedy in such cases is an action for defamation brought by the dignitary, under the ordinary law.<sup>6</sup>

### The rights to strike and to picket.

1. The Supreme Court has laid down, in a number of cases<sup>6,7,8</sup> that

1. *Niharendu v. K. E.*, (1954) F.C.R. 38: A. 1942 F.C. 22.
2. *K. E. v. Sadashiv*, (1947) 74 I.A. 69: A. 1947 P.C. 82.
3. *Kartar Singh v. State of Punjab*, A. 1956 S.C. 541.
4. *Sodhi Shamsher v. State of Pepsu*, A. 1954 S.C. 267.
5. *Kartar Singh v. State of Punjab*, A. 1956 S.C. 541.
6. *All India Bank Employees' Association v. National Industrial Tribunal*, A. 1962 S.C. 171 (181): (1962) 3 S.C.R. 269 (292).
7. *Radhey Shyam v. P. M. G.*, A. 1965 S.C. 311 (313).
8. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166.

there is no fundamental right to strike in India, under any of the sub-clauses of Art. 19 (1) of the Constitution.

2. It follows that those High Court<sup>9</sup> decisions in which it was suggested that peaceful picketing was a mode of exercise of the freedom of speech of the strikers are no longer good law.

(A) *Substantive aspect.*

It seems that in determining the reasonableness of a restriction upon the freedom of expression, the Supreme Court would take a stricter view than in the case of any other fundamental right and would annul any imposition which would 'operate harshly' on the freedom of speech and expression.<sup>10</sup>

**Instances of unreasonable restrictions.**

1. S. 3 (d) of the Drugs & Magic Remedies (Objectionable Advertisement) Act, 1954 provides—

"... no person shall take part in any publication of any advertisement referring to any drug which suggested . . . the use of that drug for—

the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in rules made under this Act."

The rule-making power under the Act was given to the Central Government. *Held*, that the italicised portion conferred uncanalised and uncontrolled power to the Executive to include, by specifying it in the Rules, *any disease* within the mischief of the Act, and thus imposed an unreasonable restriction upon the freedom of expression.<sup>11</sup>

2. S. 8 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, which was enacted "to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith", provided—

"Any person authorised by the State Government . . . may seize and detain any document, article or thing which such person has reason to believe contains an advertisement which contravenes any of the provisions of this Act. . . ."

*Held*, that the above provision went far beyond the purposes of the Act and, in the absence of adequate safeguards, constituted an unreasonable restriction on the freedom of expression guaranteed by Art. 19(1)(a).<sup>11</sup>

3. R. 4-A of the Bihar Government Servants Conduct Rules, 1956 which prohibits Government servants from participating in *any* demonstration . . . with any matter pertaining to his conditions of service has been struck down as an unreasonable restriction on the ground that it is wide enough to include within its prohibition even the demonstrations or expressions of ideas which are peaceful and orderly and may not, accordingly, lead to a breach of public order.<sup>12</sup>

4. A person detained under the D. I. Rules cannot be deprived of his right to publish a book unless the publication itself is prejudicial to the objects of the D. I. Act.<sup>13</sup>

9. Cf. *In re Vengan*, A. 1952 Mad. 95; *Damodar v. State*, A. 1951 Bom. 459 (464).

10. *Seshadri v. D. M.*, A. 1954 S.C. 747; (1955) 1 S.C.R. 686 (690).

11. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554.

12. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166.

13. *State of Maharashtra v. Pandurang*, (1965) S.C. [unrep.].

**Instances of reasonable restrictions.**

1. Dramatic performances, cinematographic exhibition and the like stand on a different footing inasmuch as there is a difference between a written word and a spoken word and other representations which react immediately and more violently on the minds of the audience.<sup>14</sup> Pre-censorship of such representation is not, therefore, *per se* invalid but may be so if it violates the condition of procedural reasonableness.

2. The time, place and manner of using mechanical devices causing noise or disturbance, such as loudspeaker and amplifier may be controlled in the interest of the public.<sup>15</sup>

3. The printer or publisher of every printed material may be required to print on the material the name of the printer and publisher and the place of printing and publishing.<sup>16</sup>

4. Restrictions may be imposed on commercial advertisements in the interests of morality and decency.<sup>17</sup>

**(B) Procedural aspect.****Instances of unreasonable restrictions.**

1. S. 10 of the Dramatic Performances Act, 1876, which empowers an executive officer to restrict a dramatic performance on his subjective satisfaction and without giving an opportunity to be heard to the persons going to be affected by the order, constitutes an unreasonable restriction upon the freedom of expression.<sup>18</sup>

2. S. 3(1) of the Punjab Special Powers (Press) Act, 1956 which empowered the State Government to prohibit the bringing into the State of any newspaper, if the Government was *satisfied* that such action was necessary for the maintenance of communal harmony or public order, has been held to be invalid on the ground that it placed the whole matter at the subjective satisfaction of the State Government without even providing for a right of representation to the party affected<sup>19</sup> (see p. .... *ante*).

**Instances of reasonable restrictions:**

Provision for a summary trial for contempt of court is not an unreasonable restriction.<sup>19a</sup>

**Freedom of Press.**

1. Under *our* Constitution, there is no separate guarantee of freedom of the Press. It is implicit in the freedom of expression which is conferred on all citizens.<sup>19-20</sup>

2. It follows that this freedom cannot be claimed by a newspaper or other publication run by a non-citizen.<sup>19</sup>

3. The freedom of Press, under *our* Constitution, is not higher than the freedom of an ordinary citizen.<sup>19</sup> It is subject to the same limitations as are imposed by Art. 19 (2), and to those limitations only.<sup>21</sup>

14. *State v. Baboo Lal*, A. 1956 All. 57 (574).

15. *Rajanikant v. State*, A. 1958 All. 360; *Indulal v. State*, A. 1963 Cal. 259.

16. *Wakhare v. State*, A. 1959 M. P. 208.

17. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554; (1960) 2 S.C.R. 671.

18. *State v. Baboo Lal*, A. 1956 All. 571 (574).

19. *Virendra v. State of Punjab*, A. 1958 S.C. 986.

19a. *Sher Singh v. Kapur*, A. 1968 Punj. 238 (230).

19b. *Sharma v. Srikrishna*, A. 1959 S.C. 395 (402).

20. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (614); (1959) S.C.R. 12 (121-2).

21. *Sahel Papers v. Union of India*, A. 1962 S.C. 305.

4. The Press is not, accordingly, immune from—
  - (a) the ordinary forms of taxation;<sup>20</sup>
  - (b) the application of the general law relating to industrial relations;<sup>20</sup>
  - (c) the regulation of the conditions of service of the employees.<sup>20</sup>

### What constitutes a restriction upon the freedom of the Press.

1. Any restriction that is directly imposed upon the right to publish,<sup>22</sup> to disseminate information or to circulate<sup>20, 21</sup> constitutes a restriction upon the freedom of the Press.

2. The right to publish includes the right to publish not only its own views but also those of its correspondents.<sup>22</sup>

3. The right to circulate refers to the matter to be circulated as well as the volume of circulation.<sup>21</sup>

4. To require a newspaper to reduce its space for advertisements would directly affect its circulation since it would be bound to raise its price.<sup>21</sup>

### Unreasonable restrictions upon Freedom of Press.

It would not be legitimate for the State—

(a) to subject the Press to laws which take away or abridge the freedom of expression or which would curtail circulation and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid;<sup>20</sup>

(b) to single out the Press for laying upon it excessive and prohibitive burdens which would restrict the circulation impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media;<sup>20</sup>

(c) to impose a specific tax upon the Press deliberately calculated to limit the circulation of information;<sup>20</sup>

(d) to require the newspapers either to reduce the number of their pages or to raise their prices according to a schedule prescribed by the State,<sup>20</sup> on some ground extraneous to cl. (2) e.g., the elimination of unfair competition amongst newspapers.<sup>23</sup>

### Constitutionality of pre-censorship.

1. Prior to the First Amendment Act, 1951, the word 'reasonable restriction' did not exist in Art 19 (2).<sup>24</sup> Hence, in the earlier cases,<sup>10, 12</sup> it was held that pre-censorship or any form of previous restraint on the freedom of expression or the press *prima facie* constituted an infringement of the right guaranteed by Art 19 (1).

2. The Amendment of 1951, however, empowered the Court to adjudge the reasonableness of a restriction imposed even on the right guaranteed by Art. 19 (1) (a) and such restriction could be struck down only if it was unreasonable.

22. *Virendra v. State of Punjab*, (1956) S.C.R. 308; A. 1957 S.C. 896

23. *Sakal Papers v. Union of India*, A. 1962 S.C. 305 (310).

24. Vide C5, Vol. 8, p. 14.

25. *Babulal v. State of Maharashtra*, A. 1961 S.C. 884 (891).

10. *Ramesh Thapper v. State of Madras* (1950) S.C.R. 594; A. 1950 S.C. 124.

11. *Brij Bhushan v. State of Delhi*, (1950) S.C.R. 605.

12. *Cf. Keshavan v. State of Bombay*, (1951) S.C.R. 228.



This change in the law was acted upon by the Supreme Court in *Virendra v. State of Punjab*,<sup>22</sup> and *Babulal v. State of Maharashtra*. In these cases, it has been held that—

Anticipatory action may be reasonable in emergent circumstances, e.g., to prevent a breach of the peace.<sup>23</sup>

Whether it would be unreasonable in given circumstances would have to be determined applying the various tests of urgency, duration, nature of the publications affected, and the like.<sup>1</sup> Thus—

(ii) (a) S. 3 (1) of the Punjab Special Powers (Press) Act, 1956 provided—

"The State Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may by notification, prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication."

The Supreme Court invalidated<sup>1</sup> the above provision on the ground that it was unreasonable both from the substantive and procedural points of view. It was held that it was substantively objectionable because no limitation was imposed either as to the *duration* of the ban on importation authorised by the provision or as to the *subject-matter* of the publication. It extended to any publication, and might be of an indefinite or unlimited duration. Procedurally, again, it placed the whole matter at the subjective determination of the State Government and there was no provision even for any representation of the party affected. It thus offended against the rules of natural justice.

(b) At the same time, the Court upheld the validity of another section of the same Act which was not lacking in the above respects. This was s. 2(1)(a), which ran as follows:

"2. (1) The State Government or any authority so authorised in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the *maintenance of communal harmony affecting or likely to affect* public order, may, by order in writing addressed to a printer, publisher or editor,

"(a) prohibit the printing or publication in any document or any classes of documents of any matter relating to a *particular* subject or classes of subjects for a *specified period* or in a particular issue or issues of a newspaper or periodical;

"Provided that no such order shall remain in force for more than *two months* from the making thereof;

"Provided further that the person against whom the order has been made may within ten days of the passing of this order make a *representation* to the State Government which may on consideration thereof modify, confirm or rescind the order "

In short,—

To prevent a breach of the peace during a period of emergency (such as communal agitation), *temporary* restrictions may also be imposed upon the publication of a *specified* class of matter in a newspaper provided the rules of natural justice are complied with.

(iii) It would not be unreasonable to demand security from a Press which is used for inciting people to the commission of serious crimes of violence.

(i) The validity of s. 144 of the Criminal Procedure Code which empowers the District Magistrate to impose a pre-censorship on newspapers, has been upheld on the

13. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554.

1. *Virendra v. State of Punjab*, A. 1958 S.C. 986.

2. *State of Bihar v. Sailabala*, (1962) S.C.R. 654.

ground that the restriction imposed by it was reasonable in view of the fact that it could be imposed only in emergent circumstances and for a temporary period.<sup>3</sup>

**Arts. 19 (1) (a); 105 (3); 194 (3): Freedom of Speech and Parliamentary privilege.**— See under Art. 105, post.

**Arts. 19 (1) (a) and 343.**

The subject of official languages having been dealt with in the specific Art. 343, must be deemed to be out-side the purview of Art. 19 (1) (a).<sup>4</sup>

**Constitutionality of some Acts with reference to Art. 19 (1) (a).**

**Bombay Industrial Relations Act, 1946:**

*Held valid*— Ss. 12-13<sup>4</sup>

**Bombay Prohibition Act, 1949:**

*Held invalid*.— Ss. 23(a);<sup>5</sup> 23(b);<sup>6</sup> 24(1)(a).<sup>5</sup>

**Criminal Procedure Code, 1898:**

*Held valid*.— S. 99A;<sup>7</sup> s. 144.<sup>7</sup>

**Dramatic Performances Act, 1876:**

*Held invalid*.— S. 10.<sup>8</sup>

**Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954:**

*Held invalid*.— S. 3(d).<sup>9</sup> 8<sup>9</sup>

**East Punjab Public Safety Act:**

*Held invalid*.— S. 7(1)(c).<sup>10, 25, 1</sup>

**Essential Services Maintenance Ordinance, 1960:**

*Held valid*— Ss. 3,<sup>2</sup> 4,<sup>2</sup> 5.<sup>2</sup>

**Indian Penal Code, 1860:**

*Held valid*.— Ss. 124A (narrowly interpreted);<sup>3</sup> 292;<sup>4</sup> 295A<sup>5</sup> 499a 505.<sup>4</sup>

**Industrial Disputes (Appellate Tribunal) Act, 1950:**

*Held valid*.— S. 27.<sup>6</sup>

**Madras City Police Act, 1888:**

*Held valid*—S. 41.<sup>7</sup>

**Newspaper (Price & Page) Act, 1956:**

*Held invalid*—S. 3(1).<sup>8</sup>

**Police (Incitement to Disaffection) Act, 1922:**

*Held valid*.— S. 3;<sup>9</sup> read with its Explanation

3 *Wakkare v. State*. A. 1959 MP 208.

4 *Kulkarni v. State of Bombay*, (1954) S.C.R. 384.

5 *State of Bombay v. Balsara*, (1951) S.C.R. 682; A. 1952 S.C. 318

5a. *Ramaniah v. Special Public Prosecutor* A. 1961 A. P. 190

6 *Veerabrahman v. State*, A. 1959 A. P. 572.

7 *Babulal v. State of Maharashtra* A. 1961 S.C. 884.

8 *State v. Baboo Lal*, A. 1956 AP. 581 (574)

9 *Hamdard Dvakhana*, (1960) 2 S.C.R. 810; A. 1960 S.C. 554.

10-25. *Brij Bhushan v. State of Delhi*, (1950) S.C.R. 605.

1. *Romesh Thapper v. State of Madras*, (1950) S.C.R. 594.

2. *Radhey Shyam v. P. M. G.*, A. 1965 S.C. 311.

3. *Kedar Nath v. State of Bihar*, A. 1962 S.C. 955; (1962) Supp. 2 S.C.R. 769.

4. *Ranjit v. State of Maharashtra*, A. 1965 S.C. 681 (886); (1965) 1 S.C.R. 65.

5. *Ramji Lal v. State of U. P.*, (1967) S.C.R. 860 (867); A. 1967 S.C. 620.

6. *Kulkarni v. State of Bombay*, (1954) S.C.R. 384.

7. *Annadurai*, in re, A. 1959 Mad. 63.

8. *Sakal Papers v. Union of India*, A. 1962 S.C. 305.

9. *Indulal v. Ambrish*, (1959) 62 Bom.L.R. 206 (214); A. 1960 Bom. 305.

**Punjab Special Powers (Press) Act, 1956:***Held valid.*—S. 2(1)(a),<sup>10</sup> (b).<sup>10</sup>*Held invalid.*—S. 3.<sup>10</sup>**Representation of the People Act, 1951:***Held valid.*—Ss. 123(5),<sup>11</sup> 125(5).<sup>11</sup>**U. P. Special Powers Act, 1932:***Held void.*—S. 3.<sup>12</sup>**Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955:***Held valid.*—Whole Act. <sup>13</sup>**Cl. (1) (b): Freedom of Assembly.**

This clause guarantees the freedom of citizens to meet with each other in any number provided the assembly is (a) peaceable<sup>14</sup> and (b) unarmed. Like other rights, this also is not an absolute right but is liable to be subjected to 'reasonable' restrictions in the interests of public order. The right of public meeting or of procession is not specifically guaranteed by the Constitution but will follow from the right of assembly.

**'Public Order.'**— See pp. 33, *ante***Instances of reasonable restrictions.**

(i) S. 144 of the Cr P. C. which authorises the making of *temporary* orders for the prohibition of meetings or processions to prevent an *imminent* breach of the peace, constitutes a reasonable restriction upon this freedom.<sup>15</sup>

(ii) Throwing the burden of proof upon the accused, subject to adequate safeguards, cannot be said to constitute an unreasonable restriction as regards a law to suppress the mischief of gambling.<sup>16</sup>

(iii) Restrictions may be imposed upon the holding of meetings on private property belonging to others or at places of works, such as workshops and office compounds.<sup>17</sup>

(iv) The purpose of the meeting offer another ground of restriction, such as an assembly for the purpose of taking opium.<sup>18</sup>

**Instances of unreasonable restrictions.**

R 4-A of the Bihar Government Servants Conduct Rules, 1956, which prohibits Government servants from participating "in any demonstration with any matter pertaining to his conditions of service" has been struck down as an unreasonable restriction on the ground that it is wide enough to include within its prohibition even demonstrations through assemblies or processions which may be peaceful and orderly and may not, accordingly, lead to a breach of public order.<sup>19</sup>

**Constitutionality of some Acts with reference to Art. 19(1)(b):****Criminal Procedure Code, 1898:***Held valid.*—S. 144;<sup>20</sup> 188.<sup>21</sup>

10. *Virendra v. State of Punjab*, (1958) S.C.R. 308 (327).

11. *Jamuna Prasad v. Lachhi Ram*, (1955) 1 S.C.R. 608; A. 1954 S.C. 686

12. *Supdt. v. Ram Manohar*, (1960) 1 S.C.R. 821; A. 1960 S.C. 633.

13. *Express Newspapers v. Union of India*, A. 1958 S.C. 578.

14. *Cf. Linghanna v. State of Mysore*, A. 1954 Mys. 12.

15. *Kishan Chander v. State of M. P.*, (1964) 1 S.C.R. 765.

16. *Babulal v. State of Maharashtra*, A. 1961 S.C. 884.

17. *Railway Board v. Niranjan*, A. 1963 Punj. 336.

18. *State v. Mangala*, A. 1957 All. 753

19. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166.

20. *Kishan Chander v. State of M. P.*, (1964) 1 S.C.R. 765; *Babulal v. State*, A. 1961 S.C. 884; (1961) 3 S.C.R. 423.

21. *Ram Manohar v. State*, A. 1958 All. 100 (III).

Madras City Police Act, 1888:

Held valid.—S. 41.<sup>22</sup>

Mysore Police Act, 1888:

Held valid.—S. 45.<sup>23</sup>

### CL. (1) (c): Freedom of Association.

1. The right guaranteed by this clause is the ordinary right which is enjoyed by all citizens to *form* associations; it has no reference to a right which is conferred by a particular *statute* to act as a member of a body which is the creation of the statute itself.<sup>21, 22</sup> Thus—

It cannot be said that the supersession of a District Board under s. 131 of the Bengal Local Self-Government Act operates as a restriction upon the rights of the members of the Board under Art. 19 (1) (c).<sup>24</sup>

2. The word 'form' includes not only the right to start an association but also to continue it,<sup>25, 1</sup> or to refuse to be a member of an association, if he so desires.<sup>2</sup>

3. The right to form associations or unions includes associations for any *lawful* purpose,<sup>3</sup> e.g., a trade union,<sup>4</sup> and Government servants are not excluded from its protection.<sup>4</sup>

4. Since the right to form a union belongs to all workmen, every workman under an employer has the freedom to form a union of his own choice and to refuse to become a member of any union he does not like.<sup>4</sup> Conversely, no union can claim a monopoly right or a right to complain if some other union is brought into existence by other workmen.<sup>5</sup>

5. On the other hand—

(a) No question of infringement of the fundamental right of association arises where the services of a government servant are terminated on the ground that he is a member of the Communist Party, because the order of termination does not prevent him from remaining a member of the Communist Party, but terminates his service which is held at the pleasure of the government and to which service there is no fundamental right.<sup>6</sup>

(b) The right to 'form' an association guaranteed by sub-clause (c) does not carry with it a further guarantee that the *objects* or *purposes* of an association so formed shall not be interfered with by law except on the grounds specified in cl. (4), i.e., public order and morality.<sup>7</sup>

(c) As to the concomitant rights of an association after it is formed, they cannot be different from the rights which can be claimed by the individual citizens of which the association is composed.<sup>8</sup> The reason is that

22. *Annadurai, in re*, A. 1959 Mad. 62 (67).

23. *Dasappa v. Addl. Dt. Magistrate*, A. 1960 Mys. 57.

24. *Bidhu v. State of W. B.*, A. 1962 Cal. 901.

25. *Kulkarni v. State of Bombay*, (1952-54) C.C. 176; A. 1954 S.C. 73.

1. *Row v. State of Madras*, A. 1951 Mad. 117 (F.B.); *U. P. Shramik v. State of U. P.*, A. 1960 All. 45 (49), *E. R. E. Congress v. General Manager*, A. 1965 Cal. 389.

2. *Sitharamachary v. Senior Dy. Inspector*, A. 1958 A.P. 78. There is an obiter in *Tika Ramjit v. State of U. P.*, A. 1956 S.C. 676 (709) that the negative right may not be a fundamental right.

3. *All India Bank Employees' Assn v. N. I. Tribunal*, A. 1962 S.C. 171 (179).

4. *O. K. Ghosh v. Joseph*, A. 1963 S.C. 812 (815).

5. *K. R. W. Union v. Registrar*, A. 1967 Cal. 507 (508).

6. *Balakrishna v. Union of India*, A. 1958 S.C. 232.

7. *All India Bank Employees' Assn. v. N. I. Tribunal*, A. 1962 S.C. 171. The contrary view taken in *U. P. Shramik Sangh v. State of U. P.*, A. 1960 All. 45 (49) is thus no longer good law.

Art. 19 grants rights to the citizens as such, and associations can lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregate of citizens composing the body.<sup>7</sup> Thus, while the right to form a union is guaranteed by sub-cl. (c), the right of the members of the association to meet would be guaranteed by sub-clause (b), their right to move from place to place by sub-clause (d), and so on. To hold otherwise would mean that while in the case of an individual citizen to whom a right to carry on a trade or business is guaranteed by sub-cl. (g) of clause (1), the validity of a law which imposes any restriction on this guaranteed right would have to be decided by the criteria laid down in clause (b), if he was associated with another and carried on the same activity, say, as a partnership or as a company etc., he would obtain larger rights and the validity of legislation restricting such rights would have to be tested by different standard, namely, that laid down in clause (4).<sup>7</sup>

(d) It follows that the right to "form" an association does not include any guaranteed right of collective bargaining or to strike.<sup>7-8</sup> Such right must be derived from the freedom of business or profession or occupation which is guaranteed by sub-cl. (g) and which can be restricted on the ground specified in cl. (b), i.e., interests of the general public.<sup>1</sup>

(e) The freedom of association guaranteed by this article cannot include a right of any particular association to obtain the recognition of the Government.<sup>9</sup> Hence, the conditions imposed by Government for obtaining recognition cannot be challenged as unreasonable restrictions imposed upon the freedom of association.<sup>9-10</sup>

#### Conditions upon recognition and withdrawal of recognition.

Though there is no fundamental right, in relation to an association, to obtain Government recognition, the question arises whether the fundamental right of association may be rendered nugatory by imposing recognition as a condition for dealing with the Government or by imposing unreasonable conditions for the grant or continuance of Government recognition.

(a) To condition the freedom of individuals to form any association they like upon the grant by the Government of recognition to such association, or in other words, to deny the individuals the freedom to become members of any association not recognised by the Government, constitutes an infringement of the freedom of association guaranteed by Art. 19 (1) (c).<sup>11</sup>

(b) Even though in the case of Government servants, the State has an interest in the associations formed by the employees, in the interests of efficiency or discipline, the control of the Government over such associations must, in order to be valid, be relatable to 'public order' or 'morality' on which grounds only the freedom of association may be restricted, under Art. 19 (4). Where, therefore, the Government compels an employee to become a member only of a 'recognised association' and then provides that recognition may be refused or withdrawn on grounds unrelated to public order or morality, such restrictions render illusory the fundamental right guaranteed by Art. 19 (1) (c).<sup>12</sup>

(c) That the same result would follow where without Government recognition, the association cannot effectively function for the object for which it has been formed.<sup>12</sup>

8. *Kameshwar v. State of Bihar*, (1962) Supp. 3 S.C.R. 369; A. 1962 S.C. 1166.

9. *Raghubar v. Union of India*, A. 1962 S.C. 263 (270).

10. *Kulhari v. State of Bombay*, A. 1954 S.C. 73; (1954) S.C.R. 384.

11. *O. K. Ghosh v. Joseph*, A. 1963 S.C. 812 (815).

12. *E. R. R. Congress v. General Manager*, A. 1965 Cal. 389.

Where, therefore, the Government Rules provide that unless a trade union is recognised by the Government, it shall have no collective footing in making representations to the Government and that its representations will be subjected to the rules and regulations governing the memorials or petitions of individual employees, and recognition, on the other hand, will confer other advantages without which it will be difficult, if not impossible, for an unrecognised trade union to maintain the association and to serve the very purpose for which a trade union is formed, namely, represent the grievances of the employees collectively to the employer, and to bring upon him the collective weight of the trade union in the negotiations on behalf of the employees in the matter of such grievances,<sup>13</sup> the conditions for the grant or continuance of recognition must answer the tests of substantive and procedural reasonableness<sup>14</sup> and must also be relatable to the grounds of public order and morality as are mentioned in Art. 19 (4).<sup>12</sup>

### **Reasonableness of Restrictions upon the Freedom of Association.**

#### *(a) Substantive aspect*

#### **Instances of reasonable restrictions.**

The Bombay Industrial Relations Act, 1945, provides that in order to be registered as a 'representative Union' so as to be entitled to represent with the employers, a Union must have a minimum membership of 15% of the total number of employees employed in any industry in any local area. This provision was challenged on the ground that it infringed the provisions of sub-clause (c) of Art. 19(1). *Held*, there was no infringement of Art 19 (1) (c), for, no restriction was imposed upon the freedom of the workers to form any Union. The only provision was that in order to represent the interests of the entire body of the workers in any industry, a Union must enlist a prescribed minimum of membership. It was open to any union of workers to enlist the prescribed percentage of membership and claim the privilege. The constitutional right to form a trade union does not carry with it any right of every individual union to represent its members in an industrial dispute and that any conciliatory law which provides for representation of labour by 'representative unions, e.g., by providing that only those unions which represent not less than 15% of the workers in an industry would be recognized for the purpose of representing the workers of that industry in an industrial dispute does not constitute a 'restriction' upon the freedom of association.<sup>10</sup>

#### **Instances of unreasonable restrictions.**

#### *(A) Substantive aspect*

(1) There cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of an administrative censorship.<sup>11</sup>

Thus, it is an unreasonable restriction to compel employees to obtain permission of the authorities before forming unions and to prohibit them from becoming members of union not constituted in accordance with the orders of Government. In this case, it was observed that even though Government as employer might choose to recognise one association only as representative of a particular class of employee, it could not prevent the employees from becoming members of other associations which were lawful nor make the previous permission of Government a condition precedent for the exercise of the employees' right to become a member of an association.<sup>11</sup>

13. Cf. *D. N. Banerjee v. P. R. Mukherjee*, (1963) S.C.R. 302 (310); *Swadeshi Industries v. Workmen*, A. 1960 S.C. 1258 (1260).

14. *State of Madras v. V. G. Row*, A. 1952 S.C. 196.

11. *Ramakrishnaiah v. Dt. Board*, A. 1962 Mad. 253.

(ii) It follows that Government cannot make it obligatory for every employee to become a member of an association sponsored by the Government.<sup>12</sup>

(iii) A restriction on this freedom which may remain in force for an *indefinite* period at the pleasure of the executive authorities, is an unreasonable restriction.<sup>13</sup>

### (B) *Procedural aspect*

The fundamental right to form associations or unions guaranteed by Art. 19 (1) (c) has such a wide and varied scope for its exercise and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of the authority in the Government to impose restrictions on such right without allowing the grounds of such imposition, both in their *factual* and *legal* aspects to be duly tested in a *judicial* inquiry, is a strong element which should be taken into account in indulging the reasonableness of restrictions imposed on the fundamental right under Art 19 (1) (c).<sup>14</sup>

### Instances of unreasonable restrictions.

S. 15 (2) (b) of the Indian Criminal Law Amendment Act (XIV of 1908) as amended by Madras Act XI of 1950 authorised the State Government to declare, on its *subjective* satisfaction that an association constitutes a danger to the public peace etc. by issuing a notification published in the Official Gazette. There was no provision for service of the notice upon the members of the association which was the subject-matter of the notification nor was any opportunity to be given to them for showing cause against the declaration. There was a provision for reference by the Government to an Advisory Board of any representation that might be made by any such association, but there was no provision for appearance of the aggrieved persons before the Board and no obligation on the part of the Government to suspend the penal consequences of the declaration pending consideration of the representation by the Board.

The Supreme Court struck down the provisions as unreasonable restrictions upon the right conferred by Art 19(1)(c) on the grounds (i) The imposition of penal consequences after declaring an association as unlawful on the subjective satisfaction of the Government without providing for adequate communication of such declaration to the association and its members, must be regarded as an unreasonable restriction, in the absence of any emergent conditions justifying such a course. (ii) Nor can the summary and one-sided review by an Advisory Board be regarded as a reasonable substitute for judicial inquiry to override the basic freedom of association in the absence of exceptional circumstances.<sup>15</sup>

### Constitutionality of some Acts with reference to Art. 19(1)(c):

**Banking Companies Act, 1949:**

*Held valid.*—S. 34A.<sup>16</sup>

**Bombay Industrial Relations Act, 1946:**

*Held valid.*—S. 13.<sup>16</sup>

**Criminal Law Amendment Act, 1908:**

*Held invalid.*—S. 15(2) (b), as amended by Madras Amendment Act, 1950.<sup>16</sup>

**Forward Contracts (Regulation) Act, 1952:**

*Held valid.*—Ss. 5,<sup>16</sup> 6,<sup>16</sup> 10,<sup>16</sup> 15.<sup>16</sup>

12. *Sitharamachary v. Senior Dy. Inspector*, A. 1958 A.P. 78.

13. *State of Madras v. Row*, (1952) S.C.R. 597 (607), A. 1952 S.C. 196.

14. *All India Bank Employees' Association v. N. I. Tribunal*, A. 1962 S.C. 171.

15. *Kulbargi v. State of Bombay*, (1954) S.C.R. 384.

16. *Rajghat v. Union of India*, A. 1962 S.C. 263.

U. P. Sugarcane (Regulation of Supply & Purchase) Act, 1953:

*Held valid.*—Sa. 15;<sup>17</sup> 16.<sup>17</sup>

**Right of association of Government servants.**—See under Art. 309, *post*.

### CL. (1) (d): Freedom of Movement.

1. It is the words '*throughout the territory of India*' which explain the meaning of the words 'freedom of movement' in sub-cl. (d) of Art. 19 (1). It does not refer to 'personal liberty' which is dealt with separately, in Art. 21.<sup>18</sup> The free movement guaranteed by the present sub-cl. relates not to general rights of locomotion, but to the particular right of shifting or moving from *one part of Indian territory to another, without* any sort of discriminatory barriers between one State and another, or between different *parts of the same State*.<sup>18</sup> If restrictions are sought to be put upon the movement of a citizen from State to State or even within a State, such restrictions will have to be tested by the permissive limits prescribed in cl. (6) of Art. 19, e.g., restriction imposed upon the right to use the public highways, including the right to run vehicles over them.<sup>19</sup>

2. What is sought to be protected by sub-cl. (d) of Art. 19 (1) is only a specific and limited aspect of the right of free movement, *viz.*, the right of free movement throughout the Indian territory, regarded as an independent and additional right apart from the general right of locomotion emanating from the freedom of person, which is dealt with in Art. 21.<sup>20</sup>

### Restriction upon the freedom of movement.

The following have been held to constitute restrictions upon the right guaranteed by Art. 19 (1) (d)

- (i) An order of externment<sup>20</sup>
- (ii) A surveillance by the police upon the movements of a person.<sup>21</sup>
- (iii) An order requiring a person not to leave his place of residence or to reside at a specified place other than his place of ordinary residence<sup>22</sup>

**Restrictions in the interests of the general public.**—See p. 92 *ante*, as to the meaning of 'interest' of the general public.

(i) A provision for the externment of persons whose presence in a particular locality may jeopardise the peace and safety of the citizens of that locality (e.g., s. 27 of the City of Bombay Police Act, 1902) is a restriction of the freedom of movement of such persons in the interests of the general public<sup>23</sup>

(ii) A person suffering from an infectious disease may be prevented from moving about and spreading the disease and regulations for his segregation may be introduced. Likewise, healthy people may be prevented in the interests of the general public, from a plague-infected area. There may be protected places, i.e., forts or other strategic places, access where to may have to be regulated or even prohibited in the interests of the general public.<sup>24</sup>

(iii) Restrictions upon the movement of, and removal from one place to another of, prostitutes may be necessary in the interests of protecting public morals.<sup>25</sup>

17. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.

18. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (per Mukherjea J.).

19. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707.

20. *Khare v. State of Delhi*, (1950) S.C.R. 519.

21. *Kharak Singh v. State of M. P.*, (1964) 1 S.C.R. 352 (359-60).

22. *State of M. P. v. Bharat. A.* 1967 S.C. 1170 (1172).

23. *Gurubachan v. State of Bombay*, (1952) S.C.R. 737.

24. *Gopalan v. State of Madras*, (1950) S.C.R. 88.

25. *State of U. P., v. Kaushaliya, A.* 1964 S.C. 416 (421-2).



### Reasonableness of Restrictions.

#### A. Substantive aspect.

1. A restriction will be unreasonable if it is in excess of the requirement having regard to the object which justifies the legislation;<sup>1</sup> or does not provide an objective test as to the person against whom it could be applied.<sup>1</sup>

2. The duration of an externment provided for by the law is a relevant consideration in determining the reasonableness of the restriction.<sup>2</sup> Ordinarily, a restriction upon the freedom of movement should be upheld as reasonable only if it is of a temporary duration.<sup>2b</sup>

But the question of duration must be considered along with the attendant circumstances,<sup>2b, 3</sup> such as the object of the legislation, nature of the persons dealt with.

A law which provides for externment for an *indefinite* period would, *prima facie*, be an unreasonable restriction, but not so, if the Act itself is temporary,<sup>3</sup> and the order of detention made under it cannot possibly extend beyond a particular date, *viz.*, the expiry of the Act.

3. A law under which a person may be required to restrict his movements to his place of residence may be reasonable but law which empowers the Executive to require a person to reside at a specified place other than his ordinary place of residence imposes an unreasonable restriction because the person may not find any accommodation or means of livelihood at the place so specified.<sup>3</sup>

4. Even when an Indian citizen wants to return from abroad, he must obtain a permit or passport for re-entry into Indian territory and he may be *punished* for unlawful entry without such passport.<sup>22</sup> This is a reasonable restriction upon his right of movement and residence under Art. 19 (1) (d)-(e). But the *removal* from India for such unlawful entry would constitute an unreasonable restriction upon his right under Art. 19 (1) (e).<sup>4</sup>

#### (B) Procedural aspect

The general rule is that a restriction upon the freedom of movement would be procedurally unreasonable if it offends against the principles of natural justice, *e.g.*, if the person against whom an order of externment is made has no right to be heard in his defence or to be told the charges or grounds upon which the order is being made against him, or to show that he is not a person coming within the mischief of the law.<sup>5</sup>

The incidents of this general proposition are—

#### I. Right to be informed of the grounds.

1. A law which imposes a restriction upon the freedom of movement shall be void if there is no provision for communicating the grounds to the person against whom the order is to be made.<sup>6</sup>

2. The grounds communicated should not be 'vague, insufficient or incomplete'.<sup>7, 25</sup> A man served with an order of externment should be told

1. *State of M. P. v Baldeo*, A 1961 S.C. 293 (298).

2. *Khare v. State of Delhi* (1950) S.C.R. 519 (1950-51) C.C. 52 (53-4).

3. *State of M. P. v Bharat*, A 1967 S.C. 1170 (1172).

4. *Abdul Rahim v State of Bombay*, A. 1960 S.C. 1315: (1960) 1 S.C.R. 285.

5. *State of M. P. v Baldeo*, A. 1961 S.C. 293 (297).

6. *Ismail v. State of Orissa*, A. 1951 Orissa 86; *State of Motilal*, A. 1952 M.B. 114; *Brainandan v. State of Bihar*, A. 1960 Pat. 322 (F.B.); *Totummal v. It. Secy.*, A. 1961 Cal. 322.

7-25. *Khare v. State of Delhi*, (1950) S.C.R. 519: (1950-51) C.C. 52 (54).

enough so that he could make some, "representation" and that, accordingly, merely to state that he was committing a 'subversive act' without mentioning the particulars thereof was not sufficient.<sup>1</sup>

But where the communication stated that the person "is likely to do a subversive act, *viz.*, an act likely to endanger communal harmony, *e.g.*, instigating local Muslim to boycott the Hindus", *held*, that the ground stated was not vague or indefinite.<sup>2</sup>

Similarly, in respect of a law which provided for the externment of a *previous convict*, when the specified authority was satisfied that he was likely, again, to engage himself in the commission of an offence similar to that for which he had previously been convicted, the Supreme Court held that it was sufficient that the "general nature of the material allegations" against him were communicated. Such a law could not be impeached as unreasonable because it did not require further particulars to be supplied to the person dealt with, for, in the very nature of things, particulars such as could be established in a court of law could not be furnished in such a case and the externment must be based largely on suspicion, having regard to the previous conviction.<sup>3</sup>

## II. The right to be heard.

1. A law of externment or internment would be void if it does not offer a right of representation or an opportunity to be heard to the person against whom the order is made.<sup>4, 5, 6</sup>

2. He must have an opportunity not only of controverting the grounds communicated to him or the allegations made against him,<sup>6</sup> but also of showing that he is not a person coming within the mischief of the law sought to be applied against him.<sup>6</sup>

3. The hearing need not, however, be of the judicial type.<sup>6</sup>

In particular circumstances, it may be that in the interests of public welfare it would not be possible or obligatory to give the person who is sought to be removed, a public hearing with a confrontation of witnesses, inasmuch as peaceful citizens would not come forward to give evidence in the public against dangerous characters and habitual offenders. In such a case, the reasonableness of the restriction imposed by the law was sustained in view of other safeguards *e.g.* -

"The power to initiate proceedings has been given to a high and responsible officer, the suspect is given a reasonable opportunity of explaining the allegations made against him, and is permitted to appear through a lawyer and to examine witnesses on his behalf for the purpose of clearing his character"<sup>6</sup>

## III. Whether it is reasonable to vest power in the Executive to be exercised on its subjective satisfaction.

1. The object and nature of the legislation must be taken into account in determining whether the restrictions imposed by it are reasonable. Thus, in a law of an *extraordinary* nature, *viz.*, the removal of persons who have become a menace to the safety of the public residing in a locality and against whom witnesses may not be willing to depose publicly, the very object of

1. *Khagendra v. D. M.*, (1950) 55 C.W.N. 53 (56); *Jatish v. B. K. Sinha*, (1950) 55 C.W.N. 104.

2. *Atar Ali v. Joint Secy.*, (1950) 55 C.W.N. 94.

3. *Hari v. D. C. of Polce.*, (1956) S.C.R. 506 A 1956 S.C. 559

4. *State of M. P. v. Bharat. A.* 1967 S.C. 1170 (1172).

5. *Guruchan v. State of Bombay.* (1952) S.C.R. 737.

6. *State of M. P. v. Baldeo, A.* 1961 S.C. 293 (297).

the law would be defeated if the suspect were allowed to cross-examine the witnesses deposing against him.

Having regard to the extraordinary nature of such legislation, therefore, it cannot be struck down as imposing an 'unreasonable' restriction upon the freedom of movement guaranteed by Art. 19 (1) (d), merely because it denies to the suspect the right to cross-examine the witnesses examined against him,<sup>7</sup> or because it enables the Executive Officer to extern a person whenever he is subjectively satisfied that witnesses are not willing to come forward to give evidence against the suspect;<sup>8</sup> or that a previously convicted person is likely to engage himself again in the commission of an offence similar to that for which he had previously been convicted.<sup>9</sup>

2. In *Khare* case<sup>9</sup> it has been laid down that a law of externment is not unconstitutional merely because it leaves the necessity of making the order of externment to the subjective satisfaction of a particular officer. In the impugned Act in that case [as in the Preventive Detention Act] this authority was conferred upon some specified officers of superior rank.<sup>9</sup>

In a later case,<sup>6</sup> the Court has observed that where there is a likelihood of the law being put in motion by an officer of inferior rank, the law will be held to constitute an unreasonable restriction if it does not lay down the conditions precedent to the subjective satisfaction specifically and clearly so as to safeguard against a casual or capricious exercise of the power against innocent citizens.<sup>6</sup> It cannot, of course, be laid down as a universal rule that unless there is a provision for an Advisory Board to scrutinise the materials on which action is taken, the legislation providing for externment must necessarily be condemned as unreasonable.<sup>6</sup> Reasonableness may rest on other safeguards, such as an appeal to the State Government, right to challenge the order in Court on certain grounds.<sup>6</sup>

### Arts. 19(1)(d) and 21.

The object of Art. 19 (1) (d) is to guarantee to a citizen the right to move freely 'throughout the territory of India' without any discriminatory barriers.<sup>10</sup>

Art. 19 has no application to a legislation dealing with preventive (Art. 22) or punitive (Art. 21) detention as its *direct* object. If there is a legislation directly attempting to control a citizen's freedom of speech or his right to assemble peacefully etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive, or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 will not arise.<sup>10, 11</sup>

### Constitutionality of some Acts with reference to Art. 19 (1) (d):

**Bombay Police Act, 1951:**

*Held valid.*—Ss. 57,<sup>8</sup> 59,<sup>8</sup> 56.<sup>8, 12</sup>

**C. P. & Berar Goondas Act, 1946:**

*Held invalid.*—Ss. 4,<sup>7</sup> 4A.<sup>7</sup>

7. *Bhagubhai v. D. M.*, (1956) S.C.R. 533; A. 1956 S.C. 585.

8. *Hari v. D. C. of Police*, (1956) S.C.R. 976; A. 1956 S.C. 589.

9. *Khare v. State of Delhi*, (1950) S.C.R. 519.

10. *Gopalan v. State of Madras*, (1950) S.C.P. 88 (1950-51) C.C. 74 (133).

11. *Kharek Singh v. State of U. P.*, A. 1963 S.C. 1295 (1966).

12. *Bhagubhai v. Dt. Magistrate*, (1956) S.C.R. 533; A. 1956 S.C. 585.

**City of Bombay Police Act, 1902:**

*Held valid.*—S. 27(1).<sup>13</sup>

**East Punjab Public Safety Act, 1949:**

*Held valid.*—S. 4(1)(c).<sup>9</sup>

**M. P. Public Security Act, 1959:**

*Invalid.*—S. 3(1)(b).<sup>14</sup>

**Passport Act, 1920:**

*Held valid.*—S. 3.<sup>14a</sup>

**U. P. Police Regulations:**

*Held invalid.*—Reg. 235(b).<sup>14b</sup>

### CL (1) (e): Freedom of residence.

1. The object of this clause is the same as that of cl. (1) (d), *viz.*, to remove internal barriers within India or between any of its parts, and the freedom guaranteed by cl. (1) (e) has to be construed similarly, *viz.*, with reference to the words 'territory of India.'

2. But since the rights under Art. 19 are available only to a citizen, a person cannot complain of the infringement of his right under the present sub-clause, if his citizenship has been terminated by a law made by Parliament, under Art. 11.<sup>14</sup>

Reasonableness of restrictions

(A) *Substance*

(i) Passport regulations for entry from abroad can be reasonably imposed even upon citizens of India.<sup>14, 15</sup>

(ii) Prostitutes may be required to reside in or to remove from particular areas.<sup>16</sup>

(B) *Procedure*

The removal of a citizen from India on the subjective satisfaction of the Executive and without giving him an opportunity of showing cause is an unreasonable restriction upon the right guaranteed by Art 19 (1) (e).<sup>17</sup>

### Constitutionality of some Acts with reference to Art. 19 (1) (e):

**Bombay Police Act, 1951:**

*Held valid.*—S. 57.<sup>13</sup>

**Passport Act, 1920:**

*Held valid.*—S. 3(1).<sup>17, 18</sup>

### CL (1) (f): Freedom of property.

1. This clause guarantees the right of private property, *viz.*, that a man is free to acquire any property by any lawful means and to hold it at his own and to dispose of it at his will, subject, however, to reasonable restrictions that the State may impose in the interests of the 'general public' or of the Scheduled Tribes. Further, the freedom is subject to the paramount right of the State to acquire or requisition private property for public purpose on payment of compensation (Arts 31, *post*).

13. *Gurbachan v. State of Bombay*, (1952) SCR 737 A 1952 SC 221

14. *State of M. P. v. Bharat* A 1957 SC 1170 (1172)

14a. *Abdul Rahim v. State of Bombay*, A 1960 SC 1315 (1316)

14b. *Kharak Singh v. State of U. P.*, A. 1963 SC 1295. (1964) 1 SCR 332

15. *Ebrahim v. State of Bombay*, (1954) SCR 933 (590). A 1954 SC 229.

16. *State of U. P. v. Koushalya*, A. 1964 SC 416 (423)

17. *Ebrahim v. State of Bombay*, (1954) SCR. 933.

18. *Hari v. Dy. Commr.*, A. 1955 SC 559 (568)

19. *Abdul Rahim v. State of Bombay*, A. 1960 SC. 1315.

2. Art. 19(1)(f) applies equally to concrete as well as abstract rights of property.<sup>20</sup>

3. On the other hand, Art. 19 (1) (f) has no application—

(a) Where the right of property of one individual citizen has been violated by another.<sup>21</sup>

(b) Where the State seeks to exercise its rights under the ordinary law as owner of property as distinguished from its sovereign rights.<sup>22</sup>

(c) Where the right is statutory, such as a right of franchise.<sup>23</sup>

4. A person cannot complain of the infringement of his fundamental right in respect of a property after his title to the same has been negated by the decision of a competent Court,<sup>24</sup> or if his interest in the property has been acquired in transgression of the law.<sup>24</sup>

5. The clause relates to one's own property and confers no right to hold property which is vested in a corporate body.<sup>1</sup>

### Arts. 19 (1) (f) and 31.

1. (I) Until 1960, the prevailing view was that Arts. 19 (1) (f) and 31 were mutually exclusive. Art. 19 (1) (f) applies so long as a person is not 'deprived of his property by a law enacted by a competent Legislature, under Art. 31 (1)'<sup>a</sup> or 31 (2).<sup>b-2</sup>

(II) But in *Kochuni v. State of Madras*,<sup>3</sup> the majority of the Supreme Court has held that the 'law' referred to in Art. 31 (1) must be a *valid* law and must not, therefore, contravene any of the fundamental rights enumerated in Part III of the Constitution. In the result, a law enacted under Art. 31 (1) shall be void if it contravenes Art. 19 (1) (f); in other words, if it constitutes an *unreasonable* restriction upon the right of property of an individual, even though such law may have been made in exercise of the State's Police power<sup>4</sup> or taxing power.<sup>4</sup>

The principle has *not* been extended to a law made under Art. 31 (2).<sup>5</sup>

2. But, at the same time, it has been held<sup>6</sup> that Art. 31 (2) is to be construed *harmoniously* with Art. 19 (1) (f). Thus, Art. 19(1)(f) would be deprived of all its contents if it were held that choices in action could be acquired by the State by paying a fraction of the money taken as compensation<sup>6</sup> or to acquire the public debts due from the State by paying a nominal compensation.<sup>6</sup>

### Arts. 31A-B, and 19(1)(f).

Laws protected by Arts. 31A-B cannot be challenged under Art. 19 (1) (f).<sup>7</sup>

20. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191 (196); (1954) S.C.R. 1005, *Suami Motor Transport v. S. Mutt.*, (1963) Supn. 1 S.C.R. 282 (305).

21. *Shamdasani v. Central Bank*, (1950-51) C.C. 68; A. 1952 S.C. 59.

22. *Dhirendra v. State of W. B.*, A. 1956 Cal. 437.

23. *Joseph v. State of Kerala*, (1965) S.C. [W.P. 95/64].

24. *Biswanath v. Union of India*, A. 1965 S.C. 821 (825).

25. *Bajal v. Keshava*, A. 1968 Mys. 198 (200).

1. *Azeer v. Union of India*, A. 1968 S.C. 662 (675).

1a. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 669 (919), *Das J.*: (1950-51) C.C. 10 (24).

1b. *Kamaksha Narain v. Collector*, (1956) S.C.A. 494 (499).

2. *State of Bombay v. Bhajji*, (1965) 1 S.C.R. 777 (780).

3. *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1092).

4. *Kunnathal v. State of Kerala*, A. 1961 S.C. 552.

5. *Shabaji v. State of W. B.*, (1967) 2 S.C.R. 949.

6. *State of M. P. v. Ranajirao*, (1968) S.C.J.A. 1730/68, d. 21-3-68.

7. *Golak Nath v. State of Punjab*, A. 1967 S.C. 1643 (1670).

**'Property'.**

1. The rights of property guaranteed by Art. 19 (1) (f) mean the rights which, by themselves and taken independently, are capable of being acquired, held or disposed of as 'property'.<sup>5</sup>

Hence, restrictions on rights or privileges which are appurtenant to or flow from the ownership of property are not restrictions upon the right guaranteed by Art. 19 (1) (f).<sup>6</sup> Similarly, an office<sup>7</sup> which subsists only during the pleasure of another person or a personal covenant which does not run with the land<sup>8</sup> is not 'property' within the meaning of this article.

2. There is no reason why the word "property", as used in Article 19 (1) (f) of the Constitution, should not be given a liberal and wide connotation and should not be extended to those well-recognised types of interest which have the insignia and characteristics of proprietary right.<sup>9</sup> 'Property', in this clause, has a wider connotation than in Art. 31 (2), and thus includes 'money'.<sup>9</sup>

3. 'Property' includes not only real and personal property but also incorporeal rights such as patents, copyrights, leases, choses in action and every other thing of exchangeable value which a person may have.<sup>10</sup>

(A) The following interests have been held to be 'property' within the meaning of Art. 19 (1) (f)—

(i) The beneficial interest of the head of a Hindu religious endowment, such as a mutt, is 'property'.<sup>11</sup>

(ii) The right to hold a fair on one's own land.<sup>11</sup>

(iii) Any interest in a commercial or industrial undertaking.<sup>12</sup>

(iv) Right to money or choses in action, e.g.—

(a) The amount of unpaid wages.<sup>9</sup>

(b) Right to recover the purchase price or compensation money under statutory provisions for transfer of landlord's interest to tenants.<sup>13</sup>

(v) Hereditary trusteeship.<sup>14</sup>

(B) The following have been held *not* to constitute 'property' for the purposes of Art. 19 (1) (f)—

(a) The rights of a bare licensee, i.e., where the license is not coupled with a grant.<sup>14</sup>

(b) The rights of share holders of a company, e.g., to elect directors, to apply for winding up.<sup>15</sup>

(c) The office of a Tikait<sup>16</sup> or a Mutwalli.<sup>17</sup>

5. *Chauraji Lal v. Union of India*, (1950) S.C.R. 869 (1950-51) C.C. 10 (26)

6. *Purushottam v. Venkatappa*, A. 1952 Mad. 150.

7. *Mahadeo v. State of Bombay*, A. 1959 S.C. 735

8. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191; (1954) S.C.R. 1005-1006.

9. *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (1958) S.C.R. 1122.

10. *Shrirur Mutt v. Commissioner*, (1952) 1 M.L.J. 557 (581); *Dwarakadas v. Sholapur Co.*, A. 1951 Bom. 86.

11. *Ganpati v. States of Ajmer*, (1955) 1 S.C.R. 1065.

12. *Javvantisamghji v. State of Gujarat*, A. 1962 SC 821 (1962) Supp. 2 S.C.R. 411.

13. *Amar Singh v. Custodian*, A. 1957 S.C. 599.

14. *Shantabai v. State of Bombay*, A. 1958 S.C. 532 (533, 536): (1959) S.C.R. 265.

15. *Dwarakadas v. Sholapur Co.*, A. 1954 S.C. 119 (136): (1954) S.C.R. 674.

16. *Gorindaji v. State of Rajasthan*, A. 1963, 1638.

17. *Ch. Zain Yar Jung v. Director of Endowments*, A. 1963 S.C. 985.

(d) A personal covenant which does not run with the land.<sup>18</sup>

**'To hold.'**

"To hold" means to *possess* the property, and *enjoy* the benefits which are ordinarily attached to its ownership.<sup>19</sup> Interference with the right of enjoyment is, therefore, a restriction of the right to hold property.<sup>20</sup>

**'To acquire.'**

'To acquire' means to become *owner* of the property.<sup>21</sup> Ownership involves the right of user, of taking produce and of destruction or disposition.

**'To dispose of.'**

These words, read in their context, denote that kind of property which a citizen has a right to hold—the right to dispose of being part of or incidental to the right to hold.<sup>22</sup>

Hence, where a citizen has lost his right to hold a property, e.g., a member of a society dissolved under the Societies Registration Act, any provision for the administration of such property cannot be said to infringe the right to dispose which such member enjoyed under Art. 19 (1) (f) prior to the dissolution.<sup>23</sup>

**Restrictions in the interests of the general public.**

As to the meaning of 'interests of the general public' see p. ...., *ante*. The following are some instances of restrictions imposed upon the right of property, in the interests of the general public:

1. Control of accommodation in urban areas in view of shortage of houses;<sup>24</sup> or control of rent, or protection of slum-dwellers from eviction.

2. Agrarian reform by way of reduction of rent,<sup>25</sup> or fixing the maximum rent.<sup>26</sup>

3. Restriction of the rights of management of a Company by its shareholders, by appointing Directors, in order to secure the supply of a commodity essential to the community and to prevent a serious unemployment amongst a section of the people.<sup>27</sup>

4. A law of pre-emption<sup>28</sup> or consolidation of holdings,<sup>29</sup> the object of which is to prevent fragmentation of holdings and to preserve the homogeneity of the village community or the convenience of co-owners,<sup>30</sup> imposes a restriction upon the right conferred by Art. 19 (1) (f) in the interests of the general public.

As regards a law<sup>31</sup> or custom<sup>32</sup> which gives a right of pre-emption on the mere ground of *vicinage*, the Supreme Court has held<sup>33</sup> that though it may be upheld as reasonable in its application to agricultural lands, as being conducive to consolidation of holdings, no such ground can be urged in its

18. *Manadeo v. State of Bombay*, (1959) Supp. 2 S.C.R. 339, *Chitranjit Lal v. Union of India*, A. 1951 S.C. 41 (57).

19. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777.

20. *Board of Trustees v. State of Delhi*, A. 1962 S.C. 458 (472).

21. *Venkatachellum v. Kalamurthy*, A. 1955 Mad. 350.

22. *Kishan Singh v. State of Rajasthan*, A. 1963 S.C. 1811.

23. *Jyoti Pershad v. Union Territory*, A. 1961 S.C. 1602.

24. *Raja of Bobbili v. State of Madras*, A. 1952 Mad. 203 (212).

25. *Ch. Shanbhogue v. State of Mysore*, A. 1960 Mys. 266.

26. *Chitranjit Lal v. Union of India*, A. 1951 S.C. 41.

27. *Ram Sarup v. Munshi*, A. 1963 S.C. 553.

28. *Atar Singh v. State of U.P.*, A. 1959 S.C. 564.

29. *Pratap Dasari v. Raj Kumari*, A. 1967 S.C. 1578 (1600).

application to urban lands, so that a law of this nature which extends to all lands must be struck down as unreasonable.<sup>5</sup>

On the other hand—

No public interest is served by merely transferring the property of one individual to another individual,<sup>7</sup> unless that is done in pursuance of a public purpose,<sup>7</sup> e.g., taking a vacant premises to accommodate homeless persons at a time of scarcity of accommodation;<sup>8</sup> or taking away the proprietary interests of landlords for the benefit of tenants, under a scheme of agrarian reform.<sup>7</sup>

### Reasonableness of restrictions.

#### (A) Substantive aspect

#### I. Instances of 'reasonable' restrictions.

(i) The restrictions upon the right of property imposed by the Administration of Evacuee Property Act are not excessive or unreasonable, having regard to the most abnormal and unusual situation caused by mass migration between India and Pakistan owing to the communal disturbances, which the impugned legislation was intended to deal with.<sup>10</sup>

(ii) In order to effectively deal with the widespread offence of smuggling commodities like gold, to the detriment of the national economy and financial stability, sec. 178A of the Sea Customs Act places the burden of proving that all the goods mentioned in the section and reasonably believed to be smuggled are not really so is on the person from whose possession they are seized. The reasonableness of this restriction by way of asking a person to prove the negative was challenged on the ground that it would not be possible for persons like a *bona fide* purchaser to discharge such onus at all. The Supreme Court, however, negated this contention on the ground that the majority of persons against whom the section would be applied would be persons concerned in the act of illicit importation. If it was liable to be applied to persons like a *bona fide* purchaser that was only a small section of the public and that in view of the magnitude of the problem to be dealt with the harshness it was likely to impose on a disproportionately small section of the public could not be said to constitute an unreasonable restriction on the right to hold property under Art. 19(1)(f).<sup>11</sup>

A similar provision in a law to suppress gambling has been upheld.<sup>12,20</sup>

(iii) Prohibition of possession, consumption, buying, or selling of wines, by a law of prohibition, is a 'reasonable restriction' upon the right to 'acquire, hold and dispose of property' conferred by Art. 19(1)(f), having regard to the Directive Principles in Art. 47; but similar prohibition in regard to toilet and medicinal preparations containing alcohol is an 'unreasonable restriction' within the meaning of Art. 19(5). The possession or consumption of medicinal and toilet preparations which is excepted even by Art. 47 cannot be reasonably prohibited simply because of the possibility of their being misused by 'some perverted addicts'.<sup>21</sup>

On the other hand, though 'prohibition' of consumption etc. of toilet and medicinal preparations containing alcohol constitutes an unreasonable restriction, a power to regulate the consumption or sale of such preparations may be necessary in order to

5. *Bhan Ram v. Bajinath*, (1962) Supp. 3 S.C.R. 724; A. 1962 S.C. 1476.

6. *Sant Ram v. Labh Singh*, (1964) 7 S.C.R. 756.

7. *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1092; 1105).

8. *Jinadathnath v. Sharma*, A. 1961 S.C. 1523.

9. *State of Bihar v. Kameshwar*, (1962) S.C.R. 889.

10. *Sadhu Ram v. Custodian-General*, (1955) 2 S.C.R. 1113 (1116).

11. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316 (333).

12-20. *Kishan Chander v. State of M. P.*, (1961) 1 S.C.R. 766 (774).

21. *State of Bombay v. Balsara*, (1951) S.C.R. 682; (1901-51) C.C. 308.



carry out a law of prohibition relating to intoxicating liquors. Such regulation is not an 'unreasonable' restriction upon the right to property, for such regulation is necessary in order to prevent the evasion of prohibition laws.<sup>22</sup>

(iv) A temporary law of rent control passed in order to meet an abnormal scarcity of accommodation<sup>23</sup> which gives the landlord a right to move the Civil Court for fixation of reasonable rent, if he is not satisfied with the District Magistrate's assessment of the reasonable rent, cannot be said to be 'unreasonable'.<sup>24</sup>

(v) A temporary enactment which seeks to protect tenants, holding over after the expiry of lease, from eviction, in the natural interest of increasing the production of foodgrains, cannot be held to constitute an unreasonable restriction upon the landlords' rights.<sup>25</sup> Nor is it unreasonable to provide that a landlord, who is not himself a tiller of the soil, should assure to the actual tiller some fixity of tenure.<sup>26</sup>

(vi) Even where a law imposing a ban upon the eviction of slum-dwellers does not fix a time-limit for the operation of the statute, it cannot be said to be unreasonable if, from the very nature of things, it is evident that the ban must be temporary, e.g., until alternative accommodation can be provided under a 'scheme for 'slum clearance'.<sup>1</sup>

(vii) A law fixing a reasonable rent from cultivating tenants, even when it is retrospective in operation.<sup>2</sup>

(viii) Search and seizure for the purposes of investigation<sup>3</sup> or for the purpose of preventing evasion of tax<sup>4</sup> does not constitute any unreasonable restriction upon the right guaranteed by Art. 19(1)(f). A search, by itself, is no 'restriction' at all on the right to hold and enjoy property. No doubt a seizure and carrying away of documents is a restriction of the possession and enjoyment of the property seized. This is, however, a reasonable restriction, being only a temporary interference for the limited purpose of an investigation. Statutory regulation in this behalf is also necessary in the public interest.<sup>5</sup>

(ix) Increase in the rates for electricity supplied by the State, even though the rates had been fixed by contract,—if it is necessary in order to prevent a stoppage of the supply which had become uneconomic.<sup>6</sup>

## II. Instances of unreasonable restrictions.

1. A law<sup>7a</sup> or custom<sup>7b</sup> authorising pre-emption on the ground of vicinage.

### (B) Procedural Aspect.

## I. Instances of unreasonable restrictions.

1. When a law deprives a person of the possession of his property for an indefinite period of time merely on the *subjective* determination of an executive officer, such a law can on no construction be described as a 'reasonable' restriction on the freedom of property.<sup>8</sup>

2. But the law cannot be said to be unreasonable if the executive officer is required to give reasons for the exercise of his discretion and his order is subject to revision by an administrative superior.<sup>9</sup>

22. *Nageswara v. Madras State*, A. 1954 Mad 643.

23. *Iswari Prosad v. N. R. Sen*, A. 1952 Cal. 273.

24. *Ram Krishna v. Radhamal*, A. 1952 All. 697.

25. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510: (1957) S.C.R. 605.

1. *Jyoti Pershad v. Union Territory*, A. 1961 S.C. 1602 (1613).

2. *Shri Kishan v. State of Rajasthan*, (1955) 2 S.C.R. 531 (540): A. 1955 S.C. 795.

3. *M. P. Sharma & others v. Satish Chandra*, (1964) S.C.R. 1077.

4. *Board of Revenue v. Jhaver*, A. 1968 S.C. 59 (66).

5. *Venkata v. State of A. P.*, (1964) 7 S.C.R. 456 (468).

5a. *Bhanu Ram v. Baijnath*, A. 1962 S.C. 1476: (1962) Supp. (3) S.C.R. 724.

5b. *Sant Ram v. Lakh Singh*, A. 1965 S.C. 314.

6. *Raghubir v. Court of Wards*, (1963) S.C.R. 1049: (1962-54) 2 C.C. 187.

7. *Ch. Commr. of Calcutta Police v. Rola Ram*, (1947) 51 C.W.N. 833.

3. A law which affects right of property without providing for a notice or hearing to the persons affected, constitutes an unreasonable restriction, e.g., the revocation of a license for running a boarding house;<sup>7</sup> declaring a place as a 'market' under a Municipal law; declaring a land as pest infested, for the purpose of reclamation under a scheme of compulsory levy for the purpose.<sup>8</sup>

4. Absence of judicial review is an element for consideration in determining the reasonableness of a restriction upon the right of property. Thus, a statute which empowers an administrative authority to settle a scheme for the administration of a religious endowment, interfering with the proprietary rights of the head of the endowment, would be unreasonable if there is no provision for appeal from the order of such authority to a court<sup>9</sup> or a right of suit is barred;<sup>10</sup> but would be reasonable if there is a provision for resorting to the civil court either by way of appeal or by way of suit.<sup>11</sup>

But there are matters which are not fit for a judicial determination and in such cases, an administrative appeal or revision would be taken as sufficient to ensure reasonableness.<sup>12</sup>

## II. Instances of reasonable restrictions.

(i) Even though an Accommodation Control Act authorises an administrative officer to direct the owner of a vacant house to let it out to such private person as may be considered 'suitable' by him, it was held that the Act did not constitute an unreasonable restriction upon the owner's right of property, because the suitability of the allottee was to be determined with reference to the object of the Act, namely, to provide accommodation to those who were in need of it, at a time of scarcity of accommodation, and that there was a provision for judicial review of the decision of the administrative officer.<sup>13</sup>

(ii) A law for the improvement and clearance of slum areas which provided that no decree or order for the eviction of a tenant in such areas should be executed without the permission of such authority was held to constitute a reasonable restriction upon the rights of the landowner on the grounds that -

(a) the policy of the Act was clear and that the administrative authority was to exercise his discretion in conformity with the policy and in a quasi-judicial manner; and

(b) there was a right of appeal to a superior administrative authority.

From the substantive standpoint, it was held that the restriction was reasonable because in the nature of things the restriction was bound to be *temporary*, because the ban would cease to exist as soon as alternative accommodation for the slum dwellers could be arranged for under the scheme of slum clearance envisaged in the Act.<sup>14</sup>

(iii) A law which gives the persons affected a right to object before a declaration affecting their rights cannot be held to constitute an unreasonable restriction upon their rights of property.<sup>15</sup>

## Proprietary rights of the head of a Hindu religious endowment and the power of the State to impose restrictions thereupon.

(I) 1. Both office and property are blended in the head of a Hindu religious institution and the beneficial interest of the head of the institution

7. *Sri Kishan v. State of Rajasthan*, (1955) 2 S.C.R. 531 (540).

8. *Kamal v. Corpn., of Calcutta*, A. 1960 Cal. 172.

9. *State of M. P. v. Chamalal*, (1962) S.C. [C.A. 379 '59].

10. *Jagannath v. State of Orissa*, (1954) S.C.R. 1046.

11. *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005 (1036).

12. *Sri Kishan v. State of Rajasthan*, (1955) 2 S.C.R. 531 (540).

13. *Jinadathappa v. Sharma*, A. 1961 S.C. 1523.

14. *Jyoti Pershad v. Administrator*, A. 1961 S.C. 1602.

15. *Bombay Corpn. v. Pancham*, A. 1965 S.C. 1008 (1016).

is a 'property' within the meaning of Art. 19 (1) (f). The State may, no doubt, impose reasonable restrictions upon this right of property, in the interests of the general public, under Art. 19 (5) but since the proprietary interest is conferred upon the head by the rules of customary law relating to Hindu religious endowments in order to enable him to discharge his religious duties efficiently, the restrictions imposed by the State would cease to be reasonable if they render the head unfit to discharge the religious duties called for by the endowment.<sup>16</sup>

2. The head has large powers of disposal over the surplus income of the institution subject to the only restriction that he cannot spend anything out of it for his personal use unconnected with the dignity of his office. Hence, any law which takes away from the head his right to spend the surplus income or make its exercise subject to previous sanction or directions issued by an administrative authority, constitutes an unreasonable restriction within the meaning of Art. 19 (5). Such restrictions are inconsistent with the dignity of his office.<sup>17</sup>

3. Similarly, where the head has an unrestricted power of disposal over personal gifts, known as *Pathakanikas*, a law which requires the head to keep accounts of the receipts and expenditure of such personal gifts to be submitted to an administrative authority, constitutes an unreasonable restriction upon his rights of property.<sup>18</sup>

4. The head of a religious institution has the right to manage the properties of the institution, though the State can interfere in case of negligence or maladministration. If a law empowers an administrative authority to take away this right of management, at any time, at its absolute discretion, and to vest the administration in a manager subject to the control of the administrative authority, this would obviously constitute an unreasonable restriction inasmuch as it would cripple the authority of the Mahant altogether and reduce him to the position of a priest or paid servant, contrary to the tenor of his office.<sup>19</sup>

5. The State has the right to have a scheme settled for the due administration of a religious endowment. But since it would take away or restrict the right of the Mahant to administer the endowment, the power of the State must be exercised on reasonable grounds, e.g., in case of negligence or maladministration and in a reasonable manner, e.g., through the machinery of the judicial procedure, so that the aggrieved person may have his rights tested in a court of law. Hence, where a law authorises an administrative authority to take away the management from the Mahant or to settle a scheme without judicial intervention, it constitutes an unreasonable restriction.<sup>20</sup> If, however, an appeal to the courts is provided for,<sup>20</sup> or the decision of the administrative authority is liable to be challenged by a suit, it may not be said to be an unreasonable restriction.<sup>18</sup>

(II) On the other hand, the following restrictions cannot be said to be unreasonable:

Restrictions imposed for the purpose of carrying out the objects of the trust and for the better administration, protection and preservation of the trust property.<sup>21</sup>

16. *Commr., H. R. E. v. Lakshmindra*, A. 1954 S.C. 282; (1954) S.C.R. 1005.

17. *Jaganath v. State of Orissa*, (1962-54) 2 C.C. 191; A. 1954 S.C. 400; (1954) S.C.R. 1046.

18. *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

19. *Jaganath v. State of Orissa*, (1954) S.C.R. 1046.

20. *Sadasib v. State of Orissa*, (1966) S.C.R. 43 (55); A. 1956 S.C. 432.

21. *Moti Das v. Sahi*, A. 1959 S.C. 942 (949); (1959) Supp. (2) S.C.R. 503.

**Art. 19 (1) (f) and laws of taxation.**

1. It is now settled that a law of taxation passed by a competent Legislature under Art. 265 must nevertheless comply with the requirements of Art. 19 (1) (f).<sup>22</sup>

**I. Substantive reasonableness.**

1. A tax cannot be challenged as unreasonable merely on the ground that it was excessive<sup>23</sup> and imposed an unreasonable restriction upon a fundamental right to the extent of destroying it.

2. But a taxing statute can be struck down as constituting an unreasonable restriction upon the right to hold property, where it is 'confiscatory' in character and effect. In other words, where the State, instead of acquiring an individual's property, so imposes a tax as to virtually eliminate the owner or to compel him to part with the taxed property in favour of the State in order to pay off the tax imposed, it must be held to constitute an unreasonable restriction upon his fundamental right to hold the property.<sup>25</sup>

**II. Procedural reasonableness.**

The assessment of a tax is a quasi-judicial function<sup>23-24</sup> which can be made only upon a notice or a hearing, and not upon mere conjecture or by administrative fiat. In the *D. C. Mills case*,<sup>2</sup> the Court had annulled the assessment made by a taxing authority on the ground that it was based on conjecture without a hearing; in the instant case,<sup>1</sup> a statute was struck down because it empowered the executive to make an assessment, without providing for any machinery or procedure for making the assessment and without even providing for a right of appeal against the assessment.

The requirement of procedural reasonableness would, however, be satisfied if the Rules provide adequate opportunity to the assessee to object to the notice of demand served on them.

**Constitutionality of some Acts with reference to Art. 19 (1) (f):**

**Ajmer Tenancy and Land Records Act, 1950:**

*Held invalid.*—S. 112.<sup>4</sup>

**Aligarh Muslim University (Amendment) Act, 1951:**

*Held valid.*<sup>5</sup>

**Assam Fixation of Ceiling on Land Holdings Act, 1957:**

*Held valid.*<sup>6</sup>

**Assam Sales Tax Act, 1947, as amended in 1960:**

*Held valid.*—S. 15.<sup>7</sup>

**Banking Companies Act, 1949:**

*Held valid.*—S. 38(1), (3) (b) (n).<sup>8</sup>

22. *Kunnathal v. State of Kerala*, A. 1961 S.C. 522; (1961) 3 S.C.R. 77.

23. *Balaji v. I. T. O.*, A. 1962 S.C. 123; *Jagannath v. State of U. P.*, A. 1962 S.C. 148.

24. The wide statement in *Bhopal Sugar Industries v. S. T. O.*, A. 1967 S.C. 549 (552) that a taxing statute which is within the competence of the Legislature cannot be deemed to infringe Art. 19 (1) (g), appears to have been made without considering all aspects of the matter and cannot be accepted as such.

25. *Ct. Corpn. of Calcutta v. Liberty Cinema*, A. 1965 S.C. 1008 (1118).

1. *Kunnathal v. State of Kerala*, A. 1961 S.C. 552.

2. *D. C. Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941.

3. *Amalgamated Coalfields v. Janapala Sabha*, A. 1964 S.C. 1013 (1020).

4. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049.

5. *Azeez v. Union of India*, A. 1968 S.C. 662 (675).

6. *Sonapur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137.

7. *Steelworth v. State of Assam*, (1962) Supp. 2 S.C.R. 589.

8. *Joseph v. Reserve Bank of India*, A. 1962 S.C. 1371.

**Bhopal Reclamation & Development of Land Act, 1954:***Held invalid.*—S. 4.<sup>9</sup>**Bihar Hindu Religious Trusts Act, 1951:***Held valid.*—Ss. 28;<sup>10</sup> 32.<sup>10</sup>**Bombay Labour Welfare Fund Act, 1953:***Held valid.*—S. 3(1)-(2) [in so far as they refer to fines].<sup>11</sup>*Held invalid.*—S. 3(1) [in so far as it applies to unpaid accumulation].<sup>11</sup>**Bombay Land Tenure Abolition Laws (Amendment) Act, 1958:***Held invalid.*—Ss. 3;<sup>12</sup> 4;<sup>12</sup> 6.<sup>12</sup>**Bombay Municipal Corporation Act, 1888:***Held valid.*—Ss. 354R and 354RA.<sup>13</sup>**Bombay Prohibition Act, 1949:***Held void.*—Ss. 12, 13(b), in so far as it affected the consumption of medical and toilet preparations containing alcohol.<sup>14</sup>**Bombay Sales Tax Act, 1946:***Held valid.*—S. 12A(4).<sup>15</sup>**Bombay Town Planning Act, 1955:***Held valid.*—Ss. 4, 9, 10, 11, 12, 13.<sup>16</sup>**Bombay Town Planning (Gujarat Amendment and Validating Provisions) Act, 1963:***Held valid.*—Whole Act.<sup>17</sup>**Calcutta Municipal Act, 1951:***Held valid.*—S. 548(2).<sup>18</sup>**Civil Procedure Code:***Held valid.*—S. 87B.<sup>20</sup>**Criminal Procedure Code, 1898:***Held valid.*—S. 96.<sup>19</sup>**Displaced Persons (Compensation & Rehabilitation) Act, 1954:***Held valid.*—S. 12.<sup>21</sup>**Durgah Khwaja Saheb Act, 1955:***Held valid.*—Ss. 2(d) (v).<sup>22</sup> 14.<sup>22</sup>**Electricity Act, 1910:***Held valid.*—S. 28(1).<sup>23</sup>**Employees Provident Fund Act, 1952:***Held valid.*—S. 5.<sup>24</sup>**Essential Commodities Act, 1955:***Held valid.*—Ss. 3(2), (3).<sup>25</sup>

9. *State of Bhopal v. Champa Lal*, (1964) 6 S.C.R. 35 (48).

10. *Moti Das v. Sahi*, A. 1959 S.C. 942 (949); (1959) Supp. (2) S.C.R. 563.

11. *Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122 (1148-49).

12. *Jayvantsinghji v. State of Gujarat*, A. 1962 S.C. 821; (1962) Supp. 2 S.C.R. 411.

13. *Bombay Corpn. v. Pancham*, A. 1965 S.C. 1008 (1016).

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682.

15. *Kantilal v. Patel*, A. 1938 S.C. 415.

16. *Gupte v. Greater Bombay Corporation*, A. 1968 S.C. 303 (317).

17. *Marechal v. Makwana*, (1967) 3 S.C.R. 65 (83); A. 1967 S.C. 1373.

18. *Corpn. of Calcutta v. Liberty Cinema*, A. 1965 S.C. 1107 (1118).

19. *Sharma v. Satish*, (1954) S.C.R. 1077.

20. *Narottam v. Union of India*, (1964) 7 S.C.R. 55.

21. *Gujrat v. Custodian*, A. 1968 S.C. 457 (460).

22. *Durgah Committee v. Hussain*, A. 1951 S.C. 1402.

23. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

24. *Hindustan Electric Co. v. R. P. F. Commr.*, A. 1959 Punj. 27.

25. *Thamral v. Union of India*, A. 1959 Raj. 206.

**Forward Contracts (Regulation) Act, 1952:***Held valid.*—S. 15.<sup>1</sup>**Imports Control Order, 1955:***Held valid.*—Cl. 9(a).<sup>2</sup>**Income Tax Act, 1922:***Held valid.* Ss. 2(6A)(e);<sup>3</sup> 12(1B);<sup>3</sup> 16(3);<sup>4</sup> 46(2).<sup>5</sup>**J. & K. Right of Prior Purchase:***Held valid.*—S. 15, fourthly.<sup>6</sup>**Land Acquisition Act, 1894:***Held valid.*—Ss. 6(3);<sup>7</sup> 17(4).<sup>7</sup>**Madhya Pradesh Minimum Wages Fixation Act, 1962:***Held valid.*<sup>8</sup>**Madras City Tenants' Protection Act, 1922:***Held valid.*—Ss. 9, 12.<sup>9</sup>**Madras Estates Land (Reduction of Rent) Act, 1947:***Held valid.*—S. 3(4).<sup>10</sup>**Madras Hindu Religious and Charitable Endowments Act, 1951:***Held invalid.*—Ss. 30(2);<sup>11</sup> 31;<sup>11</sup> 55;<sup>11</sup> 63-69;<sup>11</sup> 87.<sup>12</sup>**Madras General Sales Tax Act, 1959:***Held valid.*—Ss. 41(2)-(3).<sup>13, 26</sup>**Madras Revenue Recovery Act:***Held valid.*—S. 48.<sup>2</sup>**Mysore House Rent & Accommodation Control Act, 1951:***Held valid.*—S. 3(3)(a).<sup>3</sup>**Non-Ferrous Metal Control Order, 1958:***Held valid.*—Cls. 3.<sup>4</sup> 4.<sup>4</sup>**Orissa Co-operative Societies Act, 1952:***Held valid.*—S. 133.<sup>3</sup>**Orissa Hindu Religious Endowments Act, 1939:***Held invalid.*—Ss. 38-39;<sup>6</sup> Prov. to s. 46.<sup>6</sup>**Orissa Hindu Religious Endowments Act, as amended in 1954:***Held valid.*—Ss. 42(1)(b);<sup>7</sup> 42(7);<sup>7</sup> 44(2);<sup>7</sup> 74(3);<sup>7</sup> 79A.<sup>7</sup>

1. *Raghubir v. Union of India*, A. 1962 S.C. 263.
2. *Fedco v. Bilgrami*, A. 1960 S.C. 415.
3. *Narain Lal v. I. T. A. Comm.*, A. 1965 S.C. 1375.
4. *Balan v. I. T. A.*, A. 1962 S.C. 123.
5. *Collector of Malabar v. Hajeer*, (1957) S.C.R. 970, (977).
6. *Prem Dulani v. Raj Kumari*, A. 1967 S.C. 1578.
7. *Isvarlal v. State of Gujarat*, A. 1968 S.C. 870 (881).
8. *Narottumdas v. State of M. P.*, (1964) 7 S.C.R. 820 (825).
9. *Vajrapani v. New Theatre*, (1964) 6 S.C.R. 1015.
10. *State of A. P. v. Kannapali*, (1963) 1 S.C.R. 155.
11. *Commr. H. R. E. v. Lakshmindra*, (1951) S.C.R. 1005.
12. *Pubbini v. Govinda*, A. 1958 Mad. 117.
- 13-25. *Bd. of Revenue v. Jhaver*, A. 1968 S.C. 59.
- 1-2. *Collector of Malabar v. Ehtahim*, (1957) S.C.R. 970 (977).
3. *Jindathappa v. Sharma*, A. 1961 S.C. 1523.
4. *Narendra v. Union of India*, (1960) 2 S.C.R. 375.
5. *Bharat v. Asst. Registrar*, A. 1958 Orissa 217.
6. *Jagannath v. State of Orissa*, (1954) S.C.R. 1046; A. 1954 S.C. 400.
7. *Sadani v. State of Orissa*, (1956) S.C.R. 43; A. 1956 S.C. 432.

**Orissa Sales Tax Act, 1947:**

*Held valid.*—S. 14A.<sup>8</sup>

**Sea Customs Act, 1949:**

*Held invalid.*—S. 178.<sup>9</sup>

**Slum Areas (Improvement & Clearance) Act, 1959:**

*Held valid.*—S. 19.<sup>10</sup>

**Sri Jagannath Temple Act, 1954:**

*Held valid.*—Ss. 8, 11, 18, 21, 21A, 30.<sup>11</sup>

**Sugar Export Promotion Act, 1958:**

*Held valid.*—Whole Act.<sup>12</sup>

**Travancore-Cochin Land Tax Act, 1955:**

*Held invalid.*—Ss. 4;<sup>13</sup> 5A;<sup>13, 14</sup>

**United State of Gwalior, Indore & Malwa Gambling Act:**

*Held valid.*—Ss 6,<sup>14</sup> 8.<sup>14</sup>

**West Bengal Non-Agricultural Tenancy Act, 1949:**

*Held valid.*—S. 24.<sup>15</sup>

### CL. (1) (g): Freedom of profession, trade, business.

(A) 1. This freedom means that every citizen has the right to choose his own employment or to take up any trade or calling, subject only to the limits as may be imposed by the State in the interests of the public welfare, and the other grounds mentioned in cl. (6).<sup>16</sup>

2. Our Constitution does not recognise 'franchises' or rights to business which are dependent on grants by the State, or 'business affected with public interest' meaning business which are particularly liable to control by the State. Under our Constitution, any citizen has the right to engage in any business which is known to the common law, as of right, and the State has the power to regulate or restrict any business on the grounds specified in cl. (6).<sup>1</sup> Thus, every citizen has a right to sell vegetables in the public market<sup>16</sup> or to carry on the business of transport on the public streets<sup>17</sup> subject only to restrictions as are warranted by cl. (6) of Art. 19.

3. The right to carry on a business implies a right *not* to carry it on, if he so chooses, and nobody can be compelled to carry on a business against his will.<sup>19</sup>

(B) On the other hand.—

1. The right guaranteed by this sub clause is the natural right to enter into or carry on any trade, profession or calling which every person has, as the member of a civilised society, anterior to and independent of any legislation or grant by the State,<sup>17</sup> e.g.—

(i) To carry on a business of transport on the highway,<sup>17</sup>

8. *Orient Paper Mills v State of Orissa*, A. 1961 S.C. 1438.

9. *Collector of Customs v Sampathu*, A. 1962 S.C. 316.

10. *Jyoti Pershad v Administrator A* 1961 S.C. 1602.

11. *Birakshore v. State of Orissa*, (1964) 7 S.C.R. 32.

12. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1135).

13. *Kunnathat v. State of Kerala*, A. 1961 S.C. 552.

14. *Krishnachandra v State of M. P.*, A. 1965 S.C. 307.

15. *Sibsankar v. Prabartak Sangha*, A. 1967 S.C. 940.

16. *Saghir Ahmed v State of U. P.*, (1955) 1 S.C.R. 707.

17. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707 (717).

18. *Rashid Ahmed v Municipal Board*, (1950) S.C.R. 566. (1950 51) C.C. 61.

19. *Hathising Mfg. Co. v. Union of India*, A. 1960 S.C. 923 (928); (1960) 3 S.C.R. 528 (538; 543).

(ii) To sell one's goods in the public market.<sup>18</sup>

(iii) To hold a market on one's own land.<sup>20-26</sup>

2. There are certain activities which are so inherently pernicious that nobody can be considered to have a fundamental right to carry them on as a trade or business,<sup>1</sup> e.g., betting and gambling.<sup>2</sup>

3. Where the right to carry on any profession is *created by a statute*, the exercise of that right is subject to the terms and conditions imposed by the statute, and no fundamental right is infringed by such terms and conditions, e.g., the right to practise before a Court of law,<sup>3</sup> or a tribunal<sup>4</sup> or to get a licence for carrying on a trade.<sup>5</sup>

On the same principle, it has been held that there being no fundamental right to stand as a candidate for election to a municipal body, there is no infringement of any fundamental right if the Legislature lays down that if a person wants to stand as a candidate for election he shall not either be employed as a paid legal practitioner on behalf of the municipality or act as a legal practitioner against the municipality.<sup>6</sup>

4. Nor is there any fundamental right to do a thing which can arise only out of a grant or contract, e.g.—

(i) The right to enter into another's land to catch and carry away fish<sup>7</sup> or to work a mine on another's land.<sup>8</sup> The position is different where the contract creates a proprietary interest, e.g., the right to take away soil or to build upon the land.<sup>9</sup>

(ii) Similarly, there is no common law right to be *recognised* by the Government as the agent of a traveller for the purposes of application for passport,<sup>10</sup> or as publisher of approved text books.<sup>11</sup>

5. Though a citizen has the fundamental right to carry on any business of his choice, there is no right to carry on business inherently dangerous<sup>12</sup> to the society, so that such business may be absolutely prohibited or permitted to be carried only under the licence of the State, e.g., dealing in liquor.<sup>13</sup>

6. Art 19 (1) (g) does not confer on any individual or association the monopoly right to carry on any trade or business. Hence, if by reason of any State action, an element of competition is introduced into a trade, the existing trader or traders who might have been enjoying a monopoly in the trade cannot complain of the infringement of their fundamental right conferred by this Article.<sup>14</sup>

7. There is no fundamental right in a citizen to carry on business *wherever he chooses* e.g., on the street,<sup>15</sup> and his right must be subject to

20-25. *Ganapati v State of Aimer*, (1955) 1 SCR 1066

1. *State of Bombay v Chamarbaughwala*, (1957) SCR 374.

2. *Chamarbaughwala v Union of India*, (1957) SCR 930.

3. *Devata Singh v Chief Justice A*, 1962 SC 201

4. *Jagjit v State of Hyderabad*, A. 1954 Hyd 28; *Rangaswami v Industrial Tribunal*, A. 1954 Mad 553

5. *Mahaboob v Dy Commr*, A. 1952 Assam 145.

6. *Sakhawant v State of Orissa* (1952-54) 2 C.C. 155; A. 1955 S.C. 166.

7. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919; A. 1955 S.C. 17.

8. *Shivji v. Union of India*, A. 1959 Punj. 510 (512)

9. *Mahadeo v. State of Bombay*, A. 1959 S.C. 735.

10. *Mediator Co. v. State of W. B.*, A. 1958 Cal 634

10a. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (240)

11. *Coverjee v. Excise Commr.*, (1954) S.C.R. 873.

12. *Nagendra v. Commr*, A. 1958 S.C. 398.

13. *Harnam Singh v. R. T. A.*, (1952-54) 2 C.C. 129; (1954) S.C.R. 371.

14. *Pears Lal v. Delhi Municipality*, A. 1968 S.C. 133 (138).



any reasonable restriction imposed by the Executive in the interest of public convenience.<sup>15</sup>

8. While a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government<sup>16</sup> or any other individual doing business with him. Any individual, as well as the Government, has got a right to enter into a contract with a particular person<sup>17</sup> or to determine the persons with whom he or it will deal;<sup>18</sup> and no citizen has a *fundamental right* to insist upon the Government doing business with him,<sup>19</sup> even though he may have a right under the ordinary law to sue for specific performance or damages for breach of contract, in proper cases.<sup>19</sup>

### Right to enter into contract. .

1. The right to *enter* into a contract relating to property or business is a fundamental right guaranteed by Art. 19 (1) (f)-(g). But rights arising *under* a contract are *not* fundamental rights guaranteed by *our* Constitution.<sup>20</sup> It is, accordingly, competent for the State to supersede by legislation contractual rights and obligations, including those arising under contracts made by the Government itself under Arts 298-9.<sup>20</sup> Thus, a grant made by the State cannot deprive the Legislature of its power to vary the terms of the grant or to derogate from it.<sup>21</sup> Nor is the State debarred from controlling prices by legislation on the ground that it would affect the incidents of Government contracts.<sup>20</sup>

2. It has already been stated (p. 127, *ante*) that there is no fundamental right to enter into contractual relations with the Government.<sup>16</sup>

### 'Trade or business'.

Though the word 'business' is ordinarily more comprehensive than the word 'trade', in the present clause it is used as synonymous with the other,<sup>22</sup> as meaning any substantial and systematic or organised course of purpose.<sup>23, 24</sup>

### CL (6): 'Law'.

Law, in this context, postulates a law which is otherwise valid. Hence, any imposition, which restricts a citizen's right to carry on an occupation, trade or business, but is not authorised by law, cannot be covered by clause (6) and must accordingly, be held to be invalid, being in contravention of clause (1) (g).<sup>25</sup>

Thus,—

(a) A bye law<sup>25</sup> or order<sup>1</sup> or rule<sup>2</sup> which is *ultra vires*; or

(b) A rule<sup>2</sup> or order<sup>3</sup> which has not been duly published<sup>3</sup> or laid before Parliament,<sup>3</sup> as required by the state; or

15 *Ibrahim v. R T A* (1952-54) 2 CC 217 (1953) SCR 290

16 *Achuthan v. State of Kerala* A 1959 SC 490

17 *Vedanthala v Divisional Engineer* A 1955 Mad 365.

18 *Bhaskaran v State of Kerala*, A. 1958 Ker. 333 (334).

19 *Achuthan v. State of Kerala*, A 1959 SC. 490.

20 *Secy. to Govt. v. A. G. Factory*, A. 1959 AP 538 (541; 544).

21 *State of Bihar v. Kameshwar*, A 1952 S.C. 252.

22 *Barada v State of Assam*, A 1955 Assam 23.

23 *Krishan Kumar v. State of J. & K.*, A 1967 S.C. 1368 (1371).

24 *Narain Weaving Mills v. Commr. of Excess Profits Tax*, (1955) 2 S.C.R. 952 (961).

25 *Yasin v. Town Area Committee*, (1952) SCR 572.

1. *Vallinavaram v. State of Madras*, A. 1952 Mad. 528

2. *State of Kerala v. Joseph*, A 1958 SC. 296.

3. *Narendra v. Union of India*, A. 1960 SC. 430.

(c) A sales tax which contravenes Art. 286,<sup>4</sup> cannot be saved by cl. (6).

### 'Relating to'.

1. This expression means that the provisions of the law which is protected from a challenge as to reasonableness must be essentially related to the two sub clauses (i) and (ii).<sup>5</sup> Thus, in a law creating a State monopoly under sub-cl. (ii), only those provisions which are basically and *essentially necessary* for creating the State monopoly will be saved; if there are other provisions which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the latter part of cl. (6) and their validity must be judged under the first part of cl. (6).<sup>7</sup>

2. For the same reason, if the law not only violates Art 19 (1) (g) but also affects, not indirectly but *directly*, any *other* fundamental right, in such a case, the protection of cl (6) will not be available and it will have to be sustained by reference to the requirements of the corresponding clauses in Art. 19.<sup>5</sup>

### Restriction 'in the interests of the general public'.

As to the meaning of this expression, see p 92, *ante*

The following are instances of restrictions imposed in the interests of the general public—

1. Restrictions imposed by the Imports and Exports (Control) Act, 1947 under the imperative necessity to control export and import trade for the economic stability of the country.<sup>8</sup> The determination of the import policy is governed by such factors that the Court must proceed upon the assumption that the executive decision is in the interests of the general public unless the contrary is shown.

2. A provision for the cancellation of a licence on the ground that it has been obtained by fraud (whether the licensee is a party to that fraud or not) after giving the licensee an opportunity of being heard.<sup>1b</sup>

3. Restrictions imposed upon the sale of essential commodities to ensure their equitable distribution and availability at fair prices,<sup>9</sup> e.g. the fixing of maximum selling prices,<sup>7</sup> or upon the production of food products for the maintenance of their food value, e.g. to enquire that a beverage must contain a minimum percentage of fruit juice.<sup>8</sup>

4. Restrictions imposed by the Motor Vehicles Act upon the right to ply vehicles on public highways, for the conservation of roads, prevention of congestion and the like.<sup>9</sup>

5. Restrictions imposed on the right to carry on a profession, in the interest of purity in the public life, e.g. that a legal practitioner who is employed on behalf of or against a Municipality shall not be entitled to stand as a candidate for election as a Councillor of that Municipality.<sup>10</sup> Prohibition of tourism also comes under this category.<sup>11</sup>

4. *Himmattal v State of M. P.* (1952-54) 2 CC 212 A. 1954 S.C. 115

5. *Akadasi v. State of Orissa*, A. 1963 SC 1047 (1054)

5a. *Glass Chateaus v. Union of India*, A. 1961 SC. 1514

5b. *Feden v Bilgrami* A. 1960 SC 415

6. *Dwarkanthprasad v State of U. P.* (1952-54) 2 CC 221 (223) A. 1954 SC 224;

7. *Narendra v Union of India*, (1960) 2 SCR. 375.

5a. *Glass Chateaus v. Union of India*, A. 1961 SC. 475 (1960) 2 S.C.R. 627.

8. *Hamdard Dawakhana v. Union of India*, A. 1965 SC. 1167.

9. *Saghir Ahmad v. State of U. P.*, (1955) 1 SCR. 707.

10. *Sakhowant v. State of Orissa*, (1952-54) 2 CC. 155; A. 1954 S.C. 166.

11. *In the matter of Phool Din*, A. 1952 All. 491 (494).

6. Regulations laying down the conditions of any hours of employment in shops and commercial establishments, even where no employee is engaged;<sup>12, 13</sup> or fixing minimum wages in an industry,<sup>14</sup> or widening the definition of 'workman' or 'employer in relation to industrial disputes'.<sup>15</sup>

7. Restriction imposed upon cane-growers not to sell sugarcane to occupiers of factories, except through a Cane-growers' Co-operative Society, where the membership of such Society is not less than 75% of the total cane-growers within an area.<sup>16</sup>

8. Restrictions for the suppression of injurious business like gambling,<sup>17</sup> or prostitution.<sup>18</sup>

9. Elimination of middlemen to ameliorate the condition of agriculturists.<sup>19</sup>

### Reasonableness of restrictions.

#### (A) Substantive aspect

In order to determine the reasonableness of a restriction imposed upon the right guaranteed by Art. 19 (1) (g), the Court must have regard to the nature of the business,<sup>20</sup> besides the other factors mentioned at pp. 81-2, *ante*.

#### 1. Instances of unreasonable restrictions.

1. S. 4 of the Central Provinces Regulation of Manufacture of Bidis Act (LXIV of 1948) empowered the Deputy Commissioner to prohibit the manufacture of *bidis* during the agricultural season in such villages as he might specify in his order. The object of the Act, as stated in its Preamble, was—"to provide measures for the supply of adequate labour for agricultural purposes in *bidi* manufacturing areas" *Held*, that the above provision and the order of the Deputy Commissioner made thereunder (forbidding all persons residing in certain villages from engaging in the manufacture of *bidis*) were void, being in contravention of Art. 19 (1) (g) of the Constitution. For, the object of the Act could well be achieved by legislation restraining the employment of *agricultural* labour in the manufacture of *bidis* during the agricultural season or by regulating hours of work in the business of making *bidis*. A total prohibition of the manufacture imposes an unreasonable and *excessive* restriction upon the lawful occupation of manufacturing *bidis*. The statute not only compels those who can be engaged in agricultural work not to take to another avocation, *vis.*, the manufacture of *bidis* but also prohibits persons who have no connection or relation with agricultural operations from engaging in the business of *bidi* making and thus earning their livelihood, on the otherhand, it prevents a manufacturer of *bidi* in the specified area from carrying on the business by importing labour from outside that area. No doubt, the regulation of employment of agricultural labour in the manufacture of *bidis* during the agricultural season is a restriction in the interest of the general public, but the language employed by the statute is wide enough to cover restrictions both within and without the limits of the constitutionally permissible legislative action affecting the right (see p 75 *ante*). Hence, the impugned legislation is wholly void.<sup>21</sup>

12. *Ramdhandas v. State of Punjab*, A. 1961 S.C. 1559.

13. *Manoharlal v. State*, (1951) S.C.R. 671.

14. *Bijay Cotton Mills v. State of Ajmer*, A. 1955 S.C. 33: (1955) 1 S.C.R. 752.

15. *Basti Sugar Mills v. Ram Ujagar*, A. 1964 S.C. 355.

16. *Tika Ramji v. State of U. P.*, (1955) S.C.R. 393 (448).

17. *Krishnachandra v. State of M. P.*, A. 1965 S.C. 307 (308).

18. *Malerkhotta v. Mushtaq*, A. 1960 Punj. 18.

19. *Jan Md. v. State of Gujarat*, (1960) 1 S.C.R. 505 (515).

20. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873.

21. *Chintamamao v. State of M. P.*, (1950-51) C.C. 64: (1960) S.C.R. 759.

2. Under section 8 of the Cinematograph Act, 1919, the District Magistrate imposed, *inter alia*, the following conditions in the licence granted to the Appellant, the owners of a cinema concern:

(a) The licensee should exhibit at each performance one or more of approved film of such length and for such length of time as the Provincial or Central Government may direct.

(b) The licensee should exhibit at the commencement of the performance *not less than* 2,000 feet of one or more approved films.

*Held*, that both the above conditions amounted to 'unreasonable' restrictions upon the fundamental right guaranteed to the Appellant under Art 19 (1) (g), and were, accordingly, void. (a) The first condition gives an *absolute* and unfettered discretion to the Government without imposing any limitation as to the nature of the film or the duration of the time during which the licensee would be obliged to exhibit an 'approved film' nor does it offer any guide as to how the Government is to exercise its discretion. (b) The second condition is better in no way since it imposes the minimum length of the approved film to be exhibited but not the *maximum*. Hence, the discretion of the authority is as unfettered as in the case of condition (a).<sup>22</sup> A similar condition which fixes the maximum limit has been held to be reasonable.<sup>23</sup>

3. A law which leaves it entirely to the discretion of the Government to requisition the stocks of a commodity at *any* rate fixed by it and to dispose of such stock at *any* rate obviously constitutes an unreasonable restriction upon the owner's right under Art 19 (1) (g).<sup>24</sup>

4. A law which gives uncanalised power to an authority to refuse a licence to carry on a normal trade, on his subjective consideration without provision for review by the superior authority must be held to be an unreasonable restriction.<sup>24</sup>

5. Gratuity is a reward for efficient and faithful service rendered for a considerable period, and is usually granted on retirement. There would be no justification for awarding gratuity when an employee voluntarily resigns except in exceptional circumstances. A law which imposes an obligation upon an employee to pay gratuity in every case of voluntary resignation from service is, therefore, unreasonable.<sup>25</sup>

## II. Instances of reasonable restrictions.

(i) A temporary legislation to control production, supply and distribution of *essential commodities* during a period of emergency, cannot be said to be unreasonable.<sup>1</sup>

The principle has also been applied to normal times in respect of an essential commodity the supply of which is inadequate e.g., milk.<sup>2</sup>

(ii) Marketing legislation which seeks to enable producers to get a fair price for the commodities by eliminating middlemen and providing a regulated market, cannot be said to impose unreasonable restrictions on the citizens' right to do business unless it is *clearly established* that the provisions are too drastic and overreach the object to achieve which it was enacted. This principle is applicable to both wholesale and retail trade.<sup>3</sup>

22. *Seshadri v Dt. Magistrate*, (1952-54) CC 64 A 1954 SC 747. (1955) 1 S.C.R. 686.

23. *Baig v. State*, A 1961 AP 126.

24. *Hari Chand v. Mizo District Council*, (1967) 1 SCA 655 (664): A. 1967 SC. 829.

25. *Express Newspapers v. Union of India*, A 1958 SC. 578 (629). (1959) S.C.R. 12.

1. *Harshankar v. State of M. P.*, (1955) 1 S.C.R. 380: (1952-4) 2 CC. 510 (612).

2. *Arumachala v. State of Madras*, A. 1959 SC 300, reversing in part *Kutti v. State of Madras*, A 1954 Mad. 621.

3. *Jan Md. v. State*, (1966) 1 S.C.R. 505 (516).

4. *Ajit Singh v. State of Punjab*, (1967) S.C. [W. P. 187/66, d. 24-2-67].

(iii) Where the fixation of price of an *essential commodity* is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middlemen for whom it would be unprofitable to carry on business at the fixed rate.<sup>5</sup>

(iv) For the purpose of ensuring payment of a tax, law may, reasonably, provide for the cancellation of the registration of a dealer, even though such restriction may result in the extinction of his business.<sup>6</sup>

(v) The State may impose conditions for the entry into business having regard to the importance of the business in the national economy e.g., the membership of a stock exchange.<sup>7-25</sup>

(vi) "The greatest good of the greatest number" has been taken as a ground for reasonableness in upholding the validity of a notification under the U. P. Sugarcane (Regulation of Supply & Purchase) Act, 1953, which provided that where not less than 75 per cent of the sugarcane growers of the area of operation of a Sugarcane Growers' Co-operative Society are members of the Society, the occupier of the factory for which the area is assigned shall not purchase or enter into an agreement for purchase of cane grown by a sugarcane grower, except through such co-operative society. The object of the restriction placed by the notification upon individual cane-growers to sell their produce to any person they liked, was to eliminate the unhealthy competition between the cane-growers on the one hand and to prevent malpractices indulged in by the occupier of a factory for the purposes of breaking up cane-growers' co-operative society and the provision was reasonable because the condition of 75 per cent. representation ensured that the restriction would be for the benefit of the largest number of cane-growers who formed the co-operative society.<sup>1</sup>

(vii) A law which prohibits the slaughter of bull, bullock (cattle as well as buffalo) cow and calf (cattle or buffalo), in pursuance of the Directive in Art. 48 of the Constitution in order to conserve the sources of milk-supply and draught cattle, constitutes a reasonable restriction, but a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo), *after they cease* to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable.<sup>2</sup>

On the same principle, it has been held that a ban on the slaughter of cattle below the age of 20 years is an unreasonable restriction upon the profession of butchers because, the Court found, cattle become useless after 15 years.<sup>3</sup>

(viii) A restriction imposed upon the carrying on of the trade of prostitution within a specified area is a reasonable one.<sup>4-6</sup>

(ix) A provision for cancellation of a licence on the ground that it was obtained by fraud is a reasonable one.

(x) To require the *Mutwali* of a *Wakf* to prepare an annual budget and to send it to the majlis within a specified time and to make non-compliance with this requirement an 'offence', are reasonable restrictions upon the occupation of the *mutwali*, because he occupies the position of a manager of a public religious institution.<sup>7</sup>

(xi) A law which empowers a quasi-judicial industrial tribunal to determine whether in the circumstances of a particular case the employer should not have the

5. *Narendra v. Union of India*, (1960 S.C.J. 214 (222): (1960) 2 S.C.R. 375.

6. *Rahaman v. State of A. P.*, A. 1961 S.C. 1471.

7-25. *Madhubhai v. Union of India*, A. 1961 S.C. 21 (26).

1. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676 (710).

2. *Hanif Quateshi v. State of Bihar*, A. 1958 S.C. 731; (1959) S.C.R. 629.

3. *Abdul Hakim v. State of Bihar*, (1961) 2 S.C.R. 610.

4. *Sona v. Municipality of Agra*, A. 1956 All. 736.

5. *Malerkotla v. Mushtaq*, A. 1959 Punj. 18 (20).

6. *Fedco v. Bilgrami*, A. 1960 S.C. 415.

7. *Bashiruddin v. State of Bihar*, (1957) S.C.R. 1032.

right to resort to a particular mode of employment say, contract labour, cannot be held to have imposed an unreasonable restriction upon the right of the employer to carry on trade.<sup>8</sup>

(B) *Procedural aspect.*

1. Instances of reasonable restrictions.

1. The restrictions imposed by the Imports and Exports (Control) Act, 1947 cannot be said to be 'unreasonable' inasmuch as it gives specific and reasonable instructions to officers and also provides for appeals to rectify the orders of subordinate officers.<sup>9</sup>

2. Where an appeal is provided from the decision of a Tribunal and it is obliged to act quasi-judicially, the reasonableness of the law cannot be challenged on the ground that it did not specifically provide for notice or for hearing.<sup>10</sup>

3. But judicial review of an administrative decision is not an essential condition of 'reasonableness' in all cases. Thus, the validity of the Minimum Wages Act, 1948 has been upheld on the ground that though there is no provision for judicial review of the decision of Government in the matter of fixing the minimum wages, Government acts with the advice of an Advisory Board which consists of an equal number of representatives of both the employer- and employees engaged in the industries for which the wages are to be fixed. There is thus sufficient safeguard against arbitrary exercise by Government of its discretionary power and the restrictions cannot be held to be unreasonable.<sup>11</sup>

II. Instances of unreasonable restrictions.

1. The power of granting or withholding licenses or of fixing the prices of goods necessarily has to be vested in certain public officers or bodies, and they would certainly have to be left with some amount of discretion in these matters. But a law or order which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in *normally available commodities* cannot but be held to be unreasonable.<sup>12,13</sup>

2. A provision for cancellation of a licence (in respect of a trade which is not necessarily dangerous) without giving a reasonable opportunity to be heard against the proposed order, would be an unreasonable restriction (see p 134, *post*).

3. But discretionary power cannot be held to be arbitrary where the policy according to which the discretion is to be exercised is provided by the law.<sup>14</sup>

Whether 'restriction' includes prohibition.

1. As has been already pointed out, the question whether 'reasonable restrictions' could include total prohibition cannot be answered categorically. It depends on the nature of the mischief which the Legislature seeks to remedy. Thus,—

(a) Where a business or trade is inherently dangerous,<sup>16,17</sup> total prohibition thereof would be reasonable, *e.g.*—

(i) As the business of making or selling intoxicant liquors is attended

8. *G. S. Mills v. K. T. S. Kamgar Sabha*, A. 1961 S.C. 1016 (1018)
9. *Khader v. Subramania*, A. 1952 Mad. 840.
10. *Chaturbhai v. Union of India*, (1960) 2 S.C.R. 362
11. *Bijoy Cotton Mills v. State of Ayer*, (1952-54) 2 C.C. 264; A. 1955 S.C. 33
12. *Dwarka Prasad v. State of U. P.*, (1952-54) 2 C.C. 221; A. 1954 S.C. 221; (1954) S.C.R. 603.
13. *Seshadri v. Dt. Magistrate*, (1955) 1 S.C.R. 686; A. 1954 S.C. 747.
14. *Fedro v. Bulgrami*, (1960) S.C.J. 235 (240); A. 1960 S.C. 415.
15. *Harishankar v. State of M. P.*, (1955) 1 S.C.R. 380; A. 1954 S.C. 465.
16. *Cooperative v. Excise Commr.*, (1954) S.C.R. 873; (1952-4) 2 C.C. 227 (229). A. 1954 S.C. 220.
17. *Allanmoor v. D. M.*, A. 1956 Raj. 153; In re Sundara, A. 1953 Mad. 142.

with danger to the community, it may be entirely prohibited, or permitted under such conditions as will limit to the utmost its evils.<sup>18</sup>

(ii) Similarly, trading in dangerous goods such as explosives<sup>17</sup> or trafficking in women<sup>19</sup> or toutism<sup>18</sup> may be totally prohibited.

(b) The same principle has been applied to trading in *essential commodities*.<sup>19, 20</sup>

(c) It has also been upheld as coercive sanction for the realisation of a tax.<sup>21</sup>

2. But outside the above exceptional categories, a total prohibition of the right to carry on a business would be regarded as an 'unreasonable' restriction,<sup>22</sup> and, "greater the restriction, the more the need for strict scrutiny by the Courts".<sup>20</sup>

### Permits and licences in relation to the freedom of business.

(A) (1) In the absence of exceptional circumstances, the exercise of no fundamental right guaranteed by the Constitution can be made to depend upon the absolute discretion of an administrative authority.<sup>23</sup> If, therefore, a law confers power on an administrative authority absolute discretion to grant or withhold or revoke<sup>24</sup> a *permit* for the carrying on of a business, the restriction imposed by such law is 'unreasonable',<sup>25</sup> except in the case of trade or business which is inherently dangerous<sup>1</sup> to the community and which the State is entitled either to prohibit entirely, or to permit only under such conditions as will limit to the utmost its evils,<sup>1</sup> or in a time of *emergency*,<sup>26</sup> when it is necessary to impose control on the production, supply and distribution of commodities *essential* to the life of the community,<sup>25</sup> or in respect of a trade or business which affects the national economy, such as import<sup>2</sup> or export.<sup>3</sup>

2. The discretion vested by a statute cannot, however, be said to be absolute and unregulated if the statute lays down the policy according to which the discretion is to be exercised.<sup>25</sup> If the authority exercises the discretion otherwise than in accordance with the statutory policy, his order would be vitiated by abuse of power and would be liable to be set aside by a court of law as *ultra vires*.<sup>25</sup>

3. An existing permit cannot be cancelled or revoked without giving an opportunity to the licensee to be heard,<sup>4</sup> except in the case of inherently dangerous trades or calling which a person has no common law right to carry on,<sup>1</sup> or the commodities which are essential to the community.<sup>5</sup>

(B) 1. The power to make *licensing* regulations is, however, to be distinguished from a permit system. While the object of a permit is to prohibit the entry into a business to persons to whom the permit is refused, at

18. In the matter of Phool Din, A. 1952 All. 491.

19. *M. B. Cotton Association v. Union of India*, A. 1954 S.C. 631.

20. *Narendra v. Union of India*, (1960) 2 S.C.R. 375.

21. *Rahaman v. State of A. P.*, A. 1961 S.C. 1471.

22. *Chintamanrao v. State of M. P.*, (1950) S.C.R. 759.

23. *State of Madras v. V. G. Row*, (1952) S.C.R. 597 (608): A. 1952 S.C. 196; *Dwarkanath Prasad v. State of U. P.*, (1954) S.C.R. 803.

24. *Ganapati v. State of Ajmer*, (1955) 1 S.C.R. 1065: A. 1955 S.C. 188 (190).

25. *Harishankar v. State of M. P.*, (1955) 1 S.C.R. 380; (1952-4) 2 C.C. 510 (512): A. 1954 S.C. 465.

1. *Coverjee v. Excise Commr.*, (1954) S.C.R. 873; (1952-4) 2 C.C. 227 (229): A. 1954 S.C. 220.

2. *Glass Chetons v. Union of India*, A. 1961 S.C. 1514.

3. *Daya v. Joint Chief Controller*, A. 1962 S.C. 1796 (1804).

4. *Fedco v. Bagrami*, (1960) S.C.J. 235 (249).

5. *Narendra v. Union of India*, (1960) 2 S.C.R. 375.

the discretion of the administrative authority, the object of a license is to regulate the carrying on of a business by imposing conditions upon anybody who may choose to carry on the business.

2. The State has, in the interests of the public, the right to lay down reasonable conditions subject to which a business may be carried on, and if power is conferred by the Legislature upon an administrative authority to proceed to grant or refuse the licence, not in an arbitrary manner but in a quasi-judicial manner,<sup>6</sup> having regard to the conditions<sup>7</sup> laid down by the Legislature, and in accordance with the principles of natural justice,<sup>7</sup> the restrictions cannot be said to be unreasonable.

2. On the other hand,—

(a) If the statute does not lay down the principles for the guidance of the licensing authority in the matter of granting or cancelling<sup>7</sup> or refusing<sup>8</sup> licence, it would constitute an unreasonable restriction upon the freedom of business.<sup>9</sup>

(b) The conditions imposed by a licence must not be so excessive or arbitrary as to lead to an extinction of the business of the licensee and thus amount to a deprivation of the fundamental right to carry on the business.<sup>10</sup>

(c) If a statute authorises an administrative authority to refuse licence<sup>11</sup> to a person or to cancel an existing licence,<sup>4,7</sup> in the absence of exceptional circumstances, such as the inherently dangerous nature of the trade or the need for essential commodities in an emergency, such law must be struck down as constituting an *unreasonable* restriction upon the freedom guaranteed by Art 19 (1) (g).

#### Cl. (6) (i): Professional or technical qualifications.

As a result of the amendment of this Clause in 1951, it has been made clear that if the State lays down professional or technical qualifications for entering into any trade or business, it will not be open to an aggrieved person to challenge such restriction as unreasonable.

#### Cl. (6) (ii): Trading by the State.

1. Since Art 19 (1) (g) declares that every citizen has the right to carry on any trade or business, the right would obviously be impaired if the State itself seeks to carry on a trade or business ousting private traders from that trade wholly or partially. Hence, under the original cl (6),

6. *Chaturbhaj v Union of India* A 1961 SC 421

7. *Mineral Development Co v State of Bihar*, A 1960 SC 468 (472).

8. *Dwarka Prasad v State of Uttar Pradesh* (1951) SCR 803.

9. *Panna Lal v Union of India* A 1957 SC 397 (410)

10. *Sheshadri v Dt Magistrate* (1955) 1 SCR 686 A 1954 SC 747

11. With respect the Author is unable to agree with the majority view in *Kishan Chand v Commr of Police* A 1961 SC 705 that because such statute does not require an opportunity to be given to the party affected and authorises the authority to act in his discretion, the function must be taken to be administrative and not quasi-judicial and accordingly, the principle of natural justice cannot be imported. It is submitted that this argument, overlooking the existence of the fundamental rights in our Constitution. Any restriction upon the freedom under Art 19 (1) (g) is *prima facie* invalid unless the State is able to show that by reason of substantive and procedural safeguards, the restriction is reasonable. Where there is no procedural safeguard and the elementary principles of natural justice are not insisted upon by the statute, how can it be upheld as reasonable? The reliance of the majority upon the Privy Council decision in *Nakkuda Ali v. Jayaratne*, (1951) AC 66 is also open to question inasmuch as the Privy Council in that case had not to deal with a Constitution having a Bill of Rights and Judicial Review and that makes a world of difference.



such action on the part of the State could be justified only if it was *reasonable*.

**The Amendment of 1951** exempts the State from that condition of reasonableness, by laying down that the carrying on of any trade, business, industry or service by the State would not be questionable on the ground that it is an infringement of the right guaranteed by Art. 19 (1) (g), even though by law the State excludes the citizens, wholly or partially, from the trade or business entered upon by the State.<sup>12</sup> Hence, the State shall now be free either to compete with any private traders or to create monopoly in favour of itself without being called upon to justify its action in Court as 'reasonable'.<sup>13</sup>

The State may enter into a trade or industry causing a partial or complete elimination of private traders, not only for reasons of administrative policy, e.g., manufacture of salt or alcohol; or for mitigating the evils arising from the competitive system, e.g., for the better control of prices or quality of products, or for the administration of public utility services, but also simply for the making of profit just as a private trader would do, e.g., carrying on the business of motor transport.<sup>14, 15</sup> There is no infringement of the right guaranteed by Art. 19 (1) (g) where the State enters a trade merely as a competitor.<sup>16</sup>

2. There are no limitations upon this power of the State to create a monopoly in its favour.<sup>16</sup> Hence, the law can provide the exclusion from a service of all citizens or *some* of them only; it may do business in the entire State or in a specified part thereof.<sup>17</sup>

3. In view of the amendment, a challenge on the ground of contravention of Art. 14 is also of no avail.<sup>18</sup>

#### **Amendment of Cl. (6), not retrospective.**

The amendment of cl. (6) by the Constitution (First Amendment) Act, 1951 has been held not to be retrospective and, accordingly, not to affect laws made prior to 18-6-51.<sup>13</sup>

#### **Whether legislation is necessary for the carrying on of trade by the State.**

1. It was ruled by the Supreme Court<sup>18</sup> that the State is competent to enter into any trade or business like a private individual without a specific legislation sanctioning such activity. Since then Art 298 has been inserted in the Constitution in 1956 (see *post* to make it clear that the right to carry on a trade or business is included in the 'executive power' of the Union or a State).

2. Specific legislation would, however, be necessary if the Government requires some power which requires legislation under the Constitution,<sup>17</sup> e.g., when the State seeks to create a monopoly in its favour, to the exclusion of the citizen whose right to carry on the trade is guaranteed by Art. 19 (1) (g) and can be taken away only by a law falling under cl (6) of that article.

12. *Narayanappa v State of Mysore*, A 1960 S.C. 1073 (1078).

13. *Sashir Ahmad v State of U. P.*, (1955) 1 S.C.R. 787; (1952-4) 2 C.C. 248 (257).

14. *Ch. Ramchandra v State of Orissa* (1950) S.C.R. 28.

15. *Ram Jawaya v. State of Punjab* (1955) 2 S.C.R. 225.

16. *Kondala Rao v. A P S. R. T. C.* A 1961 S.C. 82.

17. *Salwanarayanaiah v. A P S. R. T. C.* (1961) 1 S.C.R. 643 (649).

18. *P. T. C. S. v. R. T. A.*, A. 1960 S.C. 801 (806).

**Whether the State can create a monopoly right in favour of a particular individual or individuals.**

1. While the amendment of cl. (6) by the Constitution (First Amendment) Act, 1951 precludes the Court from questioning the reasonableness of a law which creates a monopoly in favour of the State itself or of a corporation owned or controlled by the State, to carry on a trade to the exclusion of the citizens,—where such a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of the restriction imposed in the latter case may be questioned by the Court, for, the amendment of cl. (6) does not apply to such a case.

2. In such a case, the reasonableness has to be determined with reference to the circumstances relating to the trade or business in question. Thus,—

(a) There are certain trades which are so inherently dangerous (e.g., the business relating to intoxicating liquor) that the State cannot, without danger to the society, allow normal trading by all persons. In such cases, the creation of a monopoly right in favour of an individual or individuals for the purpose of effective State control might be reasonable.<sup>19</sup>

(b) But where there is nothing innocuous in the nature of the business itself, e.g., the business of selling vegetables,<sup>20</sup> the prohibition of normal trading by all persons and the granting of a monopoly right to a particular individual cannot be held to be reasonable.

3. Even though a monopoly is not granted to any particular trader and there is no express prohibition against the carrying on of the business by anybody, there is an unreasonable restriction on the freedom of business if the effect of a Municipal bye-law, charging a licence fee, is to bring about a total stoppage of a business in the commercial sense.<sup>21</sup>

### **Art. 19 (1) (g) and laws of taxation.**

I. Where a tax is imposed upon a trade or business without legal authority<sup>22</sup> or in contravention of a limitation imposed by the Constitution (e.g., Art. 286),<sup>23</sup> it constitutes a patent infringement of the right guaranteed by Art. 19 (1) (g).

II. The question is whether, when it is imposed by a law, the constitutionality of such law may be questioned on the ground that it imposes an 'unreasonable' restriction upon the right guaranteed by Art. 19 (1) (g).

The early view suggested in *Ramjilal v. I.T.O.*<sup>24</sup> that the taxing power, under our Constitution, is an independent power embodied in Part XII, so that Part III could not be attracted to it in any case, has been dispelled by a number of later decisions.<sup>25</sup>

III. Hence, the reasonableness of a taxing statute may be challenged not only because it does not lay down any procedure for assessment or

19. *Cooverjee v. Excise Commissioner* (1954) SCR 873 (1952 41 C.C. 227).

20. *Rashid Ahmed v. Municipal Board*, (1950) SCR 568 (1950-51) CC 61.

21. *Yasin v. Town Area Committee*, A 1952 S.C. 115 [For facts of this case, see n. 512, ante].

22. *Kailash Nath v. State of U.P.*, A 1967 S.C. 790 (792) *State of Kerala v. Joseph*, A. 1968 S.C. 296; *Yasin v. Town Area Committee*, (1952) SCR 572 (578).

23. *Himmatlal v. State of M.P.*, (1954) SCR 1122.

24. *Ramjilal v. I.T.O.*, (1951) SCR 127 (137).

25. *Cf. Atiabari Tea Co. v. State of Assam*, A 1961 S.C. 232 (243, 259).

1. *Kunnathal v. State of Kerala*, A 1961 S.C. 552.

2. *Balaji v. I.T.O.*, A. 1967 S.C. 123 (128).

3. *Jaganmuth v. Union of India*, A. 1962 S.C. 148.

recovery of the tax<sup>1</sup> but also where the procedure laid down is not reasonable.<sup>4</sup>

IV. Retrospective operation of a taxing statute is not necessarily unreasonable,<sup>5</sup> but it may be so in particular circumstances.<sup>6</sup>

### Constitutionality of some Laws with reference to Art. 19 (1) (g).

**Banking Companies Act, 1949:**

*Held valid.*—S. 22,<sup>6</sup> 38.<sup>7</sup>

**Bihar Mica Act, 1948:**

*Held valid.*—S. 25(1) (c).<sup>8</sup>

**Bihar & Orissa Municipal Act, 1922:**

*Held valid.*—S. 150-E.<sup>9</sup>

**Bihar Preservation and improvement of Animals Act, 1956:**

*Held*—Partly valid and partly invalid.<sup>10</sup>

**Bihar Wakfs Act, 1948:**

*Held valid.*—S. 58.<sup>11</sup>

**Bombay Agricultural Produce Markets Act, 1939:**

*Held valid.*—Ss. 4-5A.<sup>12</sup>

**Bombay Industrial Relations Act, 1947:**

*Held valid.*—Ss. 3(18).<sup>13</sup>

**Bombay Lotteries & Prize Competitions Act, 1948:**

*Held valid*—Whole Act.<sup>14</sup>

**Calcutta Municipal Act, 1951:**

*Held valid.*—S. 548(2).<sup>15</sup>

**Calcutta Police Act, 1866:**

*Held valid*—S. 39.<sup>16</sup>

**C. P. & Berar Animal Preservation Act, 1949:**

*Held.*—Partly valid and partly invalid.<sup>17</sup>

**Central Excises & Salt Act, 1944:**

*Held valid*—Ch. VI.<sup>18</sup>

**Central Provinces & Berar Regulation of Manufacture of Bidis Act, 1948:**

*Held void.*—S. 4.<sup>19</sup>

**Coal Bearing Areas (Acquisition & Development) Act, 1957:**

*Held valid.*—Ss. 4-6.<sup>20</sup>

4. *Cf. Ram Bachan v. State of Bihar*, A. 1967 S.C. 1404 (1408)
5. *Jawaharimal v. State*, (1966) 1 S.C.R. 290 (905).
6. *Sajjan v. Reserve Bank of India*, (1959) 2 M.L.J. 455.
7. *Joseph v. Reserve Bank of India*, A. 1962 S.C. 1371
8. *Mineral Development Co. v. State of Bihar*, A. 1960 S.C. 468: (1960) 2 S.C.R. 609.
9. *Ram Bachan v. State of Bihar*, A. 1967 S.C. 1404 (1408).
10. *Quareshi v. State of Bihar*, A. 1958 S.C. 731: (1959) S.C.R. 629, *Abdul Hakim v. State of Bihar*, A. 1961 S.C. 448: (1961) 2 S.C.R. 610.
11. *Bashiruddin v. State of Bihar*, (1957) S.C.R. 1032.
12. *Hussain v. State of Bombay*, A. 1962 S.C. 97: (1962) 2 S.C.R. 659.
13. *G. S. Mills v. Kamgar Sabha*, A. 1961 S.C. 1016.
14. *State of Bombay v. Chamarbaugwalia*, (1957) S.C.R. 874.
15. *Corpn. of Calcutta v. Liberty Cinema*, A. 1965 S.C. 1107.
16. *Kishanchand v. Commr. of Police*, (1961) 3 S.C.R. 135.
17. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.
18. *Chaturbhai v. Union of India*, A. 1960 S.C. 424 (430).
19. *Chintamanrao v. State of M. P.*, (1960) S.C.R. 759.
20. *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 964 (961).

**Dangerous Drugs Act, 1930:***Held valid.*—S. 5.<sup>21</sup>**Durgah Khwaja Sahab Act, 1955:***Held valid.*—Ss. 2(d) (v);<sup>22</sup> 14, 22.**Electricity Act, 1910:***Held valid.*—S. 28(1).<sup>23</sup>**Essential Commodities Act, 1955:***Held valid.*—Ss. 3(2), (3).<sup>24</sup>**Forward Contracts (Regulation) Act, 1952:***Held valid.*—S. 15.<sup>25</sup>**Fruit Products Order, 1955:***Held valid.*<sup>1</sup>**Gujarat Agricultural Produce Marketing Act, 1964:***Held valid.*—Ss. 5, 6, 27(2), 30.<sup>2</sup>**Imports Control Order, 1955:***Held valid.*—Cl. 9(a).<sup>3</sup>**Income Tax Act, 1922:***Held valid.*—Ss. 2(6A) (e)<sup>4</sup>; 5(7A);<sup>5-19</sup> 16(3).<sup>20</sup>**Industrial Disputes Act, 1947:***Held valid.*—S. 10.<sup>21</sup>**Iron & Steel (Control of Production & Distribution) Order, 1941:***Held valid.*—Cl. 11B.<sup>22</sup>**Lushai Hills District (Trading by non-Tribals) Regulation:***Held invalid.*—S. 3.<sup>23</sup>**Madhya Pradesh Agricultural Preservation Act, 1959:***Held invalid.*—S. 4(2) (a).<sup>24a</sup>**Madras Commercial Crops Market Act, 1933:***Held valid.*—Entire Act.<sup>25</sup>**Madras Sales of Motor Spirit Taxation (A. P. Extension & Amendment) Act, 1958:***Held valid.*—Ss. 4(1), (6);<sup>24</sup> 26.<sup>24</sup>**Minimum Wages Act, 1948:***Held valid.*—Whole Act.<sup>1-3</sup>21. *Bahadur Singh v. Union of India*, (1956) S.C. [Petr. 111/55, d. 17-2-56].22. *Durgah Committee v. Hussain*, A. 1961 S.C. 1402.23. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (239).24. *Thanmal v. Union of India*, A. 1959 Raj. 206.25. *Raghubar v. Union of India*, A. 1962 S.C. 263.1. *Hamdard Dawakhana v. Union of India*, A. 1965 S.C. 1167.2. *Jan Md. v. State of Gujarat*, (1966) 1 S.C.R. 505.3. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240); A. 1960 S.C. 415.4. *Navmit Lal v. I. T. A. A. Commr.*, A. 1965 S.C. 1375.5-19. *Pannalal v. Union of India*, (1957) S.C.R. 233 (262).20. *Balaji v. I. T. O.*, 1962 S.C. 123.21. *Niemla Textile Mills v. Punjab Industrial Tribunal*, (1957) S.C.R. 335 (352); A. 1957 S.C. 329.22. *Union of India v. Bhanmal*, A. 1960 S.C. 475.23. *Hari Chand v. Mixe Dt. Council*, A. 1967 S.C. 829.23a. *Abdul Hakim v. State of Bihar*, A. 1961 S.C. 448.24. *Rahaman v. State of A. P.*, A. 1961 S.C. 1471.25. *Arumachala v. State of Madras*, A. 1958 S.C. 300; (1959) Supp. (1) S.C.R. 92.1. *B. C. Mills v. State of Ajmer*, (1955) 1 S.C.R. 752.2. *Unichoyi v. State of Kerala*, A. 1962 S.C. 12.

**Motor Vehicles Act, 1939:**

*Held valid.*—Ch. IV-A;<sup>3,4</sup> Ss. 42,<sup>5</sup> 43A,<sup>5</sup> 47, 48, 64A, 68C.<sup>6</sup>

**Non-Ferrous Metal Control Order, 1958:**

*Held valid.*—Cls. 3,<sup>7</sup> 4.<sup>7</sup>

**Orissa Municipal Act, 1950:**

*Held valid.*—S. 16 (1) (ix).<sup>8</sup>

**Punjab Milk Products Control Order, 1966:**

*Held valid.*<sup>9</sup>

**Punjab Shops & Commercial Establishments Act, 1958:**

*Held valid.*—Whole Act.<sup>10</sup>

**Punjab Special Powers (Press) Act, 1956:**

*Held valid.*—Ss. 2(1); 3.<sup>11</sup>

**Rajasthan Passengers and Goods Taxation (Amendment & Validation) Act, 1964:**

*Held valid.*<sup>12</sup>

**Sea Customs Act, 1878:**

*Held valid.*—Ss. 178A.<sup>13</sup>

**Securities Contracts (Regulation) Act, 1956:**

*Held valid.*—S. 4.<sup>14</sup>

**Sugar Export Promotion Act, 1958:**

*Held valid.*—Whole Act.<sup>15</sup>

**U. P. Coal Control Order, 1953.**

*Held invalid.*—Cls. 3(2) (b);<sup>16</sup> 4(3).<sup>16</sup>

**U. P. Industrial Disputes Act, 1947:**

*Held valid.*—S. 3(b).<sup>17</sup>

**U. P. Prevention of Cow Slaughter Act, 1956:**

*Held.*—Partly valid and partly invalid.<sup>18</sup>

**Working Journalists Act, 1955:**

*Held invalid.*—S. 5(1) (a) (iii).<sup>19</sup>

*Held valid.*—The rest of the Act.<sup>19</sup>

**20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.**

Protection in respect of conviction for offences.

3. *Nageswarao v. State of A. P.*, A. 1959 S.C. 1376.
4. *Satyanarayanamurthy v. A. P. S. R. T. C.*, 1 S.C.R. 642 (649).
5. *Raman & Raman v. State of Madras*, A. 1959 S.C. 696 (700); (1959) Supp. (2) S.C.R. 227.
6. *Kondala v. A. P. S. R. T. C.*, A. 1961 S.C. 82.
7. *Narendra v. Union of India*, (1960) S.C.J. 214 (222); A. 1960 S.C. 430.
8. *Sakhawant v. State of Orissa*, A. 1955 S.C. 166.
9. *Ajit Singh v. State of Punjab*, (1967) S.C. [W.P. 187/66, d. 24.2.67].
10. *Ramchandras v. State of Punjab*, A. 1961 S.C. 1559.
11. *Virendra v. State of Punjab*, A. 1957 S.C. 896.
12. *Jawaharmal v. State of Rajasthan*, (1966) 1 S.C.R. 890 (905).
13. *Collector of Customs v. Sampathku*, A. 1962 S.C. 316.
14. *Madhubhai v. Union of India*, A. 1961 S.C. 21.
15. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1132).
16. *Dwarka Prosad v. State of U. P.*, A. 1964 S.C. 224.
17. *State of U. P. v. Basti Sugar Mills*, (1961) 2 S.C.R. 330.
18. *Quareshi v. State of Bihar*, A. 1958 S.C. 731; *Abdul Hakim v. State of Bihar*, A. 1961 S.C. 448; (1961) 2 S.C.R. 610.
19. *Express Newspaper v. Union of India*, A. 1958 S.C. 572.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

#### CL (1): Prohibition against retrospective criminal law.

1. A sovereign Legislature has the power to enact prospective as well as *retrospective laws* (see, further, under Art. 245, *post*). But the present Article sets two limitations upon the law-making power of every legislative authority in India as regards retrospective *criminal* legislation. It prohibits —(i) the making of *ex post facto* criminal law, i.e., making an act a crime for the first time and then making that law retrospective;<sup>20</sup> (ii) the infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed.<sup>21</sup>

2. The prohibition of the clause is not merely against the passing of such retroactive law but also against conviction under such law.<sup>20</sup>

3. But there is nothing in this clause which creates a vested right in any course of procedure.<sup>22</sup> Nor has it any application to a law which merely mollifies the rigours of a criminal law.<sup>23</sup>

4. The statute should be properly constructed before applying this clause.<sup>24</sup>

5. The clause has no application to a civil liability unless the statute makes the failure to discharge such liability an offence.<sup>25</sup>

#### 'Shall be convicted'.

1. What is prohibited under cl. (1) is only conviction or sentence under an *ex post facto* law and *not* the *trial* thereof. Hence, trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at that time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or violation of any other fundamental right may be involved.<sup>26</sup> In short, the prohibition under this clause does not extend to merely *procedural* laws,<sup>20</sup> and a procedural law would not contravene Art. 20 (1) merely because retrospective effect is given to it.<sup>20</sup>

2. The prohibition is only against prescribing judicial punishment with retrospective effect. It does not prohibit the enforcement of any other sanction by a civil or revenue authority, e.g., the loss or deprivation of any business or forfeiture of property<sup>1,2</sup> or cancellation of naturalisation certificate by reason of act committed prior to the operation of the penal law in question.

20. *Shiv Bahadur v. State of U. P.*, (1953) S.C.R. 118: A 1953 S.C. 394.

21. *Kedar Nath v. State of Punjab*, (1954) S.C.R. 30: A. 1953 S.C. 404.

22. *Union of India v. Sukumar*, (1965) S.C. [C.A. 701/64], d. 6.10.65.

23. *Rattan Lal v. State of Punjab*, (1964) 7 S.C.R. 676 (681).

24. *Cj. Narottamdas v. State of M. P.*, (1964) 7 S.C.R. 820; *Kanaiyalal v. Indumati*, A. 1966 S.C. 444.

25. *Cj. Hatisingh Mfg. Co. v. Union of India*, A. 1960 S.C. 923; *Jawala Ram v. State of Pepsu*, A. 1962 S.C. 1246.

1. *Brij Bhukan v. S. D. O.*, A. 1965 Pat. 1 (S.B.).

2. *State of W. B. v. S. K. Ghose*, A. 1963 S.C. 255.

3. The words 'convicted' and 'offence' make it clear that the Article has no application to preventive detention,<sup>3</sup> or an order of externment,<sup>4</sup> but deals with the *punishment* for offences and provides two safeguards in relation thereto, namely,

(i) that no one shall be punished for an act which was not an offence under the law in force when it was committed;

(ii) that no one shall be subjected to a greater penalty for an offence than what was provided under the law in force when the offence was committed.<sup>10</sup>

4. On the other hand, the prohibition under the present clause is not confined to the passing or the validity of the law, but extends to the conviction or the sentence based on its character as an *ex post facto* law. The clause, therefore, must be taken to prohibit all convictions or subjections to penalty which take place after the commencement of the Constitution in respect of an *ex post facto* law whether the same was a *post-Constitution* or a *pre-Constitution* law.<sup>25</sup>

### 'Offence'.

1. None of the clauses of Art. 20 applies unless there is an 'offence'.<sup>1</sup>

2. There being no definition of 'offence' in the Constitution, the definition in s. 3 (37) of the General Clauses Act is to be applied. It, therefore, means an act or omission which is punishable by any law by way of fine, imprisonment or death. But unless there is a law forbidding the doing or the omission to do something, no question of 'punishment' comes.<sup>25</sup>

Hence, where a law of irrigation provides for the levy of a special rate for 'unauthorised use', with retrospective effect, it cannot be held that the Legislature was imposing a higher penalty in contravention of Art. 20 (1), inasmuch as there was no law prohibiting the use of water and no 'punishment' for an 'offence'.<sup>1</sup>

3. What this Clause prohibits is the creation of a new *offence* with retrospective effect. It does not prohibit the creation of a new rule of evidence or a presumption for an existing 'offence'.<sup>2</sup>

### 'Law in force'.

1. This expression refers to the law *factually in operation* at the time when the offence was committed and does not relate to a law 'deemed to be in force' by the retrospective operation of a law subsequently made.<sup>20</sup> Art. 20 (1), in fact, controls the power of the Legislature to enact such retrospective legislation so far as the punishment for crimes is concerned.

2. The law for the violation of which a person is sought to be convicted must 'have been' in force at the time when the act with which he is charged was committed. It follows, therefore, that a person cannot be convicted for an act which was *not an offence* under the law which was in force when that act was committed.<sup>3, 25</sup>

23. *Prahlad v. State of Bombay*, A. 1952 Bom. 1.

24. *Rameschandra v. State*, A. 1955 Bom. 346.

25. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188 (1201); (1952-4) 2 C.C. 269 (271); A. 1953 S.C. 394; *W. R. E. D Co. v. State of Madras*, (1953) 2 S.C.R. 747.

1. *Jawala Ram v. State of Pepsu*, A. 1962 S.C. 1246 (1243); (1962) 2 S.C.R. 503.

2. *Sajan Singh v. State of Punjab*, A. 1954 S.C. 464 (468).

3-25. *Pulin v. Satyanarjan*, A. 1953 Cal. 599.

3. But rules and regulations made under a statute which is repealed but continued in force under s. 24 of the General Clauses Act are 'law in force' within the meaning of Art. 20 (1).<sup>1</sup>

**'Penalty greater than that which might have been inflicted'.**

1. These words lay down the second prohibition contained in the clause. A person may be subjected to only those penalties which were prescribed by the law which was in force at the time when he committed the offence for which he is being punished. If an additional<sup>2</sup> or higher<sup>3</sup> penalty is prescribed by any law made subsequent to the commission of the offence, that will not operate against him in respect of the offence in question.

2. But the Article does not prohibit the substitution of a penalty which is not higher or greater than the previous one.<sup>4</sup>

It has been held that no greater penalty has been imposed by the later law, in the following cases—

Where the general law prescribes an *unlimited* fine, and a later special law specifies a *minimum* amount less than which a sentence of fine cannot be imposed in a case of conviction.<sup>5</sup> [In this case, the specification of a minimum does not impose a 'greater' penalty because the general law was silent as to the *extent* of the penalty which could be awarded].<sup>6</sup>

**'Penalty'.**

1. 'Penalty', means *punishment*<sup>2</sup> for the offence and would not include any other remedial measure provided for removing the mischief, e.g., summary eviction of a landlord who has contravened the provisions of a Rent Control law;<sup>3</sup> or the civil liability to pay an enhanced water rate in case of an unauthorised use of water;<sup>4</sup> forfeiture of property to recover embezzled money.<sup>5</sup>

2. On the other hand, the following are 'penalty' for the purposes of this article—

(i) Forfeiture of property under s. 53, I.P.C., ordered by a Court trying an offence.<sup>6</sup>

(ii) Compensatory fine under s. 9 (1) of the West Bengal Cr. Law Amendment (Special Courts) Act, 1949.<sup>7</sup>

**CL (2): Immunity from double punishment.**

This clause guarantees that no person be prosecuted and punished for the same offence more than once. 'And' is used here in the ordinary conjunctive sense.<sup>1</sup> Hence Art 20 (2) bars a second prosecution only where the accused has been both *prosecuted and punished* for the same offence previously.<sup>2</sup>

1. *Chief Inspector v. Thapar*, A. 1961 S.C. 838 (845): (1962) 1 S.C.R. 9.

2. *Kedar Nath Bajoria v. State of West Bengal*, (1963) S.C.A. 835 (852): (1954) S.C.R. 30.

3. *Mohari Lall v. Corporation of Calcutta*, A. 1953 Cal. 561.

4. *Satwant v. State of Punjab*, (1960) 2 S.C.R. 89: A. 1960 S.C. 266.

5. *State of W. B. v. S. K. Ghose*, A. 1963 S.C. 255.

6. *Fathima v. State of Madras*, A. 1963 Mad. 257.

7. *Jawala Ram v. State of Punjab*, A. 1962 S.C. 1246.

6. *Kedar Nath v. State of W. B.*, A. 1963 S.C. 404: (1954) S.C.R. 30.

7. *Venkataraman v. Union of India*, (1954) S.C.R. 1150: (1952-4) 2 C.C. 296 (298).



### Conditions for the application of Cl. (2).

1. The conditions for the application of the clause are—

(a) There must have been a previous proceeding before a Court of law or a judicial tribunal.<sup>7a</sup>

(b) The person must have been 'prosecuted' in the previous proceeding.<sup>7a</sup>

(c) He must have been 'punished' in the previous proceeding.<sup>7</sup>

(d) The 'offence' which is the subject-matter of the second proceeding must be the same<sup>8</sup> as that of the first proceeding, for which he was 'prosecuted and punished'.

(e) The 'offence' must be an offence as defined in s. 3 (38) of the General Clauses Act,<sup>9</sup> that is to say, 'an act or omission made punishable by any law for the time being in force'. It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.

(f) The subsequent proceeding must be a fresh proceeding where he is, for the second time, sought to be 'prosecuted and punished' for the same offence. Hence, the clause has no application where the subsequent proceeding is a mere continuation of the previous proceeding, e.g., in the case of an appeal against acquittal.<sup>10, 11</sup> In other words, a second punishment for the same offence does not attract the operation of the clause unless the second punishment is awarded in a *fresh proceeding*. Thus, to provide that a person who would be convicted of an offence shall not only be punished under the law but also be removed from the country, does not offend against the guarantee offered by the present clause.

2. For the same reason, the clause does not prohibit a provision for two penalties for the same offence, without involving a double prosecution and conviction.

3. The bar provided by this clause does not apply unless *all* the above conditions are satisfied.<sup>12, 14</sup>

For instance, even if proceedings have been taken for an 'offence', Art. 20 (2) will not be attracted if the proceedings do not constitute a 'prosecution'.<sup>14</sup>

### Prosecuted and punished<sup>7</sup>.

1. These words indicate that both the proceedings referred to by the clause must be proceedings before a *Court of law or a judicial tribunal*<sup>12, 13</sup>

2. 'Prosecution' in this context, thus, means an initiation or starting of proceedings of a criminal nature before a Court of law<sup>14</sup> or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the punishment<sup>13</sup>. Hence, the following

7a. *Makbool v. State of Bombay*, (1953) S.C.R. 730; *Thomas v. State of Punjab*, A. 1959 S.C. 375.

8. *State of Bombay v. Apte*, A. 1961 S.C. 578 (583).

9. *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1958 Cal. 682.

10. *Kalwaoti v. State of H. P.*, (1953) S.C.R. 546; *State of M. P. v. Veereshwar*, (1957) S.C.R. 668; A. 1957 S.C. 592.

11. *Ebrahim v. State of Bombay*, (1954) S.C.R. 933.

12. *Venkataraman v. Union of India*, (1954) S.C.R. 1150; A. 1954 S.C. 375.

13. *Magbool Hossain v. State of Bombay*, (1953) S.C.R. 730; A. 1953 S.C. 325.

14. *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375 (383); *Sampuranrai v. Collector of Customs*, A. 1958 S.C. 845; *Narayanlal v. Mistry*, A. 1961 S.C. 29.

proceedings do not constitute prosecution within the meaning of Art. 20 (2)—

Proceedings for the confiscation of goods or fine under s. 167, Sea Customs Act, 1878,<sup>15,16</sup> even though in awarding the penalty, the Collector is under a duty to act quasi-judicially.<sup>14,16</sup>

Hence, the award of the above penalties<sup>17</sup> does not bar a prosecution before a *Magistrate* under s. 167 (81) of the Sea Customs Act or under the I.P.C., in respect of the same facts.<sup>16</sup>

3. As stated earlier (p. 143. *ante*), the clause is not applicable unless the person has been *both* prosecuted and punished<sup>17</sup> Hence,—

(i) Where the previous prosecution was *null and void*,—e.g., for absence of proper sanction,<sup>17</sup> or for want of jurisdiction of Court,<sup>17</sup> a fresh trial upon the same facts would not be barred, even though the accused might have served out a part of his sentence before he could obtain his acquittal on appeal, on the ground of want of sanction or jurisdiction.<sup>18</sup>

(ii) Similarly, where there was no punishment in the previous proceedings, e.g., owing to dismissal for default of the complaint,<sup>19</sup> a fresh prosecution would not be barred. Where a conviction is set aside and a retrial ordered, the retrial is a continuation of the same proceedings and not a second prosecution.<sup>20</sup>

### 'Punishment'.

'Punishment' in this clause means a judicial penalty, awarded by a Criminal Court, as distinguished from a statutory authority<sup>14</sup> and would *not* include other penalties, such as disciplinary action in the case of public servants,<sup>21,22a</sup> (including penalty imposed under s. 22 of the Public Servants (Inquiries) Act, 1850<sup>22</sup>), or action against a lawyer under the Legal Practitioner Act,<sup>22</sup> or penalties for *jail offences* under disciplinary rules of jail<sup>19</sup> or under the Prisons Act,<sup>19,2</sup> or penalties under s. 167 (8) of the Sea Customs Act, 1878,<sup>24,1</sup> or penalties prescribed by Rules of a Legislature for breach of privilege<sup>2</sup> or removal under the Influx from Pakistan (Control) Act, or binding down for good behaviour under s. 110<sup>4</sup> or taking security under s. 107 of the Criminal Procedure Code.<sup>5</sup>

### 'Same offence'.

1. The previous conviction for one offence (e.g., hunt) does not bar a subsequent trial and conviction for a separate and distinct offence (say affray) even though the two offences arise out of the same<sup>6</sup> facts, and the allegations in the two complaints are identical.<sup>7</sup>

15. *Leo Roy v. Supdt. Dt. Jail* A. 1958 S.C. 118 (121)

16. *Kabin v. Asstt. Collector*, A. 1962 Mad. 85 (F.B.)

17. *Bejnath v. State of Bhopal*, (1957) S.C.R. 650

18. *Dattu v. Advya*, A. 1956 Hyd. 127.

19. *Ram Ghei v. Ram Kishan* A. 1952 All. 642

20. *Mithailal v. State*, A. 1954 All. 689

21. *Suresh v. Himantshu*, (1951) 55 C.W.N. 605 (611)

21a. *Rama v. Supdt. of Police*, A. 1967 Mys. 220

22. *Re Devanagraham*, A. 1962 Mad. 725.

23. *Prithish v. The State*, A. 1952 Cal. 319

24. *Maqbool Hussain v. State of Bombay*, (1953) S.C.R. 730. A. 1953 S.C. 325.

25. *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375

1. *Leo Roy v. Supdt.*, (1958) S.C.R. 822; A. 1958 S.C. 119

2. *Raj. Narain v. Atmaram*, A. 1954 All. 319 (334, 339).

3. *Ebrahim Vazir v. State of Bombay*, A. 1954 S.C. 229 (232)

4. *Arumugham v. State of Madras*, A. 1953 Mad. 664 (668).

5. *Subeg v. Emp.*, A. 1942 Lah. 84.

2. What is necessary to determine whether two offences are distinct is to see whether their *ingredients* are identical.<sup>7-8</sup>

A. The following have been held to be distinct offences—

(a) Possession of firearms without licence and dacoity.<sup>9</sup>

(b) Offence under s. 353 I. P. C. and under s. 26(1)(b), Bihar Sales Tax Act.<sup>9</sup>

(c) An offence and the conspiracy to commit that offence.<sup>1</sup>

(d) An offence under s. 409 of the I. P. C., and an offence under s. 105 of the Indian Insurance Act;<sup>7</sup> or an offence under s. 5(2) of the Prevention of Corruption Act.<sup>10</sup>

(e) The offence of making an unauthorised construction without obtaining permission of the Municipal authority and the offence of breach of the Building Rules in making the construction.<sup>11</sup>

(f) Offences under cls. (3), (8), (37) of s. 167 of the Sea Customs Act, 1878.<sup>12</sup>

(g) Offences under cls. (b) and (d) of s. 10 of the Central Sales Tax Act, 1956.<sup>13</sup>

B. On the other hand, the following have been held to be the same offence, so as to attract Art. 20 (2):

Offences under s. 116, Motor Vehicles Act, 1939 and under s. 279, I. P. C.<sup>14</sup>

### 'More than once'.

1. As has been pointed out already, there is no double punishment to attract the operation of the present clause unless there is a fresh judicial proceeding for the same offence. Hence, the clause is not attracted—

(i) Where the sentence provides for imprisonment in default of payment of the fine awarded.<sup>15</sup>

(ii) Where the sentence is for fine and also for recovery of arrears of sales tax as if it were a fine.<sup>16</sup>

2. Appeal from acquittal is a continuation of the original prosecution.<sup>17</sup>

### CL. (3): Accused's immunity from being compelled to be a witness against himself.

This clause gives protection—

(i) to a person 'accused of an offence';

(ii) against compulsion "to be a witness";

(iii) against himself.<sup>18</sup>

### 'Person'.

The Supreme Court assumed that the protection offered by this clause extended to corporations.<sup>19-19</sup>

6. *Sardul Singh v State of Maharashtra*, (1964) 2 S.C.R. 378 (395).

7. *State of Bombay v. Apte*, A. 1961 S.C. 578 (581); (1961) 3 S.C.R. 107.

8. *Ishodanand v. State*, A. 1955 Pat. 396.

9. *Shyamal v. State*, A. 1954 Pat. 247.

10. *State of M. P. v. Veereshwar*, (1957) S.C.R. 868; A. 1957 S.C. 592; *Om Prakash v. State of U. P.*, (1957) S.C.R. 423.

11. *Corporation of Calcutta v. Mulchand*, (1955) 2 S.C.R. 995; A. 1956 S.C. 110.

12. *Agrawal Corpn. v. Asstt. Collector*, A. 1964 Cal. 347 (354).

13. *City Theatres v. C. T. O.*, A. 1957 Ker. 221 (222).

14. *Weem Khan v. State*, A. 1967 Pat. 368.

15. *Loomchand v. Official Liquidator*, A. 1953 Mad. 595.

16. *Ramadas, in re.*, A. 1958 A.P. 707.

17. *Kelawati v. State of M. P.*, A. 1953 S.C. 131; (1953) S.C.R. 546.

18. *Sharma v. Satish*, (1964) S.C.R. 1077; (1962-4) C.C. (291).

19. *Of the affirmative view is State of Maharashtra v. N. E. & P. Co.*, A. 1951 Bom. 242.

### 'Accused of an offence'.

1. These words indicate that the protection of this clause is confined to criminal proceedings or proceedings of that nature before a Court of law,<sup>20</sup> or other Tribunal before whom a person may be accused of an 'offence' as defined in s. 3(38) of the General Clauses Act, i.e., an act *punishable* under the Penal Code or any special or local law.<sup>20, 21</sup>

2. It would not, therefore, extend to parties and witnesses in civil proceedings<sup>22</sup> or proceedings other than criminal, e.g., a proceeding for public examination of a director etc., under s. 45C of the Banking Companies Act, 1949,<sup>22, 23</sup> or departmental proceedings against a public servant<sup>24</sup>, a person examined under s. 171A, Sea Customs Act.<sup>25</sup>

In such proceedings, a person cannot refuse to give an answer on the plea that it might tend to subject him to a criminal prosecution at a future date.<sup>21</sup> Hence, the scope of the present clause is narrower than the corresponding American provision.<sup>22</sup>

### Stage from which the immunity is available.

1. The protection is available to a person accused of an offence not merely with respect to the evidence to be given in the court room in the course of the trial but it is also available to him at the previous stages if an accusation has been made against him which might in the normal course result in his prosecution.<sup>1</sup>

2. It follows from the above that the protection is available—

- (a) to a person against whom a *formal accusation* has been made<sup>21, 2</sup>;
- (b) if such accusation relates to the commission of an offence which in the normal course may result in prosecution.

#### A. Formal accusation

(a) The clause does not require 'formal' accusation by the issue of a process by the Court. The immunity would commence from the moment a person is named in the First Information Report,<sup>3</sup> or a complaint which would in the normal course result in prosecution, or a show cause notice is issued under the Foreign Exchange Regulations.<sup>4</sup>

If a person has been named, by officials who are competent to launch a prosecution against him, as having committed an offence, he is accused of an offence within the meaning of this clause.<sup>3</sup>

On the other hand,—

(b) The protection would not be available if no accusation has been made against the person at the time *when the compulsion is used* against him, e.g.,

(i) When money is recovered from the person who bribes or is bribed, instantaneously.<sup>5</sup>

(ii) When a sample is taken by a Sanitary Inspector from a milk vendor.<sup>5</sup>

20. *Maqbool v. State of Bombay*, A. 1953 S.C. 325 (1953) S.C.R. 730.

21. *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38-9).

22. *Suryanarayana v. Vijaya Commercial Bank*, A. 1958 A.P. 756 (759).

23. *In re Central Calcutta Bank*, A. 1957 Cal. 520 (523).

24. *Bhagwan Singh v. Dy. Commr.*, A. 1962 All. 232.

25. *Laxman v. State*, A. 1965 Bom. 195.

1. *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1316).

2. *Dastagir v. State of Madras*, A. 1960 S.C. 756 (761).

3. *Sharma v. Satish*, (1954) S.C.R. 1077.

4. *Bhagwandas v. Union of India*, (1963) S.C. [C.A. 131/61], d. 20.9.63.

5. *Mohanlal v. Jabalpur Corpn.*, A. 1962 M.P. 17.

Both the above cases relate to recovery of *material objects* from the person against whom they are intended to be used, as distinguished from his testimony. Hence, these cases will be excluded under the proposition laid down in the latter case of *Kathi*<sup>1</sup> (see *post*).

#### B. *Accusation normally resulting in prosecution.*

Though it has been held that the lodging of a First Information Report or complaint is not an indispensable condition to 'accuse' a person so as to attract Art. 20 (3), and that there may be cases where an accusation may be held to have been made *in substance*,<sup>2</sup> at the same time it has been laid down<sup>3</sup> that the provision cannot be invoked in a proceeding which is in the nature of a *general* investigation, as distinguished from an accusation against a *specified* individual, even though as a result of the *general* investigation, there may subsequently be a specific accusation against the individual who has been compelled to be a witness at the stage of the *general* investigation, *e.g.*, proceedings under ss. 235-240 of the Companies Act, 1956;<sup>4</sup> or a statement made to the Investigator under s. 33 (3) of the Insurance Act;<sup>5</sup> or to the High Court under s. 45 G (6) of the Banking Companies Act, 1949,<sup>6</sup> or to a Customs Officer under ss. 107-8 of the Customs Act, 1962;<sup>7</sup> or to an Inspector under s. 27 (2) of the Payment of Bonus Act, 1965.<sup>10</sup>

In short, Art. 20 (3) will be attracted only if the proceedings 'start with an accusation',<sup>11</sup> and the person who seeks its protection was already an accused person when he was compelled to make the statement.<sup>6, 12</sup>

#### 'Compelled'.

1. Compulsion is an essential ingredient of the clause.<sup>3</sup> The clause does not, accordingly, prohibit the admission of the confession which is made without any inducement, threat or promise, even though it may be subsequently retracted.<sup>8</sup>

2. 'Compulsion,' in the present context, means 'duress' which must be proved.<sup>7, 11</sup>

Compulsion may, however, be of many forms, it may be physical or mental.<sup>13</sup>

(A) Compulsion has been held to take place—

(i) Where the person making the statement has been starved or beaten;<sup>14</sup>

(ii) Where, by deceitful means, he has been induced to believe that his son is being tortured in an adjoining room;<sup>15</sup>

(iii) When under the provisions of any law a person is, under any legal sanction, bound to give oral or documentary evidence, it is obvious that he is 'compelled to be a witness.'<sup>14, 15</sup>

6. *Kalawati v. State of H. P.*, (1953), S.C.R. 546.

7. *R. K. Dalmia v. Delhi Administration*, A. 1962 S.C. 1621 (1870).

8. *Joseph v. Narayana*, A. 1964 S.C. 1552 (1556).

9. *Collector of Customs v. Kotumak*, A. 1967 Mad. 263 (275) F.B.

10. *Malabar Tile Works v. Union of India*, A. 1968 Ker. 143 (146).

11. *State of Bombay v. Kathi Kathu*, A. 1961 S.C. 1808 (1816).

12. *Dastagir v. State of Madras*, A. 1960 S.C. 756; (1960) 3 S.C.R. 116.

13. *Yusufalli v. State of Maharashtra*, A. 1968 S.C. 147 (150).

14. *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1968 Cal. 682 (687).

15. *Ram Swarup v. State*, A. 1958 AIL 119 (121).

(B) On the other hand, there has been no compulsion within the meaning of this clause—

(a) Merely because the person in question was in police custody at the time he made the statement.<sup>16</sup>

(b) Where the conversation of the person in question, made freely and voluntarily, was recorded, without his knowledge, by a tape-recorder.<sup>17</sup>

(c) Where he is *not bound*, under the law, to answer the question or to produce the document<sup>18</sup> asked for.

5. In *Sharma v. Satish*,<sup>19</sup> the Supreme Court made a distinction between a person being compelled to do a *volitional* act and something being obtained from him without involving any volitional act on his part and held that the immunity offered by Art. 20 (3) is confined to the former case and is not available in the latter.

It is on this principle that the Court held that the immunity is available to an accused person when a compulsory process or *notice* is issued, directing him, under pain of penalty, to produce a document, but not when a document is recovered from him by search and seizure by a police officer, without involving any volitional act on the part of the accused from whose possession the document is recovered.<sup>19</sup>

6. It follows from these later decisions, — that all statements made during the stage of investigation or out of court shall be excluded from the protection of Art. 20 (3), *unless a complaint or F. I. R. has already been made* at the time when the statement is obtained from the person by compulsion.

7. Information given to the Police is obviously pre-trial evidence within the purview of the dictum of the Supreme Court in *Sharma v. Satish*.<sup>20</sup> Hence, following this decision,<sup>19</sup> it was held by a number of High Courts<sup>21</sup> that if such information has been obtained by compulsion, it must be excluded from evidence, even though it may have led to the discovery of a fact under s. 27 of the Evidence Act. After the decision in *Kathi Kalu's case*,<sup>22</sup> the foregoing proposition must be taken as subject to two conditions—

(a) That at the time when the incriminating information was given by the person which led to the discovery of the fact, accusation had actually been made against such person by a complaint or First Information Report.

(b) That the information was obtained from such person by the use of physical coercion or threat amounting to 'duress'. The mere fact that the accused was at that time in the custody of the police does not constitute such 'duress', so as to exclude the information from the evidence.

### **The immunity extends to production of documentary evidence.**

1. It is now settled<sup>23</sup> that the words 'to be a witness' includes oral as well as written testimony.

2. But in *Sharma's case*,<sup>19</sup> the proposition had been put in a wider form so as to include not only written statements of the person accused

16. *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1816); *Dalmia v. Delhi Administration*, A. 1962 S.C. 1821 (1810).

17. *Yusufali v. State of Maharashtra*, A. 1968 S.C. 147 (150).

18. *Dastagir v. State of Madras*, A. 1960 S.C. 756.

19. *Sharma v. Satish*, (1954) S.C.R. 1077 (1088); A. 1954 S.C. 300.

20. *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38-9); (1961) 1 S.C.R. 417.

21. *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1815-6).

22. *R. K. Dalmia v. Delhi Administration*, A. 1962 S.C. 1821 (1870).

23. 5 Sh. 141; fn. 14.

but any documentary evidence which he may be compelled to produce. It was, accordingly, held that a compulsory process for the production of evidentiary documents against a person who has been accused of an offence contravenes Art. 20 (3) of the Constitution, if the documents are reasonably likely to support the prosecution against such person.<sup>19</sup>

3. But the proposition laid down in *Sharma's case*<sup>19</sup> that the protection of Art. 20(3) extends to all documentary evidence has been narrowed down by the majority in the later case of *State of Bombay v. Kathi Kalu*<sup>21</sup> to written statements "conveying his (the accused's) personal knowledge relating to the charge against him." The accused cannot be compelled to produce such a document. But the protection would not extend to the production of any other document, e.g., a document containing the statements of other persons in his custody<sup>21</sup> or even a document written by the accused himself which simply shows his handwriting or states facts which does not convey his personal knowledge relating to the charge against him. So interpreted, the guarantee in Art. 20 (3) will be narrower than the corresponding American guarantee which extends to the compelled production of all documents save public documents.

### Constitutionality of ss. 94 and 96, Cr. P. C.

1. As regards the constitutionality of s. 94 itself, though the Supreme Court, in *Sharma's case*,<sup>19</sup> left the question open,—once it is held that Art. 20(3) would "extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them" and that "there is an element of compulsion implicit in the process contemplated by s. 94",<sup>19</sup> it is difficult to resist the conclusion that a process under s. 94, Cr. P. C. cannot be issued against the accused himself for the production of documents in his possession that might support the prosecution, and that s. 94, in so far as it applies to the accused, must be held to be void.<sup>24</sup>

In the later case of *State of Gujarat v. Mohanlal*,<sup>25</sup> however, the majority of the Supreme Court has saved the constitutionality of s. 94 by construing the words 'any person' in it as excluding the accused. In the result, nothing in s. 94 of the Cr. P. C. will enable a Court to compel accused person to produce documents which might incriminate him.

### Whether the immunity extends to production of material evidence, specimen writing etc.

1. In *Sharma's case*,<sup>1</sup> the Supreme Court pointed out that the expression used in the clause is 'to be' and not "to appear" as a witness. It follows, therefore, that the immunity given by the clause extends to immunity against being compelled to furnish any kind of evidence which is reasonably likely to support a prosecution against him.<sup>1</sup>

2. But in the later case of *State of Bombay v. Kathi Kalu*<sup>2</sup> the Supreme Court has narrowed down the above proposition in *Sharma's case*,<sup>1</sup> by laying down that the protection does not extend to any kind of evidence but only to self-incriminating statements made by the accused (including oral or written testimony) relating to the charge brought against him. It follows, therefore, that Art. 20(3) does not protect the accused—

(a) From being compelled to produce any material object.<sup>3-5</sup>

24. *Swarnalingam v. A. L. Inspector*, A. 1966 Mad. 165.

25. *State of Gujarat v. Mohanlal*, A. 1965 S.C. 1251: (1965) 2 S.C.R. 457.

1. *Sharma v. Satish*, (1954) S.C.R. 1077.

2. *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1813-6).

3. *Dastagir v. State of Madras*, (1960) 3 S.C.R. 116.

It does not prohibit the use of compulsion requiring the accused to exhibit his body<sup>10</sup> for the purposes of establishing identity or for the holding of identification proceedings of suspects, taking their photographs or trying clothes upon their persons and the like.<sup>4</sup>

The provisions of s. 5 of the Identification of Prisoners Act, 1920 are not, accordingly, violative of Art. 20 (3).<sup>4</sup>

Even the recovery of blood-stained clothes<sup>5</sup> or other articles<sup>8</sup> from the person of the accused has been held not to amount to compelling him to be a witness.

Medical examination,<sup>6</sup> of the person of the accused or the taking of blood from his person for the purpose,<sup>1</sup> without his consent, would also be justifiable for the same reason.

(b) From being compelled to give specimen writing<sup>4</sup> or impressions of foot or palm or fingers.<sup>6</sup>

It is, accordingly immaterial whether these have been obtained from the accused while he was in police custody or at the direction of the Court or whether physical force was used.<sup>2, 7</sup>

#### Validity of some Acts with reference to Art. 20(3).

**Companies Act, 1956:**

*Held valid.*—S. 240.<sup>8</sup>

**Banking Companies Act, 1949:**

*Held valid.*—S. 45G.<sup>9</sup>

**Criminal Procedure Code:**

*Held valid.*—S. 96.<sup>10</sup>

**Evidence Act, 1872:**

*Held valid.*—S. 73.<sup>2</sup>

**Identification of Prisoners Act, 1920:**

*Held valid.*—Ss. 5-6.<sup>2</sup>

Protection of life and personal liberty. **21. No person shall be deprived of his life or personal liberty except according to procedure established by law.**

#### Object of Art. 21: Protection of personal liberty.

1. The object of Art. 21 is to prevent encroachment upon personal liberty by the Executive save in accordance with law, and in conformity with the provisions thereof.<sup>11</sup>

2. Before a person is deprived of his life or personal liberty the procedure established by law must be *strictly* followed and must not be departed from to the disadvantage of the person affected.<sup>12</sup>

#### Scope of Art. 21.

The words 'except according to procedure established by law' suggest that Art. 21 does not apply where a person is detained by a private indi-

4. *Ram Swarup v. State*, A. 1958 All. 119 (126).

5. *Palani, in re.*, A. 1955 Mad. 495.

6. *Pakhar Singh v. State*, A. 1958 Punj. 294 (298).

7. *Collector of Customs v. Kotumal*, A. 1967 Mad. 263 (275) F.B.

8. *Narayanlal v. Maneck*, A. 1961 S.C. 29.

9. *Joseph v. Narayanan*, A. 1964 S.C. 1552 (1556).

10. *Sharma v. Satish*, (1964) S.C.R. 1077.

11. *Gopalan v. State of Madras*, (1950) S.C.R. 88: (1950-51) C.C. 74 (133).

12. *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88: (1950-51) C.C. 180 (181); *Narayan v. State of Punjab*, A. 1950 S.C. 106.



dual and not by or under authority of the State. Since no fundamental right is infringed when the detention complained of is by a private individual, Art. 32 also cannot be invoked in such a case.<sup>13</sup> [But a petition under Art. 226 would lie; see *post*].

### 'Deprived'.

Deprivation means 'total loss'.<sup>14</sup> Deprivation of personal liberty, therefore, has not the same meaning as *restriction* of free movement. It is the total loss of personal liberty which is sought to be protected by Art. 21, as distinguished from restriction or partial control of the right to move freely which is referred to in Art. 19 (1) (d) read with cl. (5) of that Article.<sup>15</sup>

### 'Personal Liberty'.

1. 'Personal Liberty' in Art. 21 means freedom from physical restraint of person by incarceration or otherwise.<sup>14</sup>

2. It includes all the varieties of rights which go to make up a man's personal liberties other than those which are already included in the several clauses of Art. 19.<sup>15</sup>

It thus includes—

(a) the right of locomotion, except in so far as it is included in Art 19(1)(d);<sup>16</sup>

(b) the right to travel abroad, i.e., to move out of India,<sup>16</sup> and to return to India.<sup>16</sup>

### 'Procedure established by law'.

1. In Art 21 the word 'law' has been used in the sense of State-made or enacted law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice.<sup>17-18</sup> Hence, the expression 'procedure established by law' in the same Article means the procedure prescribed by the law of the State. It is not proper to construe the expression in the light of the meaning given to the expression 'due process of law' in the American Constitution.<sup>14</sup>

2. 'Procedure established by law' in Art. 21 means the law prescribed by Parliament at any given point of time. Parliament has the power to change the procedure by enacting a law or amending it, and when the procedure is so changed, it becomes the 'procedure established by law'.<sup>19</sup> It follows that the power of a High Court to punish for contempt of itself, according to the Letters Patent, is a power to be exercised 'according to procedure established by law'.<sup>20</sup> Similar are the inherent powers of the High Court, preserved by s. 561A of the Cr. P. C.<sup>21</sup>

3. The Court is not entitled to examine the *reasonableness* of a law which is validly made under Arts. 21-22, for, Art 19 is not applicable to a law made under Arts. 21-22; Arts. 21-22 form an exhaustive constitutional code relating to personal liberty.<sup>14, 22</sup>

13. *Vidya Verma v. Shivnarain*, (1955) 2 S.C.R. 983.

14. *Gopalan v. State of Madras*, (1950) S.C.R. 88.

15. *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295; (1964) 1 S.C.R. 332.

16. *Satwant v. Asstt. Passport Officer*, A. 1967 S.C. 1836 (1844-5).

17. *Vidya Verma v. Shivnarain*, (1955) 2 S.C.R. 983.

18. *Ram Chandra v. State of Bihar*, A. 1961 S.C. 1629.

19. *Krishnan v. State of Madras*, (1961) S.C.R. 621 (Mahajan & Das JJ.).

20. *State of Bombay v. Mr. P. A.* 1969 Bom. 182 (190). [Apart from the Letters Patent, Art. 215 itself could have been relied upon for the purpose].

21. *Rafiq v. Asstt. Customs Collector*, A. 1967 S.C. 1639 (1642).

22. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451; (1950-51) G.C. 159 (160).

23. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1183 (1190).

Hence, the constitutionality of a criminal law cannot be challenged on the ground that it imposes an unreasonable restriction upon personal liberty or that it is opposed to the principles of natural justice.<sup>24</sup>

4. It is a valid law if it is enacted by a competent Legislature and if it does not violate any of the *other* fundamental rights declared by the Constitution, e.g., Art. 14<sup>21</sup> or Art. 22.<sup>24</sup>

Hence, notwithstanding Art 21, it is open to challenge the constitutionality of a law which deprives a person of his life or personal liberty on the ground—

- (a) that it has not been enacted by a competent Legislature;
- (b) that the law suffers from the vice of excessive delegation;<sup>25</sup>
- (c) that it constitutes a colourable exercise of the legislative power;<sup>25</sup>
- (d) that, if the law is a subordinate legislation, it is *ultra vires* or, if it is an order, that it is *mala fide*;<sup>25</sup>
- (e) that it contravenes any of the fundamental rights other than Art. 24.<sup>25</sup>

5. 'Law' would not include mere executive or departmental instructions which have no statutory basis,<sup>25</sup> e.g., the U. P. Police Regulations.<sup>3</sup>

**Court's right to interfere when a person is deprived of liberty otherwise than according to procedure established by law.**

Art 21 says that a person may be deprived of his liberty only according to procedure established by law. It follows therefore, that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law.<sup>2</sup> And the Court, in a proceeding for *habeas corpus* will set the prisoner at liberty whenever this has not been done.<sup>2</sup> This principle has its application both in the case of punitive as well as preventive detention. Thus, —

#### (A) Punitive detention.

1. In *habeas corpus* proceedings the legality or otherwise of the detention is to be determined by the Court with reference to the time of the return and not that of institution of the proceedings. Hence, where a Court adjourns a proceeding under s. 344 of the Criminal Procedure Code without making an order of remand to custody as required by that section, and there is no such order on the date of the return the accused are entitled to be released on an application for *habeas corpus*.<sup>24</sup>

2. Under r. 41 of the Punjab Communist Detenus Rules, 1950, the Jail Superintendent was empowered to punish a detenu for 'jail offences'; if, however, he was satisfied that the offence was such that it was not adequately punishable by him, he might forward it to the Court of a Magistrate. Held, that where the Jail Superintendent had himself punished a detenu under this rule, he had no authority to refer the case again to a Magistrate, and any prosecution in such circumstances would be contrary to 'the procedure established by law' and accordingly, invalid.

3. Punishment for violation of a law which is invalid for want of legislative competence or contravention of a fundamental right, such as Art. 19, also contravenes Art 21.<sup>4</sup>

24. *Ram Krishna v. State of Delhi* (1953) S.C.R. 718 (715).

25. *Makhan Singh v State of Punjab* A. 1964 SC 381

1. *Kharak Singh v State of U. P.* A. 1963 SC 1295 (1299)

2. *Ram Narayan v State of Delhi* (1953) S.C.A. 399. (1953) S.C.R. 652..

3. *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730.

4. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554; (1960) 2 S.C.R. 671.

**(B) Preventive detention:**

Similarly, in the case of preventive detention, if the detention is not in *strict conformity* with the law authorising detention, the detenu is entitled to be released. Thus, the violation of the following provisions of the Preventive Detention Act has been held to invalidate the detention—

(i) Failure to communicate the grounds to the detenu within a reasonable time, as required by s. 7.<sup>5</sup>

(ii) Where a detenu's case is considered by only two of the three members who constitute the Advisory Board constituted under s. 8(2) of the Act.<sup>6</sup>

(iii) Failure to refer the detenu's case to the Board within the time fixed by s. 9 (1), even though the detenu may have been temporarily released under s. 14 (1).<sup>7</sup>

(iv) Where the period of detention was fixed in the initial order of detention.<sup>7</sup>

(v) Where the Government revoked a previous order of detention in conformity with the opinion of the Advisory Board, but by the same order, confirmed the detention under one of the sub-clauses of s. 3 (1) (a) of the Act.<sup>8</sup>

(vi) When the order was not in conformity with s. 11 of the Act.<sup>8</sup>

**Suspension of Art. 21.**—See under Art. 359, *post*

**22. (1) No person who is arrested shall be detained in custody**

Protection against arrest and detention in certain cases.

without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period

5. *State of Bombay v. Atmaram*, (1950-51) C.C. 139 (182).

6. *Kishorilal v. The State*, A. 1951 Assam 169 (170).

7. *Makhon Singh v. State of Punjab*, (1950-51) C.C. 180 (181); (1950) S.C.R. 88.

8. *Shibbanlal v. State of U. P.*, (1954) S.C.R. 418; (1952-54) 2 C.C. 321.

prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

- (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

**Arts. 21-22.**—(1) Art. 22 does not form a complete code of constitutional safeguards relating to preventive detention. To the extent that provision is made in Art. 22 it cannot be controlled by Art. 21; but on points of procedure which expressly or by necessary implication are not dealt with by Art. 22, Art. 21 will apply.

(2) Consequently, in a case of preventive detention, the procedure prescribed by the law under which the detention is made must be strictly followed, and if this is not done, the person detained is entitled to be released by the Court.<sup>9</sup>

**Arts. 19 and 22.**— See p. , ante

### **Scope of Cls. (1)-(2).**

These clauses lay down the procedure which is to be followed when a person is arrested.<sup>9</sup> They ensure four things<sup>9</sup> (a) right to be informed regarding grounds of arrest; (b) right to consult and to be defended by a legal practitioner of his choice; (c) right to be produced before a Magistrate within 24 hours; (d) freedom from detention beyond the said period except by order of the Magistrate.<sup>9</sup>

### **Cl. (1): Safeguards against arrest.**

1. The language of cls. (1) and (2) of this Article suggests that the fundamental right conferred by this Article gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has or is suspected

9. *Gopalan v. State of Madras*, (1950) S.C.R. 88; (1950-51) C.C. 74 (133).

to have committed, or is about or likely to commit, an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest.<sup>10</sup>

2. The words 'arrest and detention' have been interpreted to mean arrest and detention by a non-judicial authority upon an accusation of a criminal or quasi-criminal nature, so as to exclude from its purview arrests for the purpose of carrying out the provisions of a statute of a civil nature.<sup>11</sup>

Hence, the following have been held *not* to constitute 'arrest and detention' within the meaning of this article—

(a) The physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation by that person of any offence of a criminal or quasi criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under s. 4 of the Abducted Persons Recovery and Restoration Act, 1949.<sup>10</sup>

(b) Arrest for detention in the civil prison under s. 48 of the Madras Revenue Recovery Act for recovery of arrears of income tax.<sup>11</sup>

(c) Removal of persons from a brothel, under the Bengal Suppression of Immoral Traffic Act.<sup>12</sup>

(d) Deportation of an alien.<sup>13</sup>

3. On the other hand, the protection of the clause has been extended to arrest under orders of the Speaker of a Legislature for contempt.<sup>14</sup>

4. Cls. (1)-(2) do not apply to arrest made under a warrant of Court,—for a person arrested under warrant of a Court is made acquainted with the grounds of his arrest before the arrest is actually effected.<sup>15</sup>

5. Since Cls. (1)-(2) are excluded by Cl. (3), a person arrested under a law of preventive detention is not entitled to the rights under Cls. (1)-(2).<sup>16</sup>

### Right to be informed of the grounds.

1. The object of this safeguard is that on learning of the grounds of arrest, the person arrested will be in a position to make an application to the appropriate Court for bail, or move the High Court for *habeas corpus*. The intimation will also enable the arrested person to prepare his defence in time for the purposes of his trial.<sup>17</sup>

2. Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge framed by the Court for the trial of a case.<sup>17</sup> Thus, merely to inform the person that he has been arrested under s. 7 of the Criminal Law Amendment Act, 1932, without giving any particulars of the alleged acts for which such action has been taken against him, is not sufficient compliance with Art. 22 (1).<sup>18</sup>

10. *State of Punjab v. Ajai Singh*, (1953) S.C.R. 254; (1952-54) 2 C.C. 303.

11. *Collector of Malabar v. Hajeer*, (1957) S.C.R. 970; *Purshottam v. Desai*, (1955) 2 S.C.R. 887.

12. *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

13. *State of U. P. v. Abdus Samad*, A. 1962 S.C. 1506.

14. *Gunupati v. Nafisul*, A. 1954 S.C. 636; (1952-54) 2 C.C. 309; *Ref. under Art. 143*, A. 1965 S.C. 745 (766).

15. *State of Punjab v. Ajai Singh*, (1953) S.C.R. 254.

16. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1284.

17. *Vimal Kishore v. State of U. P.*, A. 1956 All. 56 (59).

18. *Madhu v. State*, A. 1950 Punj. 506; *Hariharanand v. Jailor*, A. 1954 All. 355.

3. This requirement of informing the person as to why he has been arrested is not dispensed with by giving him bail.<sup>19</sup>

**'As soon as may be'.**

1. The words '*as soon as may be*' means as nearly as is reasonable in the circumstances of the particular case. So, no definite period of time can be laid down as reasonable in all cases.<sup>20</sup> The expression also occurs in cl. (5) and has been commented upon under that clause.

2. But it will be possible for the Court, in a proceeding for *habeas corpus*, to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a *reasonable* time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the Court would order his immediate release.<sup>21</sup>

3. Since in *habeas corpus* proceedings the material date for determining the validity of the detention is the date of return, where the Court finds that a reasonable time for communicating the grounds had expired before the date of return, a communication subsequent to the return cannot save the detention of the Petitioner from invalidity,<sup>22</sup> for, the detention became invalid as soon as the reasonable time expired.

**'The right to consult legal practitioner'.**

1. The person arrested has a right to consult a legal adviser of his own choice ever since the moment of his arrest and also to have effective interview with the lawyer out of the hearing of the police, though it may be within their presence.<sup>23</sup>

2. The right extends to any person who is arrested, whether under the general law or under a special statute.<sup>24</sup>

3. The right to consult and to be defended by a lawyer of his choice belongs to the person arrested not only at the pre-trial stage, but also at the trial before the Criminal Court or before a special tribunal for the trial of any offence whether the offence is punishable with death, imprisonment or otherwise.<sup>25</sup> The right to be defended includes not only the defence against the arrest but also against the charge.

4. Nor is it correct to say that the guarantee offered by this clause is spent if the person undergoing a trial has already been released on bail.<sup>26</sup>

5. The continuance of the right after arrest at the trial, however, depends upon the nature of the action for which he is tried. The right enures if he is tried of an offence; but not so, otherwise, e.g., where he is proceeded against for recovery of damages for wrongful trespass.<sup>27</sup>

**Constitutionality of statutes barring appearance of lawyers.**

A majority of the Supreme Court has held<sup>28</sup> that any statute which prohibits the appearance or defence by a lawyer before any tribunal (e.g., A Panchayat Court) which has the power to try a person of an offence or on a criminal charge, is void for contravention of Art. 22(1), to the extent that it denies the accused of his fundamental right to be defended by a lawyer of his choice in any trial of the crime for which he was arrested.

19. *State of M. P. v. Shobharam*, A. 1968 S.C. 1910 (1917).

20. *Tarapada v. State of West Bengal*, (1951) S.C.J. 233 (1950-51) C.C. 151.

21. *State of Bombay v. Atmaram*, (1951) S.C.R. 167: (1950-51) C.C. 139.

22. *Metibai v. State*, A. 1954 Raj. 241.

23. *State of M. P. v. Shobharam*, A. 1966 S.C. 1910 (1917-8; 1921; 1922).

24. *State of M. P. v. Shobharam*, A. 1966 S.C. 1910 (1919, 1922).

### Right to be defended by a legal practitioner.

1. The article does not guarantee any absolute right to be *supplied* with a lawyer by the State. The only right is to have the *opportunity* to engage a lawyer.<sup>20</sup>

2. Nor does the clause confer any right to engage a lawyer who is disabled under the law.<sup>1</sup>

3. Where a trial is held without informing the accused of the date fixed for trial and without giving him an opportunity of getting into communication with his legal adviser, the conviction is liable to be set aside.<sup>2</sup>

4. But a person cannot complain of the infringement of this right nor would his conviction be quashed<sup>3</sup> unless he had made a request to the proper authorities for permission to allow him to be represented by a lawyer and that prayer has been refused.<sup>3-5</sup>

### Laws held void for contravention of Art. 22(1):

**Madhya Bharat Panchayat Act, 1949:**

*Held invalid.*—S. 63.<sup>6</sup>

### Cl. (2): Right to be produced before the nearest Magistrate.

1. This clause not only affirms but also liberalises the provision contained in s. 61 of the Cr. P. C. by extending the right to persons arrested in pursuance of a warrant.<sup>7-12</sup>

2. If 24 hours have passed without compliance with the requirement of the clause, the arrested person is entitled to be released forthwith.<sup>13</sup>

It is evident from the words “within 24 hours of such arrest” that the right to be produced before a magistrate arises as soon as a person is arrested and, in case of a prolonged detention compliance with the Clause at any time afterwards does not satisfy the constitutional requirement.<sup>14</sup>

3. The ‘nearest Magistrate’ refers to a Magistrate acting under a judicial capacity, as under s. 167 of the Cr. P. C.<sup>15</sup>

Hence, when a person is arrested by a Magistrate acting under s. 64 of the Cr. P. C., read with the P. P. Social Disabilities Act, the arrested

25. *Janardhan v. State of Hyderabad*, (1951) S.C.R. 344; (1950-51) C.C. 233 (235).

1. *Public Prosecutor v. Venkata*, A. 1961 A. P. 104.

2. *Hansraj v. State*, A. 1956 All 641.

3. *State of M. P. v. Shobharam*, A. 1966 S.C. 1910 (1922).

4. *Ram Sarup v. Union of India*, A. 1965 S.C. 24 (250).

5. But the decision should be otherwise if the right under Art. 22(1) is regarded as a fundamental right which cannot be waived or if it is held that the plea of denial of the right is allowed to be raised at any stage of the criminal proceeding, including appeal (as distinguished from a collateral proceeding) [see *Hidayatullah J in State of M. P. v. Shobharam*, A. 1966 S.C. 1910 (1919)]. *State of M. P. v. Shobharam*, A. 1968 S.C. 1910 (1919). [See also s. 16 of the Laccadive & Minicoy Reg., 1912—*Mayagothi v. Hassan*, A. 1968 Ker. 34].

7-12. *Gunapati v. Nafisul*, A. 1954 S.C. 637.

13. *Hariharanand v. Jailor*, A. 1954 All. 355.

14. In *State of U. P. v. Abdul Samad*, [A. 1962 S.C. 1506], the Allahabad High Court had split up a person's detention into two parts and applied Art. 22(2) from a point of time later than the initial point of time. Though the majority of the Supreme Court did not support any such division of the period of detention, their Lordships decided the case on the basis of the High Court's assumption that Art. 22(2) could be applied afresh from the second point of time. But, as Subba Rao J., in the minority, pointed out, the initial arrest was under an order of deportation and Art. 22(2) was instantly attracted, if at all, and that the subsequent removal of the detenu from one place to another had nothing to do with the applicability of Art. 22(2).

person must be produced before another Magistrate, acting under s. 167, Cr. P. C.<sup>15</sup> But it has been held that where a person was arrested by a Station Officer on his own authority, and immediately thereafter the City Magistrate (invested with judicial powers) arrived at the spot in his executive authority, and the person arrested having been produced before such Magistrate, he remanded him to jail custody, there was sufficient compliance with Art. 22(2).<sup>16</sup>

Production before the High Court has been taken as a sufficient compliance with this clause.<sup>14</sup>

**Cl. (3) (b): Nature of preventive detention and the constitutional safeguards relating thereto.**

1. 'Preventive detention' means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention. While the object of *punitive* detention is to punish a person for what he *has done*, the object of preventive detention is to prevent him *from doing* something which comes within the entries 9 of List I and 3 of List III. The object of preventive detention is to prevent the individual not merely from acting in a particular way, but from achieving a particular *object*. No offence is proved, nor any charge formulated; and the justification is *suspicion* or reasonable probability and not criminal conviction which only can be warranted by legal evidence.<sup>17</sup>

2. The object of the framers of the Constitution in giving a constitutional status to preventive detention was to prevent anti social and subversive elements from impeding the welfare of the infant Republic. But though they recognized the necessity of laws for preventive detention, they also provided certain safeguards to mitigate their harshness, by placing fetters on the legislative power conferred on this subject, under Arts. 21-22:

(i) By reason of Art. 21—

(a) Preventive detention cannot be ordered by the Executive without the authority of a law and unless in conformity with the procedure laid down therein.

(b) The law must be a valid law, i.e., within the legislative competence of the Legislature which is enacting it.

(ii) Art. 22 next imposes the following restrictions upon the power of the Legislature itself to enact a law of preventive detention:

\*(1) That no law can provide for detention for a period of more than 3 months unless the sufficiency for the cause of detention is investigated by an Advisory Board within the said period of three months [cl. (4)].

(2) That a State law cannot authorize detention beyond the maximum period prescribed by Parliament under the powers given to it under cl. (7).

15. *Eshaq v. State of U. P.*, A. 1957 All. 782.

16. *Ram Manohar v. Supdt. Central Prison*, A. 1955 All 193 [Soundness of this decision requires further examination. The words 'court of the magistrate' in Art. 22(2) should not be overlooked. Can it be said that the City Magistrate who visited the spot in his executive capacity, was holding his *court* there? The words 'court of the Magistrate' correspond to the words 'Magistrate's Court' in s. 61 of the Cr. P. Code. How is the accused to get opportunity to consult a lawyer, if he is not taken to a court? The fact that the clause extends even to persons arrested under warrant suggests that the right of production before a Magistrate in his judicial capacity is an independent right and that the requirement must be strictly complied with.

17. *Gopalan v. State of Madras*, (1950) S.C.R. 68; (1950-51) C.C. 74.



(3) That Parliament also cannot make a law authorizing detention beyond 3 months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in cl. (7).

(4) Provision has also been made to enable Parliament to prescribe the procedure.

(5) Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of Article 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention and has also the right to make a representation protesting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention.....<sup>18</sup>

### Ambit of the Court's jurisdiction in cases of detention.

The Court can pronounce upon the validity of an order of preventive detention on any of the following grounds:

(i) The Court may examine the validity of the law itself (a) on the ground of *competence* of the Legislature, *i.e.*, whether the subject-matter of the legislation is covered by the legislative Entry relating to preventive detention under which it is purported to have been made; (b) on the ground of its contravention of Art 22 of the Constitution;<sup>18</sup> or (c) on the ground that it seeks to interfere with the jurisdiction of the Supreme Court under Art 32.<sup>19</sup>

(ii) When a law of preventive detention is challenged before the Court, the Court has got to decide on a consideration of the true nature and character of the legislation whether it is *really* on the subject of preventive detention or not. But once the legislation is held to be really on the subject of preventive detention and within the powers assigned to the Legislature in question, the Courts have nothing to do with the reasonableness or with the ambit of the Legislature's authority, and there can be nothing *arbitrary* in it, so far as a Court of law is concerned.<sup>19</sup>

Of course, the authority vested with the power of enforcing the legislation may commit an abuse of such power, in which case the act of that authority would be illegal, but that would not invalidate the *legislation* itself. To decide whether a piece of legislation is *ultra vires* the only question to be considered is whether it is within the ambit of the legal powers of the Legislature. The illegality of the exercise of a legislative power or the possibility of its abuse has nothing to do with the validity of the legislation itself.<sup>19</sup>

(iii) The Court may examine the grounds to see whether they are relevant to the circumstances under which preventive detention could be supported,<sup>19</sup> *e.g.*, security of India or of a State, maintenance of public order, etc., and set the detenu free if there is no rational connection between the alleged activity of the detenu and the ground relied upon, say, public order.<sup>20</sup>

(iv) The Court may examine the grounds to see whether the grounds supplied have a relevant connection with the order. Thus, though the Court would not undertake an investigation as to the sufficiency of the materials on which the satisfaction of the detaining authority was grounded, it would examine the *bona fides* of the order and interfere if it was *mala fide*,<sup>19</sup> that

18. *Gobalan v State of Madras* (1950) SCR 88.

19. *Lakshmarayan v. Prov. of Bihar*, (1950) S.C.I. 32 (43).

20. *Sodhi Shamsher v. State of Pepsu*, A. 1954 S.C. 276.

is to say, if the law of preventive detention was used for any purpose other than that for which it was made.

(v) The Court may examine the grounds communicated to the detenu to see if they are sufficient to enable him to make an effective representation.<sup>21</sup> While the sufficiency of the ground in the sense whether it would give satisfaction to the Government is not a matter for examination by the Courts, the sufficiency of the grounds in the sense of enabling the defence to make an effective representation can be examined by the Courts.<sup>22</sup>

[See further, under 'what are vague grounds', *post*].

(vi) The order should be struck down if it violates any of the provisions of Art. 22 or does not strictly follow the procedure laid down by the law of preventive detention under which it has been made.<sup>23</sup>

### What the Court cannot do in an application under Art. 32 or 226 against an order of preventive detention.

From the foregoing discussion, it is clear that the Court cannot do any of the following things, when the validity of a detention order under the Preventive Detention Act is challenged before it:

1. It cannot invalidate the law of preventive detention on the ground that it imposes an unreasonable restriction upon any of the freedoms guaranteed by Art. 19;<sup>24</sup> or that the procedure laid down by it does not conform to the principles of natural justice.<sup>19</sup>

2. It cannot invalidate the law on the ground that the decision to make an order of detention in each case has been delegated to the subjective satisfaction of the executive.<sup>19</sup>

3. Whatever might have been the defect of the order when it had been issued, if the defect is cured or a valid order is produced at any time before the Court orders the release of the detenu, the Court cannot hold the detention to be invalid.<sup>24</sup>

4. When an order of preventive detention is challenged in a court of law, the Court is not competent to enquire into the truth or otherwise of the facts which are mentioned as ground in the communication to the detenu under Art. 22 (5).<sup>25</sup>

5. Again, the sufficiency of the grounds upon which the *satisfaction* of the authority issuing the order of detention purports to be based, provided they have a rational or relative value and are *not* extraneous to the scope or purpose of the legislative provision cannot be challenged in a court of law, except on the ground of *mala fides*.<sup>25, 1</sup>

6. It cannot go into the question whether on the *merits* the detaining authority was justified to make the order of detention or to continue it.<sup>25</sup> Thus, the High Court cannot interfere on the ground that, in view of the fact that times have changed, further detention would be unjustified.<sup>2</sup>

7. It is for the Advisory Board and not the Courts to examine the correctness of the statements made in the affidavits in support of the order of preventive detention.<sup>25</sup>

21. *State of Bombay v. Atmaram*, (1951) S.C.R. 167; *Tarapada v. State of West Bengal*, (1951) S.C.R. 212; (1950-51) C.C. 139, 151.

22. *Makhan Singh v. State of Punjab*, (1952) S.C.R. 368.

23. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451.

24. *Narayan Singh v. State of Punjab* (1952) S.C.R. 395.

25. *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18; (1950-51) C.C. 177 (179); A. 1951 S.C. 481; *Gopalan v. State of Madras*, (1950) S.C.R. 88 (218), *Sastri J.*; *Shibbaral v. State of H. P.*, (1954) S.C.R. 418; (1952-54) C.C. 321.

1. *Rameshwar v. D. M.*, A. 1954 S.C. 334

2. *Madan Lal v. State of Bihar*, (1951) 30 Pat. 716.

### When is an order *mala fide*.

1. An order of detention is *mala fide* if it is made for a 'collateral' or 'ulterior' purpose, i.e., a purpose other than what the Legislature had in view in passing the law of preventive detention,<sup>1</sup> i.e., prevention of acts prejudicial to the security of the State, maintenance of public order and so on. There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or *relevant* grounds which would justify detention under the provisions of this law itself,<sup>2</sup> or when it appears that the authority making the order did not apply his mind to it at all,<sup>3</sup> or made it for a purpose other than that mentioned in the detention order,<sup>4,5</sup> e.g., for suppressing a rival political party in opposition to the party in power.<sup>6</sup>

2. The *onus of proving mala fides* is upon the detenu,<sup>7</sup> and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

Thus, an order of detention is not *mala fide* by reason of the following:—

(i) Merely that the order of detention is made after failure to secure a conviction under the ordinary criminal law. Similarly, where there is a *pending* criminal case against a person,—if the case is withdrawn and an order of detention is made against him the order is not necessarily *mala fide*,<sup>8</sup> unless there are circumstances to show positively<sup>9</sup> that the order was made for some ulterior motive or purpose different from the one set out on the face of the order.<sup>7</sup>

Further, there is no question of *mala fides* unless the charges in the criminal prosecution are shown to be identical with the grounds of detention.<sup>9</sup>

(ii) Merely that the purpose might have been served by proceeding under the ordinary law, e.g., by making an order under s. 144, Cr. P. C.<sup>8</sup>

(iii) Merely that the order of detention refers to the *past* activities of the detenu as giving rise to the satisfaction of the detaining authority,<sup>9,10</sup> or activities taking place outside the jurisdiction of the authority making the order of detention<sup>11</sup> (because, once the grounds are relevant, the Court cannot inquire into the reasonableness of the subjective satisfaction of the detaining authority).<sup>9</sup>

(iv) That a person has been, on the expiry of his detention under a temporary law of preventive detention, detained on the *self-same* grounds under another Act.<sup>9,12</sup>

(v) The *wrong* facts were placed before the authority which issued the order.<sup>9</sup>

(vi) Merely that a fresh order is made superseding a former order which was defective.<sup>13</sup>

(vii) That there were certain disputes between the detenu and a Minister, when the Secretary who issued the detention order was not influenced by the Minister who was in charge of a different Department.<sup>14</sup>

3. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

4. *Puranlal v. Union of India*, A. 1958 S.C.R. 163.

5. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451.

6. *Thakur Prasad v. State of Bihar*, A. 1955 S.C. 631.

7. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451.

8. *Ashutosh v. State of Delhi*, A. 1953 S.C. 451.

9. *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18 (24); A. 1951 S.C. 481.

10. *Joglekar v. Commr. of Police*, A. 1956 S.C. 28.

11. *Sarin v. State*, A. 1956 All 589 (593).

12. *Udagar Singh v. State of Punjab*, (1950-51) C.C. 155.

13. *Narain v. State of Punjab*, A. 1952 S.C. 106; (1952) S.C.R. 396; *Godavari v. State of Maharashtra*, A. 1955 S.C. 1404 (1407).

14. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

(viii) That the action of the Police was *mala fide*, when there is nothing to show that the detaining authority did not apply his mind.<sup>15</sup>

(ix) Merely that the petitioner's activities were not liked by the authorities.<sup>16</sup>

3. The allegation of *mala fides* will not be entertained by the Court when it is not against the authority who made the impugned order, but some other persons, e.g., the Police.<sup>14</sup>

#### **Bona fides of successive orders.**

(A) (i) Where the Court has declared, *on the merits*, the detention of a person to be without justification, a subsequent order of detention on the *same* grounds would obviously be *mala fide*. If, however, the decision proceeded simply on the ground that the *law* under which the order had been made was invalid or the order was irregular in *form*, a fresh order of detention under new legislation, or a fresh order of detention in a valid form based on the pre-existing grounds themselves<sup>17</sup> is not *mala fide*.

(ii) In the case of a pending proceeding,—if at any time *before* the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release *merely* on the ground that at some prior stage, there was no valid cause for detention.<sup>18</sup> Of course, if it appears on the facts of the case that the order was not made *bona fide* on being satisfied that the petitioner's detention was still necessary, but was made obviously to *defeat* the pending petition challenging the validity of the earlier order, the later order would be held to be *mala fide* and the detenu released. But, in the absence of proof of bad faith, there is nothing to prevent the detaining authority to supersede a defective order by a valid order while a proceeding challenging the validity of the earlier order is pending.<sup>19</sup>

(iii) It is to be noted that by reason of ss. 11 (2) and 13 (2) of the amended Preventive Detention Act, it will no longer be possible to make a fresh order of detention on the *same* ground, if the Advisory Board *has once reported* that there is no sufficient ground for detention. Again, by reason of s. 9, it will not be possible to withhold reference to the Advisory Board by making successive orders. Any such action would be *mala fide*.

(B) On the other hand, the order was held *mala fide* in the following cases—

(i) Where the detention was made simply with the object of making a secret investigation into a crime, in contravention of the provisions of the Criminal Procedure Code.<sup>17-18</sup>

(ii) Where the primary purpose of the order of detention was only to circumvent the orders of bail issued by the Court or to effect an illegal extension of the period of imprisonment served out by the prisoner.<sup>19</sup>

(iii) But, except where a valid order of detention is made to replace a formally defective order, an order of detention under the P. D. Act cannot be *served* upon a person who is already under detention or is in jail custody.<sup>20</sup>

15. *Puranlal v. Union of India*, (1958) S.C.R. 283.

16. *Ananta v. State*, A. 1951 Orissa 27.

17. *Vimlahai v. Emperor*, 11 R. (1945) Nag. 6.

18. *Bharatham v. Commissioner of Police*, A. 1950 Bom. 202.

19. *In re Srinivasam*, A. 1949 Mad. 761; *Mani v. District Magistrate*, A. 1950 Mad. 162 (176).

20. *Rameshwar v. D. M.*, A. 1964 S.C. 334 (337).

### CL (4). Scope of Advisory Board.

1. The only function of the Advisory Board is to report to the Government whether a detenu is liable to be detained for a period exceeding 3 months, subject to the maximum laid down by Parliament under Cl. (1) (b).<sup>21</sup> Such report will enable the Government to detain the person beyond three months, provided the detention be valid on its merits, and does not otherwise offend the Constitution.<sup>21</sup>

The words 'such detention' have been interpreted to refer to preventive detention and not the period for which the person is to be detained. It follows that the matter before the Advisory Board is whether the detention is justified and not for how long he should be detained. After the Advisory Board reports that the detention is justified, it is for the detaining authority to determine the period of detention, subject to the maximum laid down by Parliament.<sup>18, 21</sup>

2. The function of the Board is purely advisory and it does not make the detention valid if it is *ultra vires* the P. D. Act or the Constitution. Hence, *habeas corpus* would still lie against the initial order of detention notwithstanding report of the Advisory Board<sup>22</sup> confirming it,—for instance, on the ground that the law is *ultra vires* or that the order is *mala fide*. Again, *habeas corpus* would lie even before the detenu's case is placed before or considered by the Advisory Board. In other words, the High Court's jurisdiction under art 22b is not in any way controlled by the constitution of Advisory Boards.<sup>23</sup>

3. Similarly, the disposal of an application for *habeas corpus* under Art. 22b cannot affect an applicant's case before the Advisory Board. The Court and the Advisory Board function in different areas.<sup>23</sup>

4. If the Advisory Board reports against the order of detention, it would be illegal for Government to detain the person beyond three months, under Art 22 (4). S. 11 (2) of the amended Detention Act, requires the appropriate Government, in such a case to revoke the detention order and to release the detenu *forthwith*.

### CL (5): The right of representation.

1. Art 22 (5) gives to the detenu the right to make a representation, but no right to be heard by an independent tribunal.<sup>21</sup>

2. The detention order will be invalid if the requirements of this clause are not complied with e.g., if the grounds on which the order has been made have no connection with the order, or have no connection with the circumstances or classes of cases under which preventive detention could be supported,<sup>24</sup> or the grounds are too vague to enable him to make the representation.<sup>24</sup>

3. When an order of preventive detention is challenged on the ground that it contravenes Art 22 (5), the question for determination by the Court is not whether the petitioner will in fact be prejudiced in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has pro-

21. The maximum period now prescribed by s. 11A of the P. D. Act is 12 months from the date of detention.

22. *Prem Dutt v. Supdt., Central Prison*, A. 1954 All. 315.

23. *Raman Lal v. Commr. of Police*, (1951) 56 C.W.N. 42.

24. *Gopalan v. State of Madras*, (1950) S.C.R. 68; (1950-51) C.C. 74 (133).

vided against the improper exercise of the power must be jealously watched and enforced by the Court.<sup>25</sup>

4. The sufficiency of the particulars conveyed to a detenu is a justifiable issue under cl. (5), the test being whether they are sufficient to enable him to make an effective representation.<sup>1</sup>

5. The "communication" of the grounds which is required by the earlier part of the clause is for the purpose of enabling the detenu to make a representation, the right to which is guaranteed by the latter part of the clause. Communication in this context, therefore, means imparting to the detenu sufficient and effective knowledge of the facts and circumstances on which the order of detention is based and which are in the nature of the charge against him of the prejudicial acts which the authorities attribute to him.<sup>2</sup> It follows that when the detenu is not conversant with the English language a communication of the grounds of detention to such detenu in the English language together with an oral explanation in Hindi at the time of delivering the grounds is not a sufficient compliance with the requirements of this clause, even though English continues to be the official language, for, such communication does not enable the detenu to make an effective representation. When the person is not conversant with the English language the grounds of detention should be communicated to him in writing in the language which he understands.<sup>3</sup>

#### 'Grounds' and 'facts': what is to be communicated.

1. 'Grounds' means the *conclusions* drawn by the authorities from the 'facts' or 'particulars'.<sup>4</sup>

2. Art. 22 (5) only obliges the authorities to communicate to the detenu the *grounds* on which the order of detention has been made, i.e., to indicate the kind of prejudicial activity the detenu is being suspected to be engaged in. But the obligation to furnish sufficient facts or particulars comes from the duty of the authorities under the second part of Art. 22 (5), viz., to 'afford the detenu the earliest opportunity of making a representation', for, without getting information sufficient to make a representation against the order of detention, it is not possible for the man to make the representation at all.<sup>5</sup> Hence, a person detained is entitled, in addition to the right to have the ground of his detention communicated to him, to a further right to have particulars, as full and adequate as the circumstances permit, furnished to him so as to enable him to make a representation against the order of detention and the sufficiency of particulars conveyed in the second communication is a justifiable issue, the test being whether they are sufficient to enable the detained person to make a representation which on being considered may give him relief.<sup>25</sup>

3. But, while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.<sup>6</sup>

25. *Ram Krishna v. State of Delhi*, (1953) S.C.R. 708; (1952-54) C.C. 317; A. 1953 S.C. 318.

1. *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

2. *Hari Kishan v. State of Maharashtra*, A. 1952 S.C. 911.

3. *State of Bombay v. Atmaram*, (1951) S.C.R. 167 (179), Kania C.J.

4. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451; (1950-51) C.C. 158 (163); A. 1951 S.C. 270; *Puranlal v. Union of India*, (1956) S.C.R. 460.

4. Though it was not obligatory upon the authority to disclose *all* facts other than those which he had the privilege to withhold under Art. 22 (6), the authority must, nevertheless, furnish information sufficient to enable the detenu to make representation. If the particulars supplied were not sufficient for that purpose, there was a violation of Art. 22 (5), and the detenu was entitled to be released. '*Particulars*' may, however, be furnished subsequent to the communication of the grounds. But once the *grounds* are communicated no new or *additional* grounds may be furnished.<sup>5</sup> In *Ujagar's case*<sup>6</sup> it has been held that where particulars are necessary in order to make the grounds intelligible for the purpose of making a representation at the earliest opportunity, the particulars also must be furnished 'as soon as may be', so that the right under Art. 22 (5) may not be defeated.

5. Failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a court of law as an invasion of a fundamental right or safeguard guaranteed by the Constitution, *viz*, being given the earliest opportunity to make a representation.<sup>7</sup>

### What is a 'vague' ground.

1. An 'irrelevant' ground is a ground which has no connection at all with the satisfaction of the authority, while a 'vague' ground is one which is not sufficient to enable the detenu to make an effective representation.<sup>8</sup>

2. The question whether the grounds furnished are vague or not, has to be determined on a consideration of the circumstances of each case.<sup>9</sup> Thus,

(A) On the one hand—

(i) A communication which is not readily intelligible by a layman without legal aid, is vague.<sup>7</sup>

(ii) As stated earlier, a communication in English to a person not conversant with that language is invalid.<sup>8</sup>

(B) On the other hand—

(i) If on reading the ground furnished it is capable of being intelligently understood<sup>9</sup> and is sufficiently definite to enable the detenu to make a representation against the order of detention, it cannot be called vague.<sup>9</sup>

(ii) Hence, vagueness cannot be urged where there is an obvious mistake or verbal inaccuracy in stating the ground,<sup>10-11</sup> or where the vagueness has been removed by a subsequent communication, made promptly.<sup>12</sup>

(iii) Particulars of things which the person is apprehended to do in the future cannot be given, in the very nature of things, with as much definiteness as of events which have already taken place.<sup>8</sup> It is not necessary to indicate the objectionable passages of the alleged speeches delivered by the detenu if the time and place and their general nature and effect are stated.<sup>13</sup>

3. If the grounds are not sufficient to enable the detenu to make a representation, he may, if he likes, ask for particulars which would enable

5. *Ujagar v. State of Punjab*, (1950-51) C.C. 155.

6. *Tarabada v. State of W. B.*, (1951) S.C.R. 212 (218).

7. *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708; A. 1953 S.C. 318.

8. *Harikishan v. State of Maharashtra*, A. 1962 S.C. 911; (1962) 2 S.C.A. 233.

9. *State of Bombay v. Atma Ram*, (1951) S.C.R. 167 (184).

10. *Thakur Prasad v. State of Bihar*, A. 1965 S.C. 631.

11. *Purnima v. Union of India*, (1958) S.C.R. 460.

12. *Durga Das v. State of J. & K.*, (1956) S.C.R. 948.

13. *Ram Singh v. State of Delhi*, A. 1961 S.C. 270; (1961) S.C.R. 461.

him to make a representation.<sup>14</sup> If he does not ask for such particulars, his inaction may, in particular circumstances, be taken into consideration in deciding whether the grounds can be considered to be vague.<sup>15</sup>

### Instances of vague grounds.

Subject to the foregoing general observations, the following cases may illustrate what grounds have or have not been held to be vague.

(A) In the following cases, the grounds have been held to be vague—

1. "In pursuance of the policy of the Communist party, you are engaged in preparing the masses for violent revolutionary campaign and attend secret party meetings to give effect to this programme"<sup>16</sup>

2. "You tried to create public disorder amongst tenants in *Una Tehsil* by circulating and distributing objectionable literature issued by underground communists"<sup>15</sup>

3. To allege, merely, that the detenu had been carrying on 'subversive' propaganda<sup>16</sup>

(B) On the other hand—

1. Where the grounds furnished to the detenu stated that he threatened public peace and tranquility in a *certain* district by urging violent methods specially among the labour classes and that his speeches at public meetings and demonstrations were prejudicial to the maintenance of public order in that district", *held*, the grounds communicated were sufficient to enable the detenu to make a representation.<sup>17</sup> It is not necessary to quote the objectionable passages in the communication.<sup>18</sup>

2. Where the ground stated—

"That you have been assisting the operations of the Communist party of India which has for its object commission of rioting with deadly weapons . . . thus acting in a manner prejudicial to the maintenance of public order;

that as a member of the C. P. I. you have fomented trouble amongst the peasants of the Howrah district . . . and amongst the tramways men and other workers at Calcutta."

and in continuation of these grounds, instances of meetings and processions with dates were furnished illustrating the attempt to foment trouble amongst workers, *held* the grounds were not vague.<sup>19</sup>

3. Where in the grounds it was stated that, with a view to prejudice the relations of India with the Portuguese Government and also the security of India, the detenu was carrying on espionage with the financial help given by the Portuguese authorities in Goa, collecting intelligence about the security arrangements on the border, *held*, the grounds were not vague by reason of the details of the financial aid or the length of the period for which the detenu was carrying on his activities not having been given, particularly because, having regard to the nature of the activities and the strained relations between India and Goa, it was against the public interest to disclose further particulars.<sup>20</sup>

### What is an 'irrelevant' ground.

1. A ground is irrelevant if it is not relevant to any of the circumstances under which preventive detention can be made under s. 3 of the P. D. Act, read with List I, Entry 9 and List III, Entry 3.<sup>21</sup>

14. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (390)

15. *Ujjagar Singh v. State of Punjab*, (1950-51) C.C. 154 (156).

16. *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

17. *Benoy v. Govt. of Assam*, A. 1950 Assam 49

18. *Ram Singh v. State of Delhi*, (1950-51) C.C. 158; A. 1951 S.C. 270.

19. *Tatapada v. State of West Bengal*, (1950-51) C.C. 151

20. *D'Souza v. State of Bombay*, (1956) S.C.R. 382

21. *Gopalan v. State of Madras*, (1950) S.C.R. 68 (223).



2. Where the contention is that any of the grounds of detention is irrelevant or vague, the grounds must be read as a whole to see whether it is relevant. If its relevancy appears upon a reading of all the grounds together, the detention order would not be vitiated.<sup>22</sup>

#### When one of several grounds is irrelevant or vague.

1. The constitutional requirement of cl. (5) must be satisfied in respect of each one of the grounds communicated to the detenu, subject, of course, to the claim of privilege under cl. (6).<sup>24, 25</sup>

2. Thus,

If any of the grounds or reasons that led to the satisfaction be 'irrelevant', the detention would be invalid even if there are other relevant grounds, because it can never be certain to what extent the bad reasons operated on the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.<sup>25-1</sup>

3. On this point, there is no distinction between 'irrelevant' and 'vague' grounds.<sup>24, 25</sup>

4. The above rule will not, however, apply where the rejected grounds are of a minor and unessential nature so that it may be reasonably stated that they might not have affected the subjective satisfaction of the detaining authority,<sup>7</sup> or where the vagueness has been removed by a subsequent communication, in time, so as to satisfy the requirement of 'earliest opportunity'.<sup>26</sup>

#### Effect of supplying vague grounds.

1. When the grounds supplied to the petitioner at the time of the order are so vague (apart from questions of technical defects) as to prevent the detenu from making a representation, the constitutional right of the detenu to make a representation at "the earliest opportunity" [Art. 22 (5)] is infringed and this renders the detention order void *ab initio*.<sup>2</sup>

2. But, where the detenu has already made a detailed representation to the Advisory Board, it is not open to him to contend before the Court that the grounds were so vague that representation was not possible.<sup>3</sup>

**Suspension of the rights under Art. 22(5).—**See under Art. 359, *post*.

#### CL (6): Discretion of authority not to disclose facts.

1. While it is obligatory upon the authority to disclose all the 'grounds', the detaining authority has been given an absolute discretion to withhold facts which it would be against the public interest to disclose, according to the opinion of such authority.<sup>4</sup>

2. The Court has no power<sup>4a</sup> to impose its opinion as to whether it is against the public interest or not to disclose any particular fact or facts. Once the authority refuses to disclose any fact or facts in the 'public interest',

22. *Shamrao v. D. M. Thana*, (1952) S.C.R. 683 (695): (1952-54) C.C. 314.

23. *Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341).

24. *Ram Krishna v. State of Delhi*, (1953) S.C.R. 708: (1952-54) C.C. 317: A. 1953 S.C. 318.

25. *Dwarkanath v. State of J. & K.*, (1956) S.C.R. 948.

1. *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418: (1952-54) C.C. 321.

2. *State of Bombay v. Atmaram*, (1951) S.C.R. 167: (1950-51) C.C. 139; *Ujagar v. State of Punjab*, (1950-51) C.C. 155 (157); *Puranmal v. Union of India*, (1958) S.C.R. 460.

3. *Ramnabhan v. State of Hyderabad*, A. 1952 Hyd. 163.

4. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (391).

4a. *Puranmal v. Union of India*, A. 1958 S.C. 163.

the Court shall have no power to declare that it was not against the public interest to disclose those facts.<sup>4</sup>

"Art. 22 (6) gives a right to the detaining authority not to disclose such facts, but from that it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right. A wide latitude is left to the authorities in the matter of disclosure".<sup>5</sup>

The Court can interfere not on the ground that what has been withheld should have been disclosed, but on the ground that what has been stated is insufficient for making a representation.<sup>6</sup>

3. Nor should it be supposed that since cl. (6) permits the withholding of facts which are considered not desirable to be disclosed in the public interests,—the authorities are bound to disclose *all other* facts save those which are so withheld under c. (6). As has been already explained (p. 165, *ante*), the sole test for determining the sufficiency of the facts disclosed is the sufficiency for giving an opportunity to make representation.<sup>6</sup>

4. While it is correct to say that the decision that further particulars cannot be furnished to the detenu without prejudice to the public interest must be taken by the detaining authority at the time when the grounds are furnished, there is no obligation on his part to communicate to the detenu that such a decision has been taken, unless the detenu, feeling the grounds to be vague, asks for further particulars.<sup>4</sup>

#### CL. (7): Power of Parliament.

In exercise of the power conferred by the present clause, Parliament has enacted the Preventive Detention Act, 1950.<sup>6</sup>

It is to be noted however, that after the amendment of s. 12 in 1951, there is no legislation under Cl. (7) (a). The result is that under no circumstances can the Government detain a person for more than 3 months without obtaining the opinion of an Advisory Board.<sup>7</sup>

#### *Right against exploitation*

**23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.**

**.(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.**

#### Art. 23: Prohibition of traffic in human beings.

This Article prohibits traffic in human beings and all forms of forced labour but authorises the State to impose compulsory service for 'public purposes'.

**Cl. (1): 'Traffic in human beings'** obviously, includes traffic in women and children.<sup>8</sup> A law for the suppression of such traffic would be

5. *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

6. For text of this Act with case-law, see the Author's 'Act, Rules & Orders under the Constitution,' Book I, pp. 60 *et seq.*

7. *Madan v. State*, A. 1952 Cal. 119 (121).

8. *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

valid by reason of the present Article even though it may restrict the freedom of business and profession guaranteed by Art. 19 (1) (g).<sup>9</sup>

**'Begar'.**

*Begar* means 'labour or service exacted by Government or a person in power *without giving remuneration for it*'.<sup>10</sup>

**'Forced Labour'.**

1. There is no *begar* or forced labour within the inhibition of Art. 23 where the Petitioners had voluntarily agreed to do extra work by entering into a contract for additional remuneration and other benefits.<sup>11</sup>

2. But where a contract for personal service is enforceable under a *penal law*, it is within the prohibition of this Article.<sup>12</sup> The result is the same where the penalty for default in rendering the service is founded on custom or administrative fiat.<sup>13</sup>

3. But a law which prohibits a person from refusing to render personal service to another merely on the ground that he belongs to a Scheduled Caste does not subject the former to 'forced labour'.<sup>14</sup> Nor is a law which prohibits strikes in essential services within the prohibition of the article.<sup>15</sup>

**Cl. (2): 'Public Purposes'.**

1. The expression 'public purposes' is wide enough to include not only military and police services<sup>16</sup> but also other social purposes. Thus, there will be no contravention of Art. 23—

(i) To compel a cultivator to carry foodgrains to the Government godown, without remuneration for such labour, in a scheme of procurement of foodgrains as an essential commodity for the community.<sup>16</sup>

(ii) To compel a Government servant to continue in service even after the age of superannuation, pending the conclusion of a departmental inquiry, which would be valid under this Clause.<sup>17</sup>

**24. No child below the age of fourteen years shall be employed**

Prohibition of employment of children in factories, etc. **to work in any factory or mine or engaged in any other hazardous employment.**

*Right to Freedom of Religion.*

**25. (1) Subject to public order, morality and health and to the**

Freedom of conscience and free profession, practice and propagation of religion. **other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.**

**(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—**

**(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;**

9. *Shama v. State of M. P.*, A. 1959 All. 57.

10. *Vasudevan v. Mittal*, A. 1962 Bom. 53 (67).

11. *Dubey v. Union of India*, A. 1952 Cal. 496.

12. *Kadar v. Muthukoya*, A. 1962 Ker. 138.

13. *Chandra v. State of Rajasthan*, A. 1956 Raj. 188.

14. *State v. Banwari*, A. 1951 All. 615.

15. *Dulal v. Dt. Magistrate*, A. 1953 Cal. 365 (372).

16. *Acharaj v. State of Bihar*, A. 1967 Pat. 114 (119).

17. *Partap Singh v. State of Punjab*, A. 1964 S.C. 72 (100).

- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

### Art. 25: Freedom of conscience and religion.

This Article guarantees that a citizen shall have the freedom of conscience and shall have the right to profess, practise and propagate religion, subject to restrictions imposed by the State, on the following grounds—(i) public order, morality and health; (ii) other provisions of the Constitution; (iii) regulation of non-religious activity associated with religious practice; (iv) social welfare and reform; (v) throwing open of Hindu religious institutions of a public character to all classes of Hindus.

Subject to the restriction which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others.<sup>17a</sup>

#### Cl. (1): Subject to public order, morality or health'.

1. The freedom of religion is subject to the interest of public order so that it would not authorise the outrage of the religious feelings of another class, with a deliberate intent.<sup>18</sup>

2. These words save the power of a competent Legislature to prohibit deleterious practices, such as the sacrifice of human beings in the name of religion.<sup>19</sup>

#### 'Subject to the other provisions of this Part'.

1. The freedom guaranteed by Cl. (1) is subject to the power conferred upon the State by cl. (b) of this Article.<sup>20</sup>

2. Since the freedom guaranteed by this Article is subject to the other provisions of Part III, this Article does not exempt religious property from the power of eminent domain conferred by Art. 31 (2).<sup>21</sup>

#### 'All persons'.

The freedom of religion conferred by the present Article is not confined to citizens of India but extends to all 'persons', including aliens,<sup>22</sup> and individuals exercising their rights individually or through institutions.<sup>23</sup>

Hence, the head of a religious institution can complain of the infringement of the right conferred by this Article.<sup>23</sup>

17a. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055: (1952-54) 2 C.C. 324 (327): A. 1954 S.C. 388.

18. *Cf. Ramji Lal v. State of U. P.*, A. 1957 S.C. 620.

19. *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (863).

20. *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (267).

21. *Suryapalsingh v. State of U. P.*, (1952) S.C.R. 1056 (1090).

22. *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005: (1952-54) 2 C.C. 191.

23. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191: (1954) S.C.R. 1005.

### 'To profess and practise'.

Freedom of conscience would be meaningless unless it were supplemented by the freedom of unhampered expression of spiritual conviction in word and action. Matters of conscience come in contact with the State only when they become articulate. While freedom of 'profession' means the right of the believer to state his creed in public, freedom of practice means his right to give it expression in forms of private and public worship.<sup>23</sup>

From this right would follow the right to take out a religious procession, subject to restrictions imposed in the interests of preventing a breach of the peace or obstruction of the thoroughfare.<sup>24</sup>

### 'Religion'.

1. Arts. 25 and 26 guarantee the right to practise and propagate not only matters of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of a doctrine.<sup>25</sup>

2. Of course, religion is a matter of faith but is not necessarily theistic and there are well-known religions in India like Buddhism and Jainism which do not believe in God. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine of belief.<sup>26</sup>

'A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.'<sup>27</sup>

'Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines'.<sup>28</sup>

3. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.<sup>29</sup>

On the other hand—

(a) The sacrifice of a cow is not an obligatory overt act enjoined by the Muslim religion.<sup>30</sup>

(b) The right to elect members to a Committee for the administration of Gurudwara property cannot be said to be a matter of religion for the Sikhs.<sup>1, 12</sup>

(c) A power given to the Board of Religious Trusts to modify the Budget relating to a trust or to give directions to the trustee, in order to carry out the wishes of the founder of the trust (in so far as it is not repugnant to the law governing such trusts) cannot be said to be an interference with the freedom of due observance of religious practices in the *math* or temple concerned.<sup>13</sup>

(d) Marrying a second wife during the lifetime of the first wife cannot be said to be an integral part of the Hindu<sup>14</sup> or Muslim<sup>15</sup> religion.

(e) There is nothing in the Muslim religion prohibiting photographs of women to be taken for electoral purposes.<sup>16</sup>

24. *Siddiqi v. State of U. P.*, A. 1954 All. 756; *Manzur v. Zaman*, A. 1925 P.C. 36.

25. *Quarechi v. State of Bihar*, (1959) S.C.R. 629.

1-12. *Sarkar v. State of Punjab*, A. 1959 S.C. 860 (866).

13. *Moti Das v. Sahi*, A. 1959 S.C. 942 (949).

14. *Ramprowd v. State of U. P.*, A. 1957 All. 411.

15. *Badruddin v. Aisha*, (1957) A.L.J. 300.

16. *Narmal v. Chief Electoral Officer*, A. 1961 Cal. 289.

**Cl. (2) (a): Scope of State regulation.**

1. What sub-cl. (a) of cl. (2) contemplates is not State regulation of the *religious practices as such* which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.<sup>17</sup>

2. For the application of the present sub clause, therefore, it is necessary to classify religious practices into such as are *essentially* of a religious character and those which are not.<sup>18</sup> Only those practices are protected by Art. 26(b) which are regarded by the *religion* in question as its essential and integral part.<sup>19</sup> Whether a religious practice is an essential part of a religion is an objective question to be determined by the Court; the view of the religious denomination itself is not final.<sup>19</sup>

**Cl. (2) (b): Social Reform.**

1.<sup>20</sup> 'Social reform' means eradication of practices or dogmas which stand in the way of the country's progress as a whole *but do not form the essence of religion*. Thus, the State may prohibit bigamy amongst the Hindus because the need of having a natural son by marrying a second wife on the failure of the first wife to get a son was not of the essence of Hindu religious belief, as, the purpose might be served by taking an adopted son.<sup>21 21</sup>

Prohibition of deleterious practices such as the 'Suttee' or the system of 'Devadasi' is also justified by the present clause.<sup>18</sup>

2. It has, however, been held by a majority of the Supreme Court<sup>22</sup> that the banning of excommunication which is made solely on *religious* grounds cannot be considered to promote welfare and social reform because it is a right belonging to a religious denomination under Art. 26(b); but it may be so where the law ban excommunication on non religious grounds, e.g., for the breach of some obnoxious social rule or practice,<sup>22</sup> or as a punishment for a crime punishable under the law of the land.<sup>22</sup>

3. In short, the expression 'social welfare and reform' does not enable the Legislature to 'reform' a religion out of existence or identity. It does not extend to the basic and essential practice of religion,<sup>24</sup> which is guaranteed by Art. 25(1) itself.<sup>24</sup>

**Throwing open of Hindu religious institutions.**

1. The right conferred by this clause is not of an absolute character. It is a right of every member of the Hindu public to enter into a public temple for worship. It does not, however, mean that such temple must be kept open *at all hours* or that any member of the Hindu public must be allowed to perform *those services* which are open only to those specially initiated, according to the ceremonial law governing the temple.<sup>25</sup>

2. Art. 25 (2) (b) must be read along with Art. 26 (b), without rendering the latter nugatory.<sup>25</sup>

17. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055. A. 1954 SC 388.

18. *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (864).

19. *Durgah Committee v. Hussain*, A. 1961 SC 1402 (1415).

20. *Srinivas v. Saraswathi*, A. 1952 Mad 193 (196).

21. *Ram Prasad v. State of U. P.*, A. 1961 All. 334.

22. *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (870), reversing *Saifuddin v. Tayebji*, A. 1953 Bom. 183.

23. *Ibid.*, p. 874.

24. *Ibid.*, pp. 875-6.

25. *Venkataramana v. State of Mysore*, (1958) S.C.R. 895; A. 1958 S.C. 255.

3. The present clause applies only to institutions of a 'public' character, which, however, include temples founded for the benefit of particular sections of the Hindus, as referred to in Art. 26. Hence, though under Art. 26 (b) the trustees of a Hindu denominational temple would be entitled to exclude people of other sections according to the ceremonial law of that temple, the State may override that right by enacting a law under the present clause,—in which case any member of the Hindu public would have a right to enter the temple for worship.<sup>23</sup>

*Explanation I* specially guarantees the right of a Sikh to carry a 'kirpan' as a part of the profession of his religion. But neither the Sikh religion nor Art. 25 entitles a Sikh to possess without licence, more than one kirpan or sword.<sup>24</sup>

*Explanation II* expands the connotation of the word 'Hindu' to include Sikhs, Jains or Buddhists, for the purposes of Art. 25(2)(b), but that expansion will not apply to any other provision of the Constitution.<sup>25</sup>

**26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—**  
Freedom to manage religious affairs.

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

#### **Art. 26: Rights of religious denomination.**

1. This Article guarantees certain rights to every religious denomination, subject to 'public order, morality and health', and the rights are capable of being enforced by or on behalf of a denomination.<sup>26</sup>

2. The word "denomination" has been defined to mean "a collection of individuals classed together under the same name; a religious sect or body having a common faith and organisation and designated by a distinctive name".<sup>27</sup> The Article contemplates not only a religious denomination but also a section thereof; hence, a Math is religious denomination within the meaning of Art. 26.<sup>28</sup> Similar is the Gowda Saraswat Brahmin Community; followers of the Zoroastrian religion.

#### **Cl. (a): Right to establish and maintain religious institutions:**

The words 'establish' and 'maintain' must be read conjunctively.<sup>29</sup> The right to maintain would no doubt include the right to administer such institution. But that right will arise only where the institution has been established or brought into existence by the religious denomination which claims that right.<sup>30</sup>

#### **Cl. (b): Right to manage own affairs in matters of religion.**

1. This clause guarantees to each religious denomination the right to manage its domestic affairs in matters which are concerned with religion

1. *R. v. Dhyani Singh*, A. 1951 All. 53.

2. *Punjabrao v. Meshram*, A. 1965 S.C. 1179 (1184).

3. *Devaraja v. State of Madras*, A. 1953 Mad. 149.

3a. *Commr., H. R. E. v. Lakshminidra*, (1952-54) 2 C.C. 191 (197): (1964) S.C.R. 1005.

4. *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (869; 873; 876).

4a. *Asrar v. Union of India*, A. 1968 S.C. 662 (674).

and the State cannot interfere in these affairs unless the denomination so exercises its right as to interfere with 'public order, morality or health.' Another limitation upon the right under Art. 26 (b) is that it is subject to Arts. 17,<sup>4</sup> 25(2)(b).<sup>5</sup> Besides these, there are no other limitations imposed by the Constitution. Hence, a right of a religious denomination under Art. 26(b), e.g., to excommunicate a member on *religious* grounds, cannot be taken away or restricted on the ground that it would affect the *civil* rights of such member,<sup>6</sup> including the right of beneficial use or enjoyment of the denominational property.<sup>6</sup>

2. While the right to administer property under cl. (d) is subject to regulation by law, the right to manage religious affairs under cl. (b) cannot be regulated by the Legislature<sup>3</sup> except on the ground of 'public order, morality or health';<sup>3</sup> or to enforce the purposes of the trust itself.<sup>7</sup>

3. This right of management includes —

(a) complete autonomy to decide what rites and observances are essential according to its religion, though the secular aspects, e.g., the scale of expenses to be incurred in connection with such observances, may be regulated by the competent legislature;<sup>3</sup>

(b) the right to spend the trust property or its income for religion and religious purposes and objects indicated by the founder or established by usage obtaining in a particular institution. To divert the trust property or funds to other purposes, although the original objects of the founder can still be carried out, is an unwarrantable encroachment upon the right guaranteed to a religious institution by this clause,<sup>8</sup> even though such other purposes are 'charitable'.<sup>9</sup>

But there is no contravention of cl. (b) where the law seeks to implement the purposes of the trust itself and to prevent mismanagement and waste by the trustee.<sup>7</sup>

### 'Matters of religion'.

1. "Religion", in this context is not confined to religious belief but includes the practices which are regarded by the community as *part* of its religion,<sup>6,10</sup> [see p. 172, *ante*] and may extend even to matters of food and dress.<sup>11</sup>

2. Each religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are *essential* according to the tenets of the religion they hold.<sup>6</sup> But the Court has the right to determine whether a particular rite or observance is regarded as *essential* by the tenets of a particular religion.<sup>7,12</sup> Thus,—

3. The following have been held *not* to be essential to the relevant religions:

(i) The sacrifice of a cow, in relation to the Muslim religion.<sup>7</sup>

(ii) The mode of representation to the Board for management of a Sikh Gurudwara<sup>6</sup> even though the right of the Sikh community to be represented on the Board may be.<sup>6</sup>

5. *Venkataraman v. State of Mysore*, A. 1958 S.C. 255: (1958) S.C.R. 695.

6. *Sarup Singh v. State of Punjab*, A. 1959 S.C. 860.

7. *Moti Das v. Sahi*, A. 1959 S.C. 942 (1950).

8. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055: (1952-54) C.C. 324 (330) A. 1954 S.C. 388.

9. *Ram v. State of Orissa*, A. 1959 Orissa 5 (16).

10. *Gopindalji v. State of Rajasthan*, A. 1963 S.C. 1638.

11. *Commr., H. R. E. v. Lakshmindra*, A. 1954 S.C. 282.

12. *Durgah Committee v. Hussain*, A. 1961 S.C. 1402 (1415).



Where the Board consists exclusively of Sikh members, the fact that the electorate for electing such members included certain non-Sikh members is far too remote and indirect to constitute an infringement of the right guaranteed by Art. 26 (b).

4. On the other hand—

(i) According to the ceremonial law relating to temples, the persons who are entitled to enter into them for worship,<sup>13</sup> where they are entitled to stand,<sup>13</sup> the hours when the public are to be admitted, how the worship is to be conducted,<sup>14</sup> are all matters of religion.

(ii) Though excommunication on non-religious grounds cannot be claimed as a right flowing from Art. 26(b), it may uphold excommunication on *religious* grounds where it is regarded as a part of the religious tenets of the community, e.g., such power belonging to the Dai of the Dawoodi Bohra community.<sup>15</sup>

**CL (c): Right to own property.**

Under this clause every religious denomination has the right to own and acquire property but it does not prevent property belonging to a religious body from being acquired by authority of law.<sup>14</sup>

**CL (d): Right to administer property.**

1. Under the present clause, a religious denomination is entitled to own, acquire and to administer the property, for the purposes to which it was dedicated,<sup>15</sup> but only in accordance with law. This means that the State can regulate the administration of trust properties by means of law validly enacted, but here again, it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law which takes away the right of administration *altogether* from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26 (d) of the Constitution.<sup>11, 16</sup>

2 Regulation by the State, again, cannot interfere with things which are essentially religious.<sup>16</sup>

(a) A religion is not merely an opinion, doctrine or belief. It has its outward expressions in acts as well. Religious practices or performances of acts in pursuance of religious belief are as much part of religion as faith or belief in particular doctrines. No outside authority has any right to say that religious rites and ceremonies to be performed at certain times and in a particular manner are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they lie under the guise of administering the trust estate. The scale of expense, to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to a religious institution, and if the expenses on these are likely to deplete the endowed properties or affect the stability of the institution, proper control can be exercised by State agencies as the law provides. This is the measure of protection afforded by Art. 26 (b) of the Constitution.<sup>16</sup>

(b) Nor is the State competent to make a law within the meaning of Art. 26 which provides for the diversion of the denominational property

13. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

14. *Suryapal v. State of U. P.*, (1952) S.C.R. 1056; (1952-4) 2 C.C. 396 (412).

15. *Saiyiduddin v. State of Bombay*, A. 1962 S.C. 853 (869-874).

16. *Ratilal v. State of Bombay*, (1953-54) 2 C.C. 324; (1954) S.C.R. 1065.

for the use of persons who have been excluded from the denomination on grounds of religion.<sup>15</sup>

### Cla. (c)-(d).

1. These clauses do not *create* rights in any denomination which it never had. They merely safeguard and guarantee the continuance of rights which such denomination had. If the right to administer properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, these clauses cannot be successfully invoked.<sup>17</sup>

In other words, even where a certain religious institution was established by a minority community, it may lose the right to administer its property in certain circumstances.<sup>18</sup>

Thus, if the terms of the endowment, or where the terms are not available, the history of the endowment clearly shows that the management of the properties was always in the hands of the officers appointed by and answerable to the State, the denomination cannot be heard to say that it has acquired the right of management under Art. 26(c), (d).<sup>17</sup>

2. The right under cl. (d) cannot be claimed where the religious denomination did not own the property at the commencement of the Constitution.<sup>19</sup>

### Pleading.

This Article cannot be invoked unless the Petitioner claims the property in question on behalf of a denomination and that denomination is specified in the pleading.<sup>19</sup>

**27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.**

Freedom as to payment of taxes for promotion of any particular religion

### Art. 27: No taxation for purposes of religion.

1. What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denominations.<sup>19a</sup>

2. It does not prohibit the levy of a 'fee' for the defraying of expenses of the State for regulating the secular administration of religious institutions. Art. 27 is not attracted to such a case as there is no question of favouring any particular religion or religious denomination, by such imposition.<sup>19, 20</sup>

17. *Dargah Committee v Hussain*, A. 1962 S.C. 1402 (1416).

18. *Azees v. Union of India*, A. 1968 S.C. 662 (670).

19. *Bira Kishore v. State of Orissa*, A. 1964 S.C. 1501 (1510).

19a. *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

20. *Moti Das v. Sahi*, A. 1959 S.C. 942 (950).

- 28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.**

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

#### 'Religious instruction'.

What is prohibited is religious, not *moral* education dissociated from any denominational doctrines.<sup>21</sup>

#### *Cultural and Educational Rights*

- 29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.**

Protection of interests of minorities.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### Cl. (1): Protection of cultural right of minorities.

1. This clause means that if there is a 'cultural' minority which wants to preserve its language, script and culture, the State shall not impose upon it any other culture which may be local or otherwise

2. Where a law passed by a State Legislature extends to the whole of the State, the 'minority' must be determined with reference to the population of the entire State<sup>22</sup>

3. A minority community can effectively conserve its language etc. only through educational institutions. The right to establish and maintain educational institutions of its choice is a necessary concomitant of the right conferred by cl. (1). This right is, however, subject to the limitation in cl. (2), if such institution receives State aid.<sup>23</sup>

4. The right to conserve the language includes the right to agitate for the protection of that language, including political agitation<sup>23</sup>

5. The right conferred by Cl. (1) is an absolute right and cannot be subjected to reasonable restriction like the rights enumerated in Art. 19 (1). Hence, political agitation to conserve the language of a section of the citizens cannot be made a 'corrupt practice' within the meaning of s. 123(3) of the Representation of the People Act.<sup>23</sup>

#### Object of Cl. (2).

1. This clause is a counterpart of the equality clauses of Art. 15. There should be no discrimination against any citizen on the ground of

21. *Nambudripad v. State of Madras*, A. 1954 Mad. 385.

22. *Kerala Education Bill, in re.*, 1958 S.C. 956.

23. *Jasdev Singh v. Pratap Singh*, A. 1965 S.C. 183 (188).

religion, etc., in the matter of admission into any educational institution maintained or aided by the State.

2. While cl. (1) protects the rights of a section of the citizens, the right conferred by cl. (2) is an individual right given to the citizen as such and not as a member of any community. The present clause gives an aggrieved person, who has been *denied* admission on the ground of his religion etc., a remedy even though other members of his religion, etc., have been admitted. If a citizen who seeks admission into any such educational institutions has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under Art. 29(2). But, on the other hand, if he has the academic qualifications but is refused admission *only* on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right under the present clause.<sup>24</sup>

3. This clause offers protection to all citizens, whether they belong to majority or minority groups.<sup>25</sup>

### 'Only of religion, race, caste, language'.

1. These words show that the educational institutions coming within this clause are not debarred from imposing conditions or limitations other than those specified, such as previous training, physical fitness, vaccination, dissociation from injurious associations and the like. Thus, the reservation of certain seats in a Medical institution for students who have passed the Higher Secondary Examination is not hit by this Article.<sup>1</sup>

2. Compared with Art. 15(1), it appears that 'sex' and 'place of birth' are omitted from Art. 29 (2). Hence, educational institutions intended exclusively for men or women could be maintained by the State without a violation of the Constitution.<sup>2</sup> Similarly, reservation of seats for residents of a particular area has been upheld.

3. The Article does not take away the right of an institution to refuse admission or to expel a student on the ground of indiscipline or the like, provided the discretion is not abused.

### Arts. 15 (1) and 29 (2).

While Art. 15 (1) is a protection against discrimination generally, Art. 29 (2) offers protection against a particular species of wrong, namely, the denial of admission into educational institutions maintained or aided by the State.<sup>26</sup> While Art. 15 (1) is available against the State, Art. 29 (2) extends against the State or anybody who denies the right conferred by it.<sup>27</sup>

### Arts. 15 (4) and 29 (2): Right of backward classes to admission to educational institutions.

1. Under Art. 15 (4), the State is entitled to reserve a *minimum* number of seats for members of the backward classes.<sup>3</sup>

24. *State of Madras v. Champakam*, (1951) S.C.R. 525; (1950-51) C.C. 183: (1951) S.C.J. 313.

25. *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568; (1952-4) 2 C.C. 336 (340).

1. *Nageswara v. Principal*, A. 1962 A.P. 212.

2. *C.J. Anjali v. State of W. Bengal*, (1953) 56 C.W.N. 801 (811).

3. *Joseph v. State of Kerala*, A. 1958 Ker. 33 (35); *Sagar v. State of A. P.*, A. 1968 A.P. 165.

4. *Ramesh v. B. B. Intermediate College*, A. 1953 All. 90.

5. *Raghu Ramulu v. State of A. P.*, A. 1958 A.P. 129; *Sudarson v. State of A. P.*, A. 1958 A.P. 569 (571).

2. But a provision fixing a *maximum* number or percentage of seats for the members of the backward classes, which would prevent the boys belonging to such classes from being admitted, even if they secure more than the specified number of seats by their merit in the general competition, would offend against Art. 29 (2),<sup>6</sup> which guarantees a right to admission to all citizens, whether belonging to the backward classes or not without being discriminated against on grounds of religion, race, caste etc.

3. A proper way of reconciling the provisions of Arts. 15 (4) and 29 (2) would be to pool all the candidates (backward class or otherwise) together and then guarantee minimum seats for those belonging to the backward classes. Thus,

If there are 100 applicants, they would be arranged in order of merit on the results of a general competition and if more than the quota reserved for the backward classes (say, 15%) could be selected *on merit* alone, they would be so selected.

If, however, out of those who succeed on merit, the number of backward candidates falls short of 15%, the deficiency would be filled up by selecting (on the basis of merit) from amongst the other backward candidates down in the list, even though they secure less marks than boys belonging to the other communities, who cannot be admitted.<sup>6</sup>

But a candidate of the backward class, who fails to secure a seat in the general competition and also to secure a reserved seat (being in excess of the 15%), has no fundamental right to admission under either Article.<sup>6</sup>

**Backward classes.**--See pp. 61-62, *ante*

### **Arts. 29 (2) and 25.**

Art. 29 (2) merely confers a right of admission, upon every citizen, into a State-aided educational institution. It does not confer upon those admitted any right to practise and propagate their religion within the precincts of such institutions.<sup>6</sup>

**30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.**

Right of minorities to establish and administer educational institutions.

**(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.**

### **Cl. (1): Right of minorities to establish educational institutions.**

1. Cl. (1) implies the right to a minority community to impart instruction to the children of its own community in institutions run by it and in its own language and if such right is infringed, an institution run by the community may seek relief for violation of the fundamental right.<sup>7</sup>

2. Even though Hindi is the national language of India and Art. 351 provides a special directive upon the State to promote the spread of Hindi, nevertheless, the object cannot be achieved by any means which contravenes the rights guaranteed by Art. 29 or 30.<sup>7</sup>

6. *Sanjib v. St. Paul's College*, A. 1957 Cal. 524

7. *State of Bombay v. Education Society*, (1952-4) 2 C.C. 336: A. 1954 S.C. 561. (1955) 1 S.C.R. 568.

3. The power of the State to determine the medium of instruction must yield to the fundamental right of a minority community to impart instruction in their own language.<sup>7</sup>

4. It confers two rights—(a) the right to establish an institution, (b) the right to administer it.<sup>8</sup>

#### Conditions for the application of CL (1).

1. In order to claim the benefit of Art. 30 (1), the community must show (a) that it is a religious or linguistic minority and (b) that the institution was established by it. Without satisfying these two conditions, it cannot claim the guaranteed right to administer it.<sup>9-10</sup> If these two conditions are satisfied, the right extends to the institutions established prior to the Constitution as well as to those established after its commencement.<sup>8</sup>

2. The right to establish such institution must, of course, be sought to be exercised after the commencement of the Constitution.<sup>8</sup>

3. On the other hand, if an educational institution has *not* been established by a religious minority, the latter cannot claim the right to administer it even though, by some process, it had been administering the institution before the Constitution.<sup>10</sup> The words 'established' and 'administered' have to be read conjunctively and if both conditions are not present, a law cannot be challenged as violative of Art. 30 (1).<sup>11</sup>

4. In the case of neither of the two rights coming under cl. (1) is it necessary that the educational institution must be for the benefit of the minority community exclusively or that not a single member of a non-minority community must be admitted into it.<sup>8</sup>

#### Ambit of the right conferred by CL (1).

1. The key to the understanding of the meaning of the clause is the expression 'of their own choice' and the content of the clause is as wide as the choice of the particular community may make it.<sup>8</sup>

2. It follows that in order to claim the right conferred by the clause it is not necessary that the curriculum of the institution must be confined to the teaching of religion only or of the language of the minority community only. There is no limitation on the subject to be taught in such institution, and they are not debarred from giving general education as well in such institution.<sup>8</sup>

3. Nor is it a condition for the protection of Art. 30 (1) that the majority of pupils belonging to the institution must belong to the religion of the minority in question.<sup>11 12</sup> It is not necessary that the institution should be established 'for the benefit' of the particular religious minority.<sup>8</sup>

#### Limits to the right under CL (1).

1. Though apparently there is no limitation imposed upon the right conferred by Art. 30 (1), it does not follow that the right is absolute in the sense that the State shall have no right to regulate the administration of the institutions established by the minority communities. Some of the limitations are inherent in the right itself. Thus, the right to administer cannot obviously include the right to maladminister.<sup>8</sup> Thus, as a condition

8. Ref. on Kerala Education Bill, A. 1958 S.C. 956: (1959) S.C.R. 995; *Rev. Father v. State of Bihar*, (1968) S.C. [W.P. 1/68, d. 13-9-68].

9. *Ramankanta v. Gauhati University*, A. 1951 A.s.m. 163.

10. *Azeez v. Union of India*, A. 1968 S.C. 662 (670).

11. *Patroni v. Kesavan*, A. 1965 Ker. 75 (77).

12. *Dependra v. State of Bihar*, A. 1962 Pat. 101 (107).

for granting aid or recognition to an institution coming under Art. 30 (1), the State may impose *reasonable* regulations for the purpose of ensuring sanitation, competence of teachers, maintenance of discipline<sup>1</sup> and the like.<sup>8</sup> But the regulation cannot go to the extent of virtually annihilating the right guaranteed by Art. 30(1),<sup>9</sup> by introducing regulations which are not related to the interests of the institution as an educational institution even though they may be in the interests of the general public.<sup>11</sup>

2. Hence, even though there is no constitutional right to receive State aid outside Art. 337, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would virtually deprive the members of a religious or linguistic community of their right under Art. 30 (1). It *cannot* be held that the right under Art. 30 (1) is available only so long as the community is in a position to run the institution with its own resources and that if they seek State aid, they must submit to *any* terms which the State may impose. While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guaranteed by Art. 30 (1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the State.<sup>9</sup> Thus, the State cannot prescribe that if an institution, including one entitled to protection of Art. 30 (1), seeks to receive State aid, it must submit to the condition that the State may take over the management of the institution or acquire it, under certain condition,—for such condition would completely destroy the right of the community to administer the institution.<sup>14</sup>

3. Similarly, in the matter of the right to establish in relation to recognition of an institution by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving State recognition, e.g., as to the qualifications of teachers to be employed by the institution, the State cannot impose conditions the acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30 (1).<sup>13</sup>

Where, therefore, the State regulations debar scholars of unrecognised educational institutions from receiving higher education or for entering into the public services, the right to establish an institution under Art. 30 (1) cannot be effectively exercised without obtaining State recognition. In such circumstances, the State cannot impose it as a condition precedent to State recognition that the institution must not receive any fees for tuition in the primary classes. For, if there is no provision in the State law or regulation as to how this financial loss is to be recouped, institutions solely or primarily dependent upon the fees charged in the primary classes cannot exist at all. Such a condition would thus be void for contravention of Art. 30(1).<sup>15</sup>

13. *Sidhrajibhai v State of Gujarat*, A. 1963 S.C. 540.

14. Ref. on the Kerala Education Bill, A. 1958 S.C. 956. [Venkatarama Aiyar J. *dissenting*, held that no right to recognition is implied in Art. 30 (1) and that, accordingly, the State could impose any terms for recognition by the State, without violating Art. 30 (1)].

15. Ref. on the Kerala Education Bill, A. 1958 S.C. 958. [According to Venkatarama Aiyar J. (*dissenting*), such a view would place the minority in a more favoured position than the majority communities and would render Art. 45 a dead letter, for, while a prohibition to charge fees in the primary classes would be void as regards institutions established by the minority communities, such a prohibition would be valid as regards those established by the majority communities and if such a prohibition could not be enforced against institutions of minority communities by way of condition of State recognition or State aid, there was no other way of introducing free primary education in such institutions. As regards the argument that such prohibition would compel the

4. For the same reason, it is not competent for the State to remove the trustees of a denominational school and appoint an *ad hoc* committee for the management thereof.<sup>16</sup>

5. In short, in order to be consonant with Art. 30(1), a regulation imposed by the State upon a minority institution must be (a) reasonable and must also be (b) regulative of the educational character of the institution and conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.<sup>16a</sup>

6. The mere opening of a rival school by the members of the majority community so as to compete with a minority school is no infringement of the rights of the latter under Art. 30 (1).<sup>17</sup>

### 'Minority'.

The word 'minority' is not defined in the Constitution. According to the popular sense of the term, therefore, it should refer to any community which is numerically less than 50% of the population of the State concerned,<sup>18</sup> when the law which is impugned as violating Art. 30 is a State law, applicable to the territory of the State as a whole. It is not correct to hold that it refers only to such a community as is in a numerical minority in that particular area or region where the educational institution involved is situated.<sup>19</sup>

### 'The right to establish and administer'.

1. This expression has to be interpreted in harmony with the substance of the right conferred by the Article. While Art. 29 (1) gives a minority community the right to conserve its language or culture, Art. 30(1) confers on religious or linguistic minorities the right to establish educational institutions of their own choice, for, it is through the education of the children that the group culture can be maintained. But the scope and object of Art. 30 (1) is wider than the mere conservation of the culture, script etc., which is indicated by the word 'choice'. The right is to establish institutions which will effectively serve the needs of the community and the scholars who resort to such institutions. The right would be nugatory if the scholars of such institutions are debarred from the opportunities for higher education or for a useful career in life.<sup>19</sup>

2. It would also include the right to select its own medium of instruction; hence, a legislation which would penalise by disaffiliation from the University any institution which uses a language as the medium of instruction, other than the one prescribed by it, offends against Art. 30 (1).<sup>20</sup>

3. The word 'establish', in this context, means to bring into existence an educational institution.<sup>21</sup>

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minority institutions to close down, Venkatarama J expressed the view that it was possible for the minority communities to run their institutions by means of voluntary subscriptions, and if there was no fundamental right to receive State aid or State recognition, such prohibition could not be held to be violative of Art. 30 (1). It may be expected that questions like these will receive further consideration when some litigation *inter parte* under Art. 30 (1) comes before the Supreme Court in future).

16. *A. P. Subba v State of Bihar*, A. 1958 Pat. 359 (365).

16a. *Siddhrajibhai v. State of Gujarat*, A. 1963 S.C. 540 (547) (1963) 3 S.C.R. 837.

17. *Joseph v. State of Kerala*, A. 1962 Ker. 33.

18. E.g., the Christians in Kerala [*Patroni v. Kesavan*, A. 1965 Ker. 75].

19. Reference on the Kerala Education Bill, A. 1958 S.C. 956 (976): (1959) S.C.R. 985.

20. *Shri Krishna v. Gujarat University*, A. 1962 Guj. 88 (117).

21. *Azees v. Union of India*, A. 1968 S.C. 662 (672).



### 'Educational institutions'.

This expression would include universities.<sup>21</sup>

### Arts. 29 and 30.

1. The right conferred by cl. (1) of Art. 30 is complementary to the right guaranteed by cl. (1) of Art. 29 because a minority can effectively conserve its language etc., only if it has the right to establish educational institutions of its choice.<sup>19</sup> But it is a separate right.<sup>21a</sup>

2. On the other hand, the right conferred by Art. 30 (1) is subject to the limitation imposed by Art. 29 (2), so that if a minority institution receives State aid, it cannot deny admission to such institution to any person outside that minority community only on ground of religion, caste etc.<sup>19</sup>

### Art. 30 (1) and the Directive Principles.

Though a Directive principle cannot override a fundamental right, an attempt should be made to give effect to both if that be possible. An attempt should, therefore, be made to reconcile the right of the minority community to establish and administer educational institutions of its own and the duty of the State to promote education and to introduce free and compulsory education under the Directives in Arts. 41, 45 and 46.

Thus, while the State has a solemn obligation to introduce free and compulsory education, it is possible for the State to discharge that obligation through State owned or State aided schools and Art. 45 does not require that obligation to be discharged at the expense of the minority communities, by acquiring or taking over the management of schools established by the minority communities which they have the right to administer under Art. 30 (1).<sup>19</sup>

### Unconstitutionality of some laws in relation to Art. 30 (1):

Aligarh Muslim University Act, 1920:

*Held valid.*<sup>22</sup>

### 31. (1) No person shall be deprived of his property save by authority of law.

Compulsory acquisition of property.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law<sup>23</sup> which provides for compensation for the property so acquired or requisitioned<sup>24</sup> and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate<sup>24</sup>

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.<sup>24</sup>

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

21a. *Rev. Father v. State of Bihar*, (1968) S.C. [W.P. 1/68, d. 13-9-68].

22. *Azees v. Union of India*, A. 1968 S.C. 662.

23. Amended by the Constitution (Fourth Amendment) Act, 1955.

24. Added by the Constitution (Fourth Amendment) Act, 1955.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

- (a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or
- (b) the provisions of any law which the State may hereafter make—
  - (i) for the purpose of imposing or levying any tax or penalty, or
  - (ii) for the promotion of public health or the prevention of danger to life or property, or
  - (iii) in pursuance of any agreement, entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Amendment.— Cl (2) has been amended and cl. (2A) has been inserted by the Constitution (Fourth Amendment) Act, 1955 :

#### Objects of Amendment.

(A) Cl (2).

(a) The amendment in the first part of the clause is somewhat verbal. This has been made in order to distinguish the scope of cl (2) from cl. (1) which had been blurred by the interpretation given by the Supreme Court in the case of *Subodh Gopal*<sup>25</sup> and *Dwarkadas*<sup>1</sup> that the two clauses relate to the same subject.

(b) The italicised words at the end of the clause have been inserted on the recommendation of the Select Committee—

"The Committee feels that although in all cases falling within the proposed clause (2) of Art 31 compensation should be provided, the quantum of compensation should be left to be determined by the legislature, and it should not be open to the courts to go into the question on the ground that the compensation provided by it is not adequate".

(B) Cl. (2A).—This clause has been inserted with a view to supercede the decisions in the cases of *Subodh Gopal*,<sup>25</sup> *Dwarkadas*<sup>1</sup> and *Saghir Ahmed*.<sup>2</sup> It will no longer be possible for the Courts to take any extended

25. *State of W. Bengal v Subodh Gopal*, A. 1954 S.C. 92: (1952-4) 2 C.C. 403.

1. *Dwarkadas v. Sholapur Spinning Co.*, A. 1954 S.C. 119: (1952-4) 2 C.C. 420.

2. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707: (1954-4) 2 C.C. 246.

view of the 'acquisition' as was taken in the above cases. The words 'taking possession of' in cl. (2) have also been substituted by the word 'requisitioned' with the same object.

### Effects of amendment.

(A) Cl. (2).—The changes introduced in this clause are—

(i) The words 'movable or immovable', which were a surplusage, have been omitted. The generic word 'property' would include all species of property.

(ii) The words 'including any interest in, or in any company owning, any commercial or industrial undertaking' have been omitted, for, these interests are taken to have been included in the word 'property'.

(iii) In place of the words 'taken possession of or acquired' the word 'compulsorily acquired or requisitioned' have been substituted, and an explanation of the words 'acquired and requisitioned' have been provided in cl. (2A). All this has been done in order to override the extended meaning given to the original words in the cases of *Subodh Gopal*<sup>1</sup> and *Dwarkadas*.<sup>2</sup>

(iv) The words 'under any law authorising the taking of such possession or such acquisition' have been substituted by the words 'save by authority of a law', in order to make the provision more explicit.

(v) The words "and no such... ..adequate" have been added at the end of cl. (2) in order to make the question of adequacy of the compensation provided by the law, non-justiciable.

(B) Cl. (2A).—Cl. (2A) now completely excludes the possibility of importing the *American* doctrine of 'taking' in the matter of interpreting Art. 31 of *our* Constitution. The obligation to pay compensation under cl. (2) will no longer arise unless either the ownership or the right to possession of the individual is *transferred* to the State or to a corporation owned or controlled by it.

The following consequences, accordingly, emerge—

(a) To determine whether an obligation to pay compensation arises under Art. 31 (2), it will no longer be relevant to enquire whether the individual has been 'substantially dispossessed' or whether his right to use and enjoy the property has been 'seriously impaired' or the value of the property has been 'materially reduced' by the impugned State action.

(b) The new cl. (2A) not only explains cl. (2) but also differentiates the scope of cl. (1). It will no longer be possible to contend that cls. (1) and (2) relate to the same subject and that they are co-extensive. While *all* cases of 'deprivation' are included within the purview of cl. (1), the cases of *acquisition* and *requisition*, involving transference of ownership or right to possession to the State, are specifically dealt with in cl. (2) and no other mode of deprivation can, accordingly, be held to attract the operation of cl. (2).

No liability for compensation can, accordingly, arise not only in cases of regulation or restriction of the rights of ownership, however substantial it may be, or in cases of harm or injury caused to the proprietary rights of an individual owing to the exercise by the State of its legitimate powers, but also in cases of total destruction of property without involving any transfer of dominion to the State.

It is now placed beyond doubt that the *only* cases where compensation is payable under Art. 31 are—where any property is physically or constructively *transferred* to the State or to a corporation owned or controlled by the State.

**Amendment not retrospective.**

The Fourth Constitution (Amendment) Act, 1955, is, however, *not* retrospective in operation,<sup>3-4</sup> and the old law will, accordingly, apply to orders relating to acquisition or taking possession of property, which were made prior to the date of operation of the Fourth Constitution (Amendment) Act, *i.e.*, 27-4-55.

**Arts. 19(1)(f) and 31.**—See p. 110, *ante*.

**Arts. 30(1) and 19(1)(g).**

It cannot be contended that the establishment of an educational institution for a minority community is not a business coming under Art. 19(1)(g), merely because it is dealt with by a separate provision in Art. 30(1).<sup>5</sup>

**Arts. 31(1) and 265(1).**—See under Art. 265, *post*.

**Cls. (1) and (2) of Art. 31.**

Since the Constitution (Fourth Amendment) Act, 1955, it is clear that cls. (1) and (2) deal with separate matters.<sup>6</sup> Cl. (1) deals with deprivation of property *otherwise* than by acquisition and requisitioning, *e.g.*, destruction of a property in order to prevent a fire from spreading. Cl. (2), on the other hand, lays down the requirements to be complied with only when deprivation is made by 'acquisition' or 'requisitioning',<sup>7</sup> within the meaning of cl. (2A).

**Scope of Cl. (1): No deprivation except under authority of law.**

1. This clause contains a declaration of the fundamental right in a negative form, namely, that no person shall be deprived of his property save by authority of law. In other words, the clause implies that a person may be deprived of his property, provided he is so deprived by authority of law.<sup>8</sup> This clause thus affords protection against executive<sup>9</sup> but not against legislative expropriation of property.<sup>10</sup> There cannot be an 'act of State' against a citizen and the Executive cannot deprive a citizen of his property unless they can point to some specific rule of law which authorises their act.<sup>11</sup>

2. The law referred to in this clause must, of course, be a valid law, which means that it must be passed by a competent Legislature<sup>12</sup> and must not contravene any of the Fundamental rights<sup>12-13</sup> or any of the other express provisions of the Constitution.<sup>12</sup>

3. The prohibition contained in this Clause does not, however, debar the Government from taking an individual's property under the terms of a contract which is otherwise valid,<sup>14</sup> or to cancel a contract in exercise of the powers conferred by its terms.<sup>15</sup> A mere breach of contract would be no breach of a fundamental right.<sup>16</sup>

3. *Cf. Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122.

4. *State of Madras v. Namasivaya*, A. 1965 S.C. 190 (192).

5. *Sakharkherda Education Soc. v. State*, A. 1968 Bom. 91 (95).

6. *Sitabali v. State of W. B.*, (1967) 2 S.C.R. 949.

7. *Kochunni v. State of Madras*, A. 1960 S.C. 1080 (1094-5).

8. *Shanta Devi v. Custodian of E. P.*, A. 1952 M.B. 181.

9. *Cf. Virendra v. State of U. P.*, (1955) 1 S.C.R. 415.

10. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925).

11. *Wazir v. State of H. P.*, (1952-4) 2 C.C. 344; (1955) 1 S.C.R. 408.

12. *Jalan Trading Co. v. Mill Mazdoor Union*, A. 1967 S.C. 691 (706).

13. *Jagannath v. State of U. P.*, A. 1962 S.C. 1563 (1571); *Vajrapani v. N. T. C. Takkis*, A. 1964 S.C. 1440 (1444) [Art. 19 (1) (f)].

14. *Hasanji v. State of M. P.*, A. 1965 S.C. 470 (473).

15. *Achutan v. State of Kerala*, A. 1959 S.C. 490; (1959) Supp. 1 S.C.R. 787.

16. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919 (922).

**Retrospective operation not invalid.**

Since a law under Art. 31 does not come within the prohibition of Art. 20 (1), there is nothing wrong in a validating legislation which seeks to validate, retrospectively, the deprivation of an individual's property without the authority of law.<sup>17</sup>

**'Deprived'.**

1. Deprivation of property may take place in various ways, such as destruction<sup>18</sup> or confiscation,<sup>19</sup> or revocation of a proprietary right granted by a private proprietor,<sup>20</sup> seizure of goods<sup>21</sup> or 'immovable property'<sup>20</sup> from the possession of an individual<sup>21</sup> or assumption of control of a business,<sup>18</sup> in exercise of the 'police power' of a State. Thus, there is a 'deprivation' where a municipal authority, under statutory power, pulls down dangerous premises,<sup>22</sup> or an insolvent is divested of his property.<sup>23</sup>

2. For the purposes of cl. (1), it is not necessary that the transfer of property must be in favour of the State as distinguished from private individuals.<sup>24</sup>

3. 'Deprivation' is to be distinguished from 'restriction' (see p. .... *ante*) of the rights following from ownership, which falls short of dispossession of the owner from those rights.<sup>25</sup> There would be a 'deprivation' within the meaning of Art. 31 (1) if a substantial bulk<sup>18</sup> of the rights constituting property is taken away, *e.g.*, where the right to occupy, transfer, assign or sublet is taken away from a leasehold interest,<sup>18</sup> or a trustee is removed from the management of a public trust,<sup>25</sup> or a person's property is declared 'evacuee property'.<sup>1</sup>

4. But there is no deprivation—

(a) Where the State simply refuses to recognise a contract to which it is not a party.<sup>2</sup>

(b) By reason of taxation which is outside the scope of Art. 31 (1) and comes under the specific provision of Art. 265.<sup>4</sup>

(c) Where an educational institution is *temporarily* deprived of its right to *manage* its property to secure compliance with the provisions of a statute enacted to control the system of education.<sup>4</sup>

(d) Where the right in question is not an absolute right but a defeasible one.<sup>5</sup>

17. *West Ramnad E. D. Co. v. State of Madras*, A. 1962 S.C. 1763: (1963) 2 S.C.R. 747.

18. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925).

19. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919.

20. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415; *Promod v. State of Orissa*, A. 1962 S.C. 1288.

21. *Wazir v. State of H. P.*, (1955) 1 S.C.R. 415.  
A. 1962 S.C. 1288.

22. *Nathubhai v. Municipal Corpn.*, A. 1959 Bom 332 (338).

23. *Vajrapuri v. New Theatres*, (1959) 2 M.L.J. 469 (473).

24. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (780).

25. *Bishan Das v. State of Punjab*, A. 1961 S.C. 1570.

1. *Zafar Ali v. Asstt. Custodian*, (1962) 1 S.C.R. 749.

2. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919; *Shantabai v. State of Bombay*, A. 1958 S.C. 532 (533): (1959) S.C.R. 265.

3. *Ranjitlal v. I. T. O.*, (1950-51) 242 (244): (1951) S.C.R. 127.

4. *Katra Education Society v. State of U. P.*, A. 1967 S.C. 1307 (1312).

5. *Vadia v. State of Saurashtra*, A. 1967 S.C. 346 (348).

**'Property'.**—See under cl. (2), *below*.

**'Save by authority of law'.**

1. Under the Constitution, the Executive cannot deprive a person of his property (of any kind<sup>6</sup>) without specific legal authority<sup>7</sup> which can be established in a court of law, however laudable the motive behind such deprivation may be.<sup>7</sup> In case of dispossession except under the authority of law, the owner may obtain restoration of possession by a proceeding for *mandamus* against Government.<sup>8</sup>

Thus, where the ownership of a land admittedly belongs to the Government, but a person has *bona fide* entered into possession and erected constructions thereon, the Government cannot dispossess such person without recourse to legal proceedings.<sup>7</sup> Similarly, even though the trustee of a public trust claims adversely to the trust, the Government cannot remove the trustee by executive action, without recourse to a suit under s. 92, C. P. Code.<sup>7</sup>

2. Since the Rulers of Indian States were fully sovereign, their executive acts also constituted law. Hence, grants made by them can be revoked, after the Constitution,<sup>8</sup> only by a law passed by a competent Legislature. But if the revocation took place, before the commencement of the Constitution, by the Ruler in his sovereign capacity, there is no remedy after the Constitution, under Art. 31 (1).<sup>8</sup>

3. The recovery of money due under a contract cannot be held to be a deprivation without authority of law, so long as that contract is not set aside in due course of law.<sup>9</sup>

**Who can complain of violation of Art. 31(1).**

1. Since this clause can be invoked only by a person who has been deprived of his property, in order to succeed, the petitioner must establish his right to the property in question.<sup>10</sup> Where, therefore, his title is disputed, he cannot invoke Art. 31 (1), until his title has been established in a proper proceeding.<sup>10</sup>

2. It must further be established that the object to which his claim relates is a 'property' recognised by law.<sup>11-12</sup>

3. Nor is Art. 31 (1) attracted where the deprivation of property has been caused by a private individual and not the State.<sup>13</sup>

4. Though Art. 31 is not confined to citizens, Cl. (1) of Art. 31 can be of no avail to a non-citizen where his contention is that the law by which he has been deprived of his property is invalid owing to a contravention of Art. 19, which is confined to citizens.<sup>14</sup>

**Scope of Cl. (2).**

Art. 31 (2) lays down the conditions subject to which the power conferred upon the State may be exercised—(a) a law made by a competent Legislature; (b) the existence of a public purpose; (c) the payment of compensation.

6. *Wazir v. State of H. P.*, (1955) 1 S.C.R. 408; (1952-4) 2 C.C. 344 (346).

7. *Bishan Das v. State of Punjab*, A. 1961 S.C. 1570.

8. *Sarwarkat v. State of Hyderabad*, A. 1960 S.C. 862 (865).

9. *Hassanni v. State of M. P.*, A. 1965 S.C. 470 (473).

10. *Behare v. State of Bihar*, A. 1963 S.C. 516; (1962) Supp. 3 S.C.R. 831.

11. *Cf. Audh Bahari v. Gajadhar*, (1955) 1 S.C.R. 70 (84).

12. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919 (922).

13. *Paika v. Pindiko*, A. 1958 Orissa 15 (17).

14. *Indo-China Steam Navigation Co. v. Jaggit*, A. 1964 S.C. 1140 (1154).

**The Constitution (Fourth Amendment) Act, 1955**, has made it clear that there is no obligation to pay compensation under this clause except where property has been 'acquired' or 'requisitioned', in the manner explained in the new cl. (2A).

This Amendment has further narrowed down the scope of this clause by laying down that once the Legislature has fixed the amount of compensation or specified the principles on which the compensation is to be determined, the question of *adequacy* of the compensation so provided shall not be justiciable.<sup>15</sup>

### Arts. 31 (2) and 19 (1) (f).

A law which falls under Art. 31 (2) is not controlled by anything in Art. 19 (1) (f).<sup>16</sup>

### 'Property'.

1. Property, in this Article, means only that which can by itself be acquired, disposed of or taken possession of.<sup>17</sup> Subject to this limitation,<sup>18</sup> it is designed to include private property in all its forms<sup>19</sup> and "must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its judicial or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others".<sup>20</sup>

2. 'Property' thus includes—

(a) Any proprietary interest, including a temporary or precarious interest, such as that of a mortgagee or lessee.<sup>21</sup>

(b) The hereditary interest in and right of management of the head of a Hindu religious endowment;<sup>18</sup>

(c) The hereditary office of a Patel or Patwari under the Berar Patels and Patwari Law, 1900;<sup>22</sup>

(d) Any interest in a commercial or industrial undertaking;<sup>17</sup> or a business,<sup>23</sup> such as managing agency;<sup>24</sup>

(e) A right of pre-emption conferred by Mahomedan law or by custom (as distinguished from a personal right when created by contract);<sup>25</sup>

(f) The contractual rights which a person has as share-holder of a company;<sup>18</sup>

(g) The salary earned by a Government servant;<sup>1</sup>

(h) Title acquired by adverse possession.<sup>2</sup>

(i) Right of a seller of property to get the purchase price.<sup>3</sup>

3. On the other hand, no right or interest constitutes 'property' unless the law recognises it as a proprietary right.<sup>26</sup>

15. *Cf. Butrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (1963).

16. *Barkaya v. State of Bombay*, A. 1960 S.C. 1203; *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1092); *Sitabati v. State of W. B.*, (1967) 2 S.C.R. 949; *Iswari Lal v. State of Gujarat*, A. 1968 S.C. 670 (881).

17. *Chironjit Lal v. Union of India*, A. 1951 S.C. 41 (55-6).

18. *Dwarakadas v. Sholapur Co.*, A. 1951 Bom. 86.

19. *Commr., H. R. E. v. Lakshminidra*, (1952-4) 2 C.C. 191 (196).

20. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587 (Sastri C.J.): A. 1954 S.C. 92.

21. *Suryapal v. State of U. P.*, (1952) S.C.R. 1056.

22. *B. P. P. & P. Assocn. v. State of Bombay*, A. 1958 Bom. 300 (303).

23. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.

24. *J. K. Trust v. Commr. of I. T.*, (1958) S.C.R. 65 (71, 74).

25. *Anand Behari v. Gajadhar*, (1955) 1 S.C.R. 70 (84).

Hence, the following interests have been held not to constitute 'property' within the meaning of this article—

- (a) The office of the managing agent of a company.<sup>3</sup>
- (b) A mere chance or prospect of having particular customers.<sup>4</sup>
- (c) The right to use a public highway.<sup>5</sup>
- (d) The right to manufacture liquor.<sup>6</sup>
- (e) A bare contractual right,<sup>7</sup> or the right of a bare licensee,<sup>7,8</sup> unattended with any interest in property
- (f) A grant-in aid, until it is actually paid.<sup>9</sup>
- (g) A right of superintendence of property, without any beneficial enjoyment.<sup>10</sup>
- (h) The right to an office held at the pleasure of the appointing authority.<sup>11</sup>

Even where the office is hereditary, it does not create a right of property if the appointing authority has the power to abolish the office.<sup>11</sup> Again, the fact that the holder of the office is entitled to property as remuneration for his office does not create a right of property if the Government has the right to resume the grant.<sup>11</sup> In such a case, no compensation is payable for abolition of the office or resumption of the grant.<sup>11</sup>

4 Since Art. 31, *per se*, did not create any right of property but only protected rights which otherwise existed<sup>12</sup> a pre Constitution right which was not recognised as a right of property under s. 299 (1) of the Government of India Act 1935 cannot be deemed to be a property under Art. 31 (1) of the Constitution.<sup>12</sup>

5 Nothing is property which is not capable of acquisition by itself, e.g.,—

(i) The interest of an allottee under the Evacuees Act, 1947, which arises from a statutory grant.<sup>13</sup>

(ii) The right to vote at an election.<sup>14</sup>

6 An incorporeal right which cannot be alienated apart from the corpus of the property cannot be regarded as a 'property' within the meaning of this Article e.g.—

(i) The right to hold a land revenue free.<sup>15</sup>

(ii) The rights of share holders of a company, e.g., to elect directors,<sup>16</sup> to apply for winding up.<sup>17</sup>

1 *Bombay Dyeing Co v State of Bombay* A 1958 SC 328

2 *Brij Bhukan v S D O* A 1955 Pat 1

3 *Jairant Singh v State of Gujarat* A 1962 SC 821

4 *Ram Jawaya v State of Punjab* (1955) 2 SCR 225 (242)

5 *Sachin Ahmad v State of M P*, (1955) 1 SCR 707

6 *Manohar v State of Rajasthan* A 1954 Raj 85.

7 *Mehboob Co v State of M P* A 1966 SC 1637 (1640), overruling *Chhotabhai v State of M P*, A 1953 SC 108

8 *Rameshwar v Commr.* A 1959 SC 498 (503)

9 *Joseph v State of Kerala* A 1968 Ker 290

10 *Bira Kishore v State of Orissa* A 1964 SC 1501

11 *Collector v Derpanda* A 1964 SC 326 (329)

12 *State of Gujarat v Vora Fiddat* A 1964 SC 1043 (1058)

13 *Amar Singh v. Custodian.* A. 1957 SC. 599

14 *Ramdas v State.* A 1950 MP. 353

15 *Girijananda v. State of Assam.* A 1956 Assam 33 (48).

16 *Chiranjit Lal v Union of India* (1950) SCR 869; A 1951 SC 41

17 *Dwarkanadas v. Sholapur Co.*, A. 1954 S.C. 119 (136) (1954) S.C.R. 674.



7. The following kinds of property cannot be subject to acquisition or requisition in view of the general principles relating to the power of 'eminent domain':

- (i) Money.<sup>18, 20</sup>
- (ii) Choses in action.<sup>18, 20</sup>

#### No property exempted.

The Article does not exempt any kind of 'property' from the power of 'eminent domain' belonging to the State.

Hence, the following kinds of property cannot claim exception—

- (i) Property already dedicated to a public use,<sup>21</sup> including religious endowments.
- (ii) The personal property of Ex-Rulers of Indian States.<sup>22</sup>
- (iii) Lands held under Ghatwali tenure.<sup>23</sup>
- (iv) Crown grants.<sup>17</sup>

#### CL (2A): 'Acquisition' or requisitioning'.

1. Cl. (2A), introduced by the Constitution (Fourth Amendment) Act, 1955, makes clear what is meant by acquisition or requisitioning within the meaning of cl. (2). Unless the taking of the property takes place in either of these two ways, there is no obligation to pay compensation 'under the Constitution'.<sup>24</sup>

(a) Where a law does not, in reality, effect a transfer of ownership or possession, Art 31 (2) cannot be invoked merely because the Legislature has actually provided for some compensation with a view to mitigating hardship or otherwise.<sup>25</sup>

(b) The transfer must be in favour of the State, which of course, includes the authorities coming under Art 12, such as a Panchayat;<sup>1</sup> or to a corporation owned or controlled by the State

2. The doctrine of taking by substantial abridgement of the rights of ownership of the owner, which was enunciated in the cases of *Subodh Gopal*<sup>2</sup> and *Duarkadas*,<sup>3</sup> has been superseded by this amendment.

3. In order to constitute 'acquisition', there must be a *transfer of the ownership* in the property to the State or to a corporation owned or controlled by the State.

Thus, there is no question of Art 31 (2) being attracted where there is no provision for transference to the State and the legislation merely

18. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (943).

19. *Bombay Dyeing Co. v. State of Bombay*, A. 1956 S.C. 328. [Though it is 'property' within the meaning of Art 19 (1) (f); see p. ante]

20. But, without referring to the earlier decisions, a right to obtain a cash grant from a Ruler has been held to be 'property' within the meaning of Art 31 [*State of M. P. v. Ranajit Rao*, A. 1966 S.C. 1053 (1056)].

21. *Suryopal v. State of U. P.*, (1952) S.C.R. 1056

22. *Vishenwar v. State of M. P.*, (1952) S.C.R. 1020 (1055).

23. *Manmohan v. State of Bihar*, A. 1955 N.U.C. (Pat) 3948.

24. *Nageswara v. Andhra Pradesh S.R.T. Corpn.*, A. 1959 S.C. 308 (318).

25. *Gangadharrao v. State of Bombay*, A. 1961 S.C. 286 (290).

1. *Ajit Singh v. State of Punjab*, A. 1967 S.C. 856 (866).

2. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 567; (1952-4) 2 C.C. 403; A. 1954 S.C. 92.

3. *Duarkadas v. Shalapur Spinning Co.*, (1954) S.C.R. 674; (1952-4) 2 C.C. 420; A. 1954 S.C. 119.

enables the tenants to purchase the landlords' share without intervention of the State;<sup>4</sup> or provides for the transfer of property to a statutory corporation which is not owned or controlled by the State.<sup>5</sup>

4. This does not, however, mean that Government cannot acquire *part* of the rights of the owner. Thus, leasehold and other similar rights can always be 'acquired' and if a person owns the totality of rights, it is not necessary to acquire the whole interest of that person if it is not needed for public purposes.<sup>6</sup> The Legislature may, thus, acquire proprietary rights of zamindars, leaving the *bhumidari* rights with them.<sup>7</sup>

5. While in 'acquisition', the *ownership* or title of the owner is transferred to the State or a corporation owned or controlled by the State, 'requisition' takes place when the *right to possession* is transferred similarly, without transferring the title. In short, it must involve the "*actual taking* of the property out of the possession of the owner or possessor into the possession of the State or its nominee".<sup>8</sup> While acquisition is permanent, requisition is for a temporary period<sup>9</sup>, and during the period when the requisitioning authority remains in possession, the rights of all other persons to enjoy the property are *suspended*.<sup>10</sup>

This does not mean, however, that the power to requisition cannot be used where the public purpose involved is not a temporary but a permanent one, for there is nothing to prevent an order of requisition being followed by an order of acquisition under a valid law.<sup>11</sup>

6. It is not clear whether any formal order of requisition is necessary to attract cl. (2A), even though the right to possess the land is statutorily transferred to a public authority, e.g., for the purpose of reclamation as in the pre amendment case of *State of M. P. v. Champalal*.<sup>12</sup> If that principle is applicable to cl. (2A) as well, there will not be any substantial difference in scope between the expressions 'taking possession of' as existed in original cl. (2) and the expression 'transfer of the right to possess' in the new cl. (2A).

7. The Amendment makes it clear that mere 'deprivation of property', short of 'acquisition' or 'requisitioning'<sup>13</sup> within the meaning of cl. (2A), i.e., without the transfer of title or right to possession, will not attract cl. (2).<sup>14</sup> Hence, there is no obligation to pay compensation in cases like the following—

(i) Where the relations between landlord and tenant are merely regulated, even though the rights of the landlord are diminished thereby.<sup>15, 16</sup>

(ii) Where a private owner is affected (i.e., by the lowering of property value)<sup>17</sup> or deprived of his property by reason of the exercise of the 'police' or 'regulatory' powers of the State, e.g., where private road transport operators lose their business and their stock-in-trade is rendered useless because the State enters into the business as a monopolist and cancels the

<sup>4</sup> *Kochunni v. State of Madras*, A. 1960 S.C. 1080 (1094).

<sup>5</sup> *Jalindra v. Jadavpur University*, A. 1960 Cal. 120 (121).

<sup>6</sup> *Suryopal v. State of U. P.*, (1962) S.C.R. 1056.

<sup>7</sup> *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328.

<sup>8</sup> Cf. *Das I.* in *State of W. B. v. Subodh Gopal*, (1964) S.C.R. 587.

<sup>9</sup> *Shyam Krishan v. State of Punjab*, A. 1953 Punj. 70.

<sup>10</sup> *Shanvi v. State of W. B.*, A. 1954 Cal. 212.

<sup>11</sup> *Collector, Akola v. Rammachandra*, (1967) S.C. [C.A. 1012/64].

<sup>12</sup> *State of M. P. v. Champalal*, A. 1965 S.C. 124 (130).

<sup>13</sup> *Senthakrishna v. Vaidhilingam*, A. 1954 Mad. 51.

<sup>14</sup> *Nageswara v. A. P. S. R. T. Corpn.*, A. 1959 S.C. 308 (318).

<sup>15</sup> *Vatrapani v. N. T. C. Talkies*, A. 1964 S.C. 1440 (1444).

<sup>16</sup> *Shikrishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

permits in favour of the existing traders;<sup>17</sup> or a licence is refused;<sup>18</sup> or adulterated foodstuffs are seized and destroyed or dilapidated structures are pulled down by municipal authorities or a fire brigade;<sup>19</sup> or restrictions are imposed on transfer of property by evacuees;<sup>21</sup> or goods are seized under the Sea Customs Act,<sup>22</sup> 1878, or the Foreign Exchange Regulation Act, 1947; or where the State merely exercises powers of superintendence over the affairs of a company;<sup>23</sup> or where a Governmental agency takes up the *management* of property with liability to account for the income<sup>24</sup> or vests the management in another body;<sup>25</sup> where the owners of private forests are restricted from cutting away timber without the permission of the prescribed authority;<sup>1</sup> or where the rate of interest is reduced;<sup>2</sup> or where injury is caused to adjoining land by drainage or irrigation works;<sup>3</sup> or where, under a scheme of consolidation, village land is taken from individual owners and set apart for their *common* use;<sup>4</sup> or where revenue-free land is assessed to land revenue;<sup>5</sup> or where blood is taken from the body of a person for the purpose of investigating an offence.<sup>6</sup>

(iii) Where the State seeks to recover possession of a land *owned* by it, from a lessee.<sup>7</sup>

(iv) Taxation<sup>8</sup> or assessment of land-revenue,<sup>9</sup> whether or not that law comes under Art 31(5)(b)(i).<sup>8</sup>

(v) Where the transfer of ownership is to a statutory corporation which is neither owned nor controlled by the State,<sup>9</sup> or from the landlord to the tenants.<sup>9a</sup>

### 'Public purpose'.

1. Though the determination by the Legislature or the Executive as to whether a particular purpose is a public purpose is *prima facie* respected by the Courts, it is the duty of the Courts to determine the question,<sup>10</sup> and the position has been made explicit by the amendment of 1954, by making the existence of a public purpose a *condition precedent* to acquisition under Art. 31 (2).<sup>11</sup>

2. The expression 'public purpose' is not capable of a precise definition and has no rigid meaning. The definition of the expression is elastic and takes its colour from the *statute* in which it occurs, the concept *varying with the time and state of the society and its needs*. The point to be determined

17. *Cf. Babubhai v State of Bombay*, A 1956 Bom. 21 (25).

18. *Ramchandra v. State of Orissa*, (1956) SCR 346 (357).

19. *Glass Chateaux Assn v Union of India*, A. 1961 SC 1514 (1517).

20. *State of W. B v Subodh Gopal*, (1952-4) 2 CC 403 (417) (1954) SCR 587.

21. *Cf. Sadhu Ram v. Custodian*, (1956) S.C.A. 70 (73), *Shanta v. Custodian*, A 1952 M.B. 181.

22. *Shew Pujan v Collector*, A 1952 Cal. 789.

23. *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, A 1954 SC. 119 (125).

24. *Cf. Guru Datta v. State of Bihar*, A 1961 SC 1684.

25. *Bira Kishore v State of Orissa*, A 1961 SC. 1501 (1508); *Govindlalji v State of Rajasthan*, A 1963 SC. 1638, *Board of Trustees v. State of Delhi*, A. 1962 S.C. 458 (471).

1. *Karrar Ali v. State of U. P.*, A 1954 All. 753.

2. *Raghubir v. Union of India*, A. 1951 Puni. 261.

3. *Sashibhusan v. State of Bihar*, A. 1956 Pat. 493 (496).

4. *Kure Singh v State of Punjab*, A 1956 Punj. 88; *Munsha Singh v. State of Punjab*, A. 1960 Punj. 317 (F.B.).

5. *Girijananda v. State of Assam*, A. 1958 Assam 33.

6. *State v Sheshappa*, A. 1964 Bom. 253 (258).

7. *Dhirendra v. State of W. B.*, A. 1956 Cal. 437.

8. *Jagannath v. State of U. P.*, A. 1962 S.C. 1563 (1571).

9. *Jatindra v. Jadavpur University*, (1959) 63 C.W.N. 914 (917).

9a. *Dasari v State*, A. 1958 Mys. 305 (308).

10. *State of Bombay v. Nanji*, (1956) S.C.R. 18.

11. *Atiya v. State of U. P.*, A. 1954 S.C. 1230 (1236-7).

in each case is whether the acquisition is in the *general interest of the community* as distinguished from the private interest of an individual.<sup>12,13</sup> In each case all the facts and circumstances will require to be closely examined in order to determine whether 'public purpose' has been established,<sup>10,18</sup> having regard to the *direct* object of the acquisition.<sup>18</sup> If the direct object is to benefit a private individual and no public purpose is involved, it will be a colourable use of the power conferred by the Legislature, and hence invalid.<sup>18,14</sup>

3. The test of a public purpose is whether it is *useful* to the public rather than its *use* by the public.<sup>16</sup> If the purpose for which the acquisition is made results in benefit or advantage to the public, it is a 'public' purpose, though the acquisition may be in favour of a private corporation or of individuals. It is not essential that the entire community or even any considerable portion<sup>16</sup> thereof should directly enjoy or participate in the improvement, provided the object of acquisition advances a public purpose.<sup>16</sup>

4. A purpose which is for the benefit of individuals may still be a 'public' purpose, provided such persons are benefited not as individuals but in furtherance of a scheme of public utility.<sup>17</sup> Thus, the acquisition of lands for a society formed for construction of houses for clearing slum areas and housing poor people or in areas where there is an acute shortage of dwelling accommodation,<sup>18</sup> is a 'public purpose', even though the direct and immediate beneficiaries were the members of the society.<sup>17</sup> Even the allotment of requisitioned premises to informers of vacancies does not take away the public purpose behind the requisition if the informers are homeless and are in need of accommodation.<sup>19</sup> Similarly, the excavation of an irrigation channel is a public purpose even though an adjoining private owner is immediately benefited by it.<sup>19</sup>

5. If the object be a 'public purpose', it does not cease to be so merely because the compensation payable for the acquisition is to be paid not from the public funds but from the funds of a private society.<sup>19,20</sup>

6. Implementation of a Directive principle of State policy is a public purpose.<sup>21</sup>

7. A public purpose may be purpose of the Union or of a State or any other public purpose.<sup>22</sup> Cases where the State acquires or requisitions property for utilitarian institutions or welfare schemes, fall within the third category. An undertaking may possibly have all the three aspects and may serve the purpose of a State, the purpose of the Union and a general public purpose.<sup>22</sup>

12. *State of Bihar v. Kameshwar*, A. 1962 S.C. 252 (290, 311): (1962) S.C.R. 889.

13. *Somawanti v. State of Punjab*, A. 1963 S.C. 151 (161; 163).

14. *Arnold Rodricks v. State of Maharashtra*, A. 1966 S.C. 1788 (1799).

15. *Khandewal v. State of U. P.*, A. 1955 All. 12.

16. *Barkya v. State of Bombay*, A. 1960 S.C. 1203 (1205).

17. *Cf. State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777: (1952-4) 2 C.C. 436 (433).

18. *Bhagwat v. Union of India*, A. 1959 Punj. 541 (551).

19. *Gundacher v. State of Madras*, A. 1953 Mad. 537.

20. But, in such a case if it is a 'company', as defined in the Land Acquisition Act, 1894, the provisions of Part VII thereof must be complied with, in order to make the acquisition legally valid (*Valjibhai v. State of Bombay*, A. 1963 S.C. 1690).

21. *State of Bihar v. Kameshwar*, (1962) S.C.R. 889: (1952-54) 2 C.C. 353 (361, 362, 379).

22. *State of Bombay v. Gulam*, A. 1955 S.C. 810: (1955) 2 S.C.R. 867 (871).

8. The following are some purposes which have been held to be public purposes—

(i) The housing of a Minister,<sup>23</sup> public officer,<sup>24</sup> an employee of the State Transport Corporation,<sup>24</sup> a member of a foreign Consulate<sup>25</sup> or the general public or the members of a non-profit making co-operative society;<sup>25,1</sup> or even the workmen engaged by an industrial company.<sup>25,1</sup>

(ii) Rehabilitation of 'refugees'.<sup>1a</sup>

(iii) Doing away with unemployment amongst a section of the community.<sup>2</sup>

(iv) A scheme of land reforms even though it may ultimately benefit a class of tenants.<sup>3,4</sup>

(v) Land reform by nationalising the means of production and elimination of the concentration of the means of production in the hands of a few individuals,<sup>5</sup> elimination of intermediaries between the Government and the tillers of the soil and vesting the management of cultivation in a village body.<sup>4</sup>

(vi) Development of lands as industrial and residential areas.<sup>5</sup>

(vii) Maintenance of supplies and services essential to the community or providing proper facilities for accommodation, transport, communication, irrigation or drainage.<sup>6</sup>

(viii) Where a company is engaged in an industry or a work which is for a public purpose e.g., the building of a textile machinery plant,<sup>7</sup> the construction of a building which serves that public purpose in which the company is engaged; or works like a hospital, a public reading room or an educational institution open to the public.<sup>8</sup>

9. On the other hand, it has been held that the following purpose is not a 'public purpose':

(i) The mere purpose of raising revenue.<sup>9,9</sup> But the mere fact that the acquired land is being sold by the Government at a profit does not show this purpose, if the profit is spent for providing amenities to the poorer classes of the society.<sup>10</sup>

(i) The acquisition of the property of one refugee for the benefit of another refugee.<sup>11</sup>

10. There is nothing to debar the Government from transferring the acquired property to a company or other party, after the land has been acquired for a public purpose and vested in the Government,<sup>12</sup> except where the exercise of the power by the State can be shown to have been colourable.<sup>13</sup>

### Competence of the Legislature.

It should be pointed out in the present context that Entries 33 of List I and 36 of List II, which circumscribed the respective powers of the Union and the State Legislatures to Union and State purposes respectively,

23. *Sudhindra v. Sailendra*, (1950) 67 C.L.J. 140 (142).

24. *State of Bombay v. Nanji*, (1956) S.C.R. 18 (27).

25. *Barkaya v. State of Bombay*, A. 1960, S.C. 1203 (1206).

1. *Jhandu Lal v. State of Punjab*, A. 1961 S.C. 343 (346).

1a. *Safi v. West Bengal*, (1951) 55 C.W.N. 463; *Gurdial v. The State*, A. 1952 Punj. 55.

2. *Dwarkadas v. Sholapur Spinning Co.*, I.L.R. (1951) Bom. 473 (490).

3. *State of Bihar v. Kameswar*, A. 1952 S.C. 252 (311-2).

4. *Visheswar v. State of M. P.*, (1952) S.C.R. 1020 Mahajan J.

5. *Arnold Rodricks v. State of Maharashtra*, A. 1967 S.C. 1788 (1797).

6. *Parekh v. State of Assam*, A. 1962 S.C. 167 (169); (1962) 3 S.C.R. 88.

7. *Aroia v. State of U. P.*, (II) A. 1964 S.C. 1231 (1238).

8. *Azara v. State of U. P.*, A. 1962 S.C. 764.

9. *State of M. P. v. Ranjitrao*, A. 1968 S.C. 1053.

10. *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017.

11. *Prov. of Bombay v. Khushaldas*, A. 1950 S.C. 222 (246).

12. *Mangalhai v. State of Gujarat*, A. 1964 Guj. 82 (88).

13. *Somnanti v. State of Punjab*, A. 1963 S.C. 151; (1963) 2 S.C.R. 774 (800).

have been omitted by the **Constitution (Seventh Amendment) Act, 1956**. Under the amended Entry 42 of List III (see *post*), either the Union or a State Legislature can acquire or requisition property, for any public purpose subject, of course, to the territorial jurisdiction over the property, in the case of a State Legislature.

### How far is existence of 'public purpose' justiciable.

1. Prior to the amendment of Cl. (2) by the **Constitution (Fourth Amendment) Act, 1955**, the language of the Clause was not quite clear, and the Court had to infer by *implication* that the existence of a 'public purpose' was a condition precedent to compulsory acquisition of private property, and that, accordingly, the question was justiciable. But the words 'save for a public purpose', inserted by the Amendment Act, makes public purpose an *express condition*<sup>14-15</sup> of compulsory acquisition or requisition and no doubt is left that when it is found that there was no public purpose to support a law of compulsory acquisition, the Court is bound to declare the law unconstitutional.<sup>15, 16</sup>

2. Any law to which Art. 31 (2) is attracted, would be unconstitutional if it seeks to make Executive determination of the existence of a public purpose 'final' and non-justiciable.<sup>14, 16</sup>

3. Of course, when the Legislature declares that there is a public purpose, the Courts should respect its words,<sup>17</sup> and in examining whether there is a public purpose behind a scheme for acquisition, the scheme should be examined as a whole instead of picking out particular items to say that they are not supported by any public purpose.<sup>18</sup> But the executive or the Legislature is not the final judge of this question.<sup>19</sup>

4. It is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intent of the Act it could be gathered that the property was being acquired either for the purposes of the State or for the purposes of the public and that the intention was to benefit the community at large.<sup>18, 19</sup>

Nor is it necessary that the notification for acquisition should specifically state that the land was needed for a public purpose.<sup>17-18</sup>

5. Once it is held that a public purpose exists, it is not competent for the Court to go into the further question, namely, whether that public purpose could be secured by a compulsory acquisition or requisition or otherwise. In other words, the *necessity* for the acquisition or requisition is not a justiciable question.<sup>19</sup> But otherwise, Government is the best judge of the need for the land;<sup>20</sup> whether that need is a public purpose or not remains justiciable.<sup>21</sup> Similarly, it is for the Government, not for the court, to decide whether a particular work is to prove useful to the public.<sup>20</sup>

6. Since 'public purpose' is a condition precedent to the exercise of the power of compulsory acquisition by the State, it is clear that the State has no power to compulsorily acquire or requisition private property for private purposes, that is to say, to take the property of A to serve the

14. *Cf. State of Bombay v. Nanji*, (1956) S.C.R. 18.

15. *State of Bihar v. Kameswar, A.* 1952 S.C. 252 4yyar. J.

16. *Cf. Arora v. State of U. P.*, A. 1962 S.C. 764 (774).

17. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777.

18. *Barkya v. State of Bombay*, A. 1960 S.C. 1203 (1288).

19. *Frov. of Bombay v. Khosaldas*, A. 1960 S.C. 222 (229).

20. *Aurora v. State of U. P.* A. 1963 All. 872 (877-8).

21. *Sachindra v. State of W. B.*, A. 1958 Cal. 510.

purposes of B, where there is no scheme of public utility involved.<sup>22</sup> On the other hand, if the ultimate object is a public purpose, it is immaterial that the possession of A is taken away and transferred to B.<sup>24</sup> But no public purpose would, *prima facie*, be served by requisitioning the property of one refugee for the benefit of another refugee.<sup>19</sup>

### 'Without authority of a law'.

In order to validate an order of acquisition or requisition, not only should there be a specific law to authorise it, but the requirements of such law must be strictly complied with.<sup>23</sup>

### Obligation to pay compensation for acquisition or requisitioning.

1. The obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property both under the doctrine of the English Common law as well as under the Continental doctrine of *Eminent Domain* subsequently adopted in America. The constitution of India has raised this obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right and declared that a law that does not make provision for payment of compensation shall be void.<sup>24-25</sup>

2. But by subsequent amendments, the above fundamental right has been hemmed in by certain limitations:

*Firstly*, while 'compensation' literally means a 'full and fair equivalent of the property taken',<sup>1</sup> cl. (2), as amended by the **Constitution (Fourth Amendment) Act**, provides that inadequacy of the compensation provided for by the Legislature shall not be called into question in a Court of law. Hence, an individual shall have no legal remedy even though he is not paid the full monetary equivalent of the property taken from him.<sup>2-3</sup> He can obtain relief from the Courts, only if no compensation is provided for at all, either literally or *in effect*<sup>4</sup> (see below).

*Secondly*, the application of cl. (2) is altogether excluded in the cases coming under Arts. 31A-31B, so that in these cases, the Courts shall not be entitled to interfere even though no compensation at all has been provided (see *post*).

### Adequacy of compensation no longer justiciable.

1. It has already been pointed out that as a result of the amendment of cl. (2) by the **Constitution (Fourth Amendment) Act**, 1955, a law coming under Art. 31 (2) will no longer be open to attack in a Court of law on the ground that the compensation provided by the Legislature is not adequate, *e.g.*, being less than the market value of the property,<sup>2</sup> or that the potential value of the land or the statutory solatium payable under s. 23 of the Land Acquisition Act has not been included.<sup>4</sup>

22. *Kochuni v. State of Madras* (II), A. 1960 S.C. 1080 (1104).

23. *Cf. Rameswar v. Secy. of State*, (1907) 34 Cal. 470 (480-1); *Manickchand*, in re, A. 1921 Cal. 916.

24. *State of Rajasthan v. Nathmal*, A. 1954 S.C. 307.

25. *State of Madras v. Namasivaya*, A. 1965 S.C. 190 (194); *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017; *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096.

1. *Cf. State of W. B. v. Bela Banerjee*, (1954) S.C.R. 556.

2. *Cf. Amur Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (363).

3. *Barrakur Coal Co. v. Union of India*, A. 1961 S.C. 954.

4. *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017.

2. But Cl. (2) still requires that *some* compensation must be 'given', and that must not be *arbitrarily*<sup>5-7</sup> arrived at. Even after the amendment of cl. (2), the Court adheres to its pre-amendment conclusions, based on the interpretation of the word 'compensation', namely, that—

(a) 'Compensation' means a 'just equivalent' of what the owner has been deprived of.<sup>7</sup>

(b) The value of land at a time anterior to the date of acquisition is no compensation if the fixing of an anterior date is made on considerations irrelevant to the value of the property about the time of acquisition.<sup>6-7</sup>

3. Notwithstanding the amendment—

(a) It is not open to the Legislature to lay down principles which may result in non-payment of compensation or which may result in paying an *illusory*<sup>8</sup> compensation.<sup>4, 8</sup>

(b) The legislation must rest upon some principle of giving compensation and not of *denying or withholding* it, and a legislation could not be supported which was based upon something which was *non-existent* or was *unrelated* to facts and consequently could not have a conceivable bearing on any principle of *compensation*. There will be a violation of Cl. (2), even after the amendment, if the principle laid down by the Legislature is not relevant to the property acquired or to the value of the property at or about the time it is acquired.<sup>8</sup>

*In short*, if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers, the question is within the jurisdiction of the Court<sup>9-10</sup> *e.g.*, where the compensation provided for by the law is 50% or less of the value of the property taken.<sup>9</sup>

(c) It is not open to the Legislature to provide that no compensation is to be paid for a *part* of the property acquired,<sup>10</sup> provided it is a *separate* tenement.<sup>11</sup> Where it is not a separate tenement, the question of non-payment for any of the elements of the property becomes a question as to *inadequacy* of the compensation provided for, which is precluded by the concluding words of Art 31(2), *e.g.*, the contention that mineral have not been separately valued where mining land is acquired<sup>11</sup>

3. It must be some pecuniary benefit to the individual in lieu of the property taken from him and not some benefit which may be conferred upon him along with other members of the public<sup>12</sup>. Thus, where land is taken away from an individual without providing for any payment of compensation to him, it cannot be said that Art 31 (2) has been complied with because the land so taken or some portion of it has been set apart for the use of the public<sup>12</sup>

4. There is a contravention of Art 31 (2) if the Legislature neither fixes the amount of compensation itself nor specifies the principles for its determination.<sup>13</sup> The task of determining the principles must be performed by the Legislature itself. But there is no unconstitutional delegation of

5. *Vaiyavethi v. Dy. Collector*, A. 1965 SC 1017 (1023)

6. *Jeejeebhoy v. Asstt. Collector*, A. 1965 SC 1096 (1965) 1 S.C.R. 636.

7. *Union of India v. Metal Corpn. of India*, A. 1967 SC 637 (642-3).

8. *Jegveera v. State of Madras*, A. 1954 SC 257 (259) (1954) S.C.R. 761.

9. *State of M. P. v. Ranjivan*, (1968) SC ICA. 1370/66 d 213 681.

10. *State of Madras v. Namosiavann*, A. 1965 SC 190 (1964) 6 S.C.R. 936.

11. *Barrakur Coal Co. v. Union of India*, A. 1961 SC 954 (963).

12. *Mukhtar Singh v. State of U. P.*, A. 1957 All. 397 (303 305).

13. *State of Rajasthan v. Nathmal*, (1952-54) 2 C.C. 239 (247); A. 1954 S.C. 307.



legislative power where the Legislature has laid down the principles according to which compensation is to be paid but leaves it to the Executive to apply those principles according to particular circumstances.<sup>14</sup>

Thus, the Legislature may provide for payment of compensation in instalments but leaves it to the Executive to specify the instalments.<sup>15</sup>

**Whether the Legislature can provide for payment of compensation on the basis of the value at a time anterior to that of acquisition.**

The decision in *Bela Banerjee's*<sup>16</sup> case on this point seemed to be clouded for some time after the amendment of Art. 31 (2) by the Constitution (Fourth Amendment) Act, 1955.<sup>14</sup> But the Supreme Court has since clarified the position by holding that—

(a) The Constitution (Fourth Amendment) Act, 1955 has *not* introduced<sup>17</sup> any change in this respect over the law as settled in *Bela Banerjee's case*<sup>16</sup>. On the other hand, the interpretation of the word 'compensation', as given in *Bela Banerjee's case*,<sup>16</sup> has been accepted by Parliament while passing this Constitution Amendment Act. In the result, though mere inadequacy of the quantum of compensation is no longer justiciable on account of the amendment, if the Legislature, in fixing the compensation or in providing the principles for determining compensation, lays down a standard which is not relevant to the value of the property at or about the time it is acquired, it would constitute a fraud on the Constitution and, accordingly, be struck down as unconstitutional.<sup>18-19</sup>

(b) In this respect, no distinction between a temporary and permanent enactment can be made. If it is no 'compensation', it would be the same whether the enactment is permanent or temporary.<sup>19-21</sup>

### **Constitutionality of some Acts under Art. 31 (2):**

**Assam Acquisition for Land for Flood Control and Prevention of Erosion Act, 1955, and Validation Act, 1959:**

*Held invalid*<sup>22</sup>

**Bombay Talukdari Abolition Act, 1949:**

*Held valid*<sup>23</sup>

**Land Acquisition (Madras Amendment) Act, 1961:**

*Held invalid*<sup>24</sup>

**Land Acquisition Act, 1894:**

*Held valid* - S. 1(1)<sup>25</sup>

**Madhya Pradesh Abolition of Cash Grants Act, 1963.**

*Held invalid*<sup>1</sup>

**Metal Corporation of India (Acquisition of Undertaking) Act, 1965:**

*Held invalid*<sup>1</sup>

14. *Cf. State of Bihar v. Kameshwar*, A 1962 S.C. 232 (270, 275-6): (1952) S.C.F. 889.

15. *Visheshwar v. State of M. P.*, (1952-54) 2 C.C. 387 (392): (1962) S.C.R. 1020.

16. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 (564).

17. *Vide* (1964) 4 Sh 189-190.

18. *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017: (1965) 1 S.C.R. 614.

19. *Union of India v. Metal Corpn. of India*, A. 1967 S.C. 637 (642).

20. *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096.

21. *State of Madras v. Namasthayan*, A. 1965 S.C. 190 (194).

22. *Dy. Commr. v. Durganath*, (1967) S.C. [C.A. 1100 of 1966, d. 15.9.67].

23. *State of Gujarat v. Vakhinghi*, (1968) S.C. [C.A. 517/68, d. 8.4.68].

24. *Mudaliar v. Sp. Dy. Collector*, (1965) 1 S.C.R. 614.

25. *Balaram v. State of Madras*, (1968) S.C. [C.A. 489/66, d. 23.4.68].

1. *State of M. P. v. Ranofirao*, A. 1968 S.C. 1053.

1a. *Union of India v. Metal Corpn. of India*, A. 1967 S.C. 637 (642).

**CL. (3): Validity of State Laws.**

1. This clause means that no law relating to acquisition or requisition made by the State Legislature after the commencement of the Constitution shall be valid unless it is reserved for consideration of the President (Art. 200) and receives his assent (Art. 201). Where this condition has not been complied with any proceedings taken under the Act shall be void,<sup>2</sup> and no part of such Act shall be enforceable.<sup>2</sup>

2. The word 'law' in the clause and in cl. (6) appears to have been loosely used to mean a bill. Again, the President is not obliged to give his assent twice over, once under Art 31 (3) and again under Art. 200. When a Bill is referred to under Art 200, the President is not debarred from seeing whether it fulfils the requirements of Art. 31 (3).<sup>3,7</sup>

3. The Supreme Court has held<sup>8</sup> that cl. (3) is attracted only where the State Legislature enacts a *substantive* legislation relating to acquisition or requisition, after the commencement of the Constitution. An Act which amends an existing law which is covered by cl. (5) (a) is also covered by that clause and need not comply with the requirement of cl. (3).

4. The assent of the President is required to enable the State Legislature to enact the law, but it does not preclude any challenge as to the invalidity of the law owing to contravention of any other provision of the Constitution, *e.g.*, Art. 31 (2).<sup>9</sup> In this respect, cl. (3) differs from cl. (4).<sup>9</sup>

**CL. (4): Pending Bills.**

1. Cl. (4) relates to Bills of a State Legislature relating to public acquisition which were *pending* at the commencement of the Constitution. If such a Bill has been passed and assented to by the President, the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of Cl. (2), *i.e.*, on the ground that it does not provide for compensation<sup>10</sup> or that it has been enacted without a public purpose.<sup>11</sup>

2. But Cl. (4) would not debar the Courts from examining validity of the law on other grounds, *e.g.*, whether the law contravenes the guarantee of equal protection in Art. 14, *e.g.*, by providing different principles of compensation for different sets of persons without any reasonable basis for such classification.<sup>12</sup>

3. What the present clause requires is that the Bill must be pending on the date of commencement of the Constitution and not that the Act ultimately passed must in every respect follow the Bill.<sup>13</sup> In other words, it does not require that the Bill must be passed without any amendment.<sup>14</sup>

**Scope of CL. (5):**

1. This clause provides a number of exceptions to the requirements of cl. (2). So, as regards laws coming under this clause [as under cl. (4)], too, the Courts shall have no power to examine the validity of the legislation

2. *State of Madras v. Namaswamy*, A. 1965 S.C. 190 (194).
- 3-7. *Cf. State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (262, 300): (1952) S.C.R. 889.
8. *Lilavati v. State of Bombay*, A. 1967 S.C. 521 (526).
9. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).
10. *Cf. Umesh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182); *Surya Pal v. State of U. P.*, (1952) S.C.R. 1056.
11. *Jagveera v. State of Madras*, (1954) S.C.R. 761.
12. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (273), Mahajan, Mukherjea and Aiyar JJ.
13. *Ram Dubey v. Govt. of M. B.*, A. 1952 M.B. 57 (67).
14. *Gajapati v. State of Orissa*, A. 1953 S.C. 375.

either on the ground of absence of provision for compensation<sup>15</sup> or on the ground of non-existence of public purpose,<sup>16,17</sup> or because the executive determination of the existence of a public purpose has been made conclusive or non-justiciable.<sup>17</sup>

2. But cl. (5) only excludes the application of cl. (2). Hence, the validity of a law coming under cl. (5) can be challenged for the violation of any other fundamental right, *e.g.*, under Art. 14,<sup>18</sup> or want of legislative competence at the time when it was made,<sup>19</sup> *e.g.*, for contravention of s. 299 (2) of the Government of India Act, 1935,<sup>20</sup> and the requirements of that section are to be construed in the same way as in *Bela Banerjee's case*.<sup>20,21</sup> Nor can Art. 31A resuscitate a pre-Constitution law which was void *ab initio* for contravention of s. 299 (2).<sup>20</sup> But it may be validated by a specific enumeration in the Ninth Schedule, in pursuance of Art. 31B.<sup>20,22</sup>

3. Cl. (5) applies to two classes of laws—

(a) 'Existing laws' other than those which come under cl. (6), *i.e.*,—

(i) Laws enacted more than 18 months before the commencement of the Constitution;<sup>20,21</sup>

(ii) Laws enacted within 18 months before the commencement of the Constitution, unless certified by the President, under Art. 31 (6).<sup>24</sup>

(b) Any law made by a State Legislature or by the Union Parliament (*i.e.*, any law made after commencement of the Constitution), for any of the purposes mentioned in items (i)-(iii) of sub-cl. (b).

#### Sub-cl. (a).

##### 'Existing law'.

1. This expression is defined in Art. 366 (10). *post* In the present context, it is assumed that the existing law was valid under the constitutional law then in force. If, for instance, a pre-Constitution statute was inconsistent with s. 299 of the Government of India Act, 1935, it was void *ab initio* and nothing in the present clause could revive it.<sup>23</sup>

2. The following laws would come within the scope of cl. (5) (a):

(a) Provincial Acts such as the Bombay Land Requisition Act, 1948.<sup>25</sup>

(b) Central Acts such as the Land Acquisition Act, 1894;<sup>1,7</sup> Cantonments Act, 1924;<sup>2</sup> Electricity Act, 1910.<sup>8</sup>

3. Where an 'existing law' is amended by an Amending Act subsequent to the commencement of the Constitution and the Amending Act contravenes the provisions of cl. (2) of Art. 31, it is only the amending provisions which will fail, if they *are severable*.<sup>4</sup> But if the life of a pre-Constitution Act is simply *extended* by an amending Act, after the commencement of the Constitution, the Act does not cease to have the protection of Art. 31 (5).<sup>25</sup>

15. *State of Bihar v. Kameshwar*, (1952) S.C.R. 899; (1952 4) 2 C.C. 353.

16. *Jhandu v. State of Punjab*, A. 1961 S.C. 343 (345); *Barkava v. State of Bombay*, A. 1960 S.C. 1208; *Lilavati v. State of Bombay*, (1957) S.C.R. 721.

17. *Somawanti v. State of Punjab*, A. 1963 S.C. 151 (160).

18. *Khandewal v. State of U. P.* A. 1955 All. 12 (18).

19. *Kandur Oil Mills v. Judge, Sales Tax*, A. 1965 All. 99.

20. *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096.

21. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

22. *Dhirubha v. State of Bombay*, (1964) S.C. [C.A. 743/63]; *State of U. P. v. Brijendra*, A. 1961 S.C. 14.

23. *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096 (1101-2).

24. *Akara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

25. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (526).

4. But notifications issued after the commencement of the Constitution cannot be challenged as unconstitutional if the Act under which they are issued is protected by Art. 31 (5) (a).<sup>5</sup>

5. When a law is protected by the present sub-clause, its validity cannot be challenged on the ground of non-compliance with any of the conditions enumerated in Cl. (2) of Art. 31, including the existence of 'public purpose',<sup>6-7</sup> except where the purpose, being patently a private purpose, would render the exercise of the statutory power by the Executive 'colourable' or 'fraudulent'.<sup>8-9</sup> But the Court has no jurisdiction to enquire into the propriety of the Executive determination in the absence of definite allegation that the Government has acted in fraud of its powers.<sup>6-7</sup>

This does not, however, preclude pleas under the general law, e.g.,—

(i) That a declaration under s. 6 of the Land Acquisition Act, 1894, is *ultra vires*—

(a) Because of non-compliance with s. 5A.<sup>10-10</sup>

(b) Because while the declaration states that the land is needed for a 'public purpose', it is established that no part of the compensation money is payable out of the public revenues or from some fund controlled or managed by a local authority.<sup>11</sup>

(c) Because the declaration does not specify whether the land is needed for a public purpose or for the purpose of a company.<sup>12</sup>

(d) Where the declaration is that the land is needed for 'company', but it is established that the entire compensation is not being paid by the company.<sup>13</sup>

(e) Where the entire compensation is payable by a company, but the declaration does not state that the land is needed for a company as distinguished from a 'public purpose', unless, on a proper interpretation of the notification, it is clear that the declaration was to the effect that the land was needed for a company.<sup>14</sup>

(f) Where the declaration is that the land is needed for and at the expense of a company, but the procedure under Part VII of the Act has not been complied with.<sup>5, 15</sup>

(ii) That the requirements of s. 40 (1), in the case of acquisition for a company, have not been complied with, by making an agreement in terms of the particular sub-clause which is relied on by the State;<sup>16</sup> or the purpose for which the land is required by the company is not covered by any of the sub clauses of s. 40 (1);<sup>14, 17</sup> or it appears from the agreement

1. *Barkya v. State of Bombay*, A. 1960 S.C. 1203 (1206); (1961) 1 S.C.R. 128; *Lilavati v. State of Bombay*, (1957) S.C.R. 621, *Jhanda v. State of Punjab*, A. 1961 S.C. 343 (345); *Somawanti v. State of Punjab*, A. 1963 S.C. 151; (1963) 2 S.C.R. 774.
2. *Ram Narayan v. Dinapore Cantt. Board*, A. 1958 Pat. 71 (74).
3. *Srinivas v. State of W. B.*, A. 1954 Cal. 171.
4. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).
5. *Mansoor v. T. C. Government*, A. 1952 T.C. 14.
- 6-7. *Somawanti v. State of Punjab*, A. 1963 S.C. 151 (160, 164).
8. *State of W. B. v. Talukdar*, (1965) 1 S.C.A. 593 (601).
9. *Nandeeswar v. U. P. Govt.*, A. 1964 S.C. 1217.
10. *Sarju Prasad v. State of U. P.*, A. 1965 S.C. 1763 (1766).
11. *Shyam Behari v. State of M. P.*, (1965) 1 S.C.A. 588 (591).
12. *Jhanda Lal v. State of Punjab*, (1961) 2 S.C.R. 459.
13. *Agarwalla v. State of W. B.*, (1965) 1 S.C.A. 600 (612).
14. *Arora v. State of U. P.*, (II), (1965) 1 S.C.A. 12.

that, while giving its consent, Government did not apply its mind to the particular sub-clause under which the acquisition was going to be made.<sup>15</sup>

(iii) That, where the acquisition is for a company, the requirements of s. 41 have not been complied with.<sup>16</sup>

(iv) That the purpose for which the land was purported to be acquired was not the real purpose and that the Government had issued the notification under s. 6 for a collateral purpose.<sup>16</sup>

But—

Where the declaration is that the land is needed for a public purpose and the compensation is payable out of the public revenues, and 'even a fraction of the community' may be benefited by the acquisition, it would not be invalid merely because the acquisition is primarily for an individual or a company.<sup>17</sup>

### Sub-cl. (b).

Any law passed by the State subsequent to the commencement of the Constitution<sup>18</sup> for any of the following purposes comes within cl. (5) (b)—

(i) Taxation<sup>19</sup> or penalty, i.e., fiscal and penal statutes.

Under this head comes a law providing for forfeiture of a land which has been sold in contravention of a statutory prohibition,<sup>20</sup> or authorising assessment of revenue-free land.<sup>21</sup>

(ii) Promotion of public health, prevention of danger to life or property.

This sub-clause means that if, for the abatement of a public menace like fire, disease, danger to the safety of occupants of a building or its neighbours, it is necessary to destroy or to take temporary possession of property, a law authorising such a taking of property cannot be challenged as invalid on the ground that it does not provide for compensation.<sup>22</sup>

But this sub-clause was not intended to cover a permanent law of acquisition for a public purpose, say, for the opening of a public park or the erection of an embankment, which does not provide for compensation, even though such acquisition may be necessary for the improvement of public health or for the prevention of danger from flood.<sup>22</sup>

(iii) Enforcement of any agreement relating to evacuee property with another Government.<sup>23</sup> Any enactment for the prevention of encroachment upon public lands cannot be said to come under this cl. (5) (b) (ii).<sup>24</sup> The Administration of Evacuee Property Act, 1950, comes under clause (5) (b) (iii). The word "otherwise" implies that the law need not always be based on an agreement with a foreign country.<sup>25</sup>

15. *Agarwalla v. State of W. B.*, (1965) 1 S.C.A. 588.

16. Subject, of course, to any validating enactment [*Agarwalla v. State of W. B.*, (1965) 1 S.C.A. 600 (619)]. That the Government applied its mind can also be proved by evidence *alunde* [*ibid*].

17. *Barkya v. State of Bombay*, (1961) 1 S.C.R. 128; (1961) 2 S.C.A. 425.

18. If it is a pre-Constitution law, it will be covered by Art. 31 (5) (a).

19. *Chhotabhai v. Union of India*, A. 1962 S.C. 1006 (1020-1); (1962) Supp. (2) S.C.R. 1 (30).

20. *Kuberdas v. State of Bombay*, A. 1960 Bom. 459 (460).

21. *Ratnaprava v. State of Orissa*, A. 1964 S.C. 1195 (1270).

22. *Dy. Commr. v. Durganath*, (1967) S.C. [C.A. 1100/66, d. 15-9-67].

23. *Harigir v. Asstt. Custodian*, A. 1961 S.C. 1237 (1259).

24. *Brij Kishan v. S. D. O.*, A. 1955 Pat. 1 (14).

25. *Samptan v. Competent Officer*, A. 1955 Pat. 148.

**Cl. (6): Validity of certain pre-Constitution laws.**

1. This clause lays down that a pre-Constitution State law<sup>1</sup> shall not be questioned in any Court on ground of contravention of cl. (2) of Art. 31 or of s. 299 (2) of the Government of India Act, 1935, if it satisfies two conditions—(i) that it was enacted within 18 months before 26-1-50 and (ii) that it was submitted for the President's certification by 26-4-50 and was certified by him.<sup>2</sup>

2. But if a provincial law was passed within 18 months before 26-1-50 and yet the certificate of the President was not obtained, it would not be entitled to the protection of the present clause against the operation of s. 299 (2) of the Government of India Act, 1935, or of Art. 31 (2) of the Constitution, e.g., (a) West Bengal Land Development and Planning Act, 1948;<sup>3</sup> (b) Madras Aliyasanthana Act, 1949,<sup>4</sup> (c) Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons (Land Acquisition) Act, 1948.<sup>4</sup>

3. The ambit of the protection given by cl. (6) is co-extensive with that given by cl. (4) [see p. 201 *ante*].

4. Certification would not, however, cure defects *outside* s. 299 (2) of the Government of India Act, 1935, or Art. 31 (2) of the Constitution, e.g., absence of legislative competence.<sup>5</sup>

Saving of law providing for acquisition of estates, etc.

**31A.** (1) Notwithstanding anything contained in article 13, no law providing for—

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 article 19 or article 31:

- 
1. *Chettiar v. State of Madras*, A. 1954 S.C. 605. *Jagjira v. State of Madras*, A. 1954 S.C. 257.
  2. *Zemindar of Ettayapuram v. State of Madras*, A. 1954 S.C. 257: (1954) S.C.R. 761.
  3. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 556. A. 1954 S.C. 170.
  4. *Satrughna v. State of Orissa*, A. 1958 Orissa 187 (192).
  5. *Rajakumudry E. S. Co. v. State of Andhra*, A. 1954 S.C. 251.
  6. This Article was first inserted by the Constitution (First Amendment) Act, 1951.
  7. The italicised words were substituted by the Constitution (Fourth Amendment) Act, 1955.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

\* Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.\*

\*(2) In this article,—

(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.\*

(b) the expression “rights”, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

**Amendment.**—The Article was originally inserted by s. 4 of the Constitution (First Amendment) Act, 1951, and later amended by the Constitution (Fourth Amendment) Act, 1955, as shown by italics. Both the amendments were given retrospective effect from the commencement of the Constitution.

Further amendments have been made by the Seventeenth Amendment Act, 1964,<sup>10</sup> by adding a second Proviso to Cl. (1) and by substituting Cl. (2) (a).

### Object of Art. 31A.

Shortly speaking, the object of the introduction of Art. 31A by the **Constitution (First Amendment) Act, 1951** was to validate the acquisition of zemindaries or the abolition of the Permanent Settlement without interference from the Courts:

Art. 31A provided that no law (past or future) affecting rights of any proprietor or intermediate holder in any estate shall be void on the ground that it is inconsistent with any of the fundamental rights included in Part III

8. The second Proviso was inserted by the Constitution (Seventeenth Amendment) Act, 1964.

9. Cl. (2) (a) was first amended by the Constitution (Fourth Amendment) Act, 1955. It has been substituted as above with retrospective effect, by the Constitution (Seventeenth Amendment) Act, 1964.

10. Its constitutionality has been upheld [*Sajjan Singh v. State of Rajasthan*, A. 1965 S.C. 645].

of the Constitution. That is to say, no such law shall be liable to attack on the ground that no compensation<sup>11</sup> has been provided for, or that there is no public purpose<sup>12</sup> or that it violates some other provision of Part III, e.g., Art. 14.<sup>13</sup>

### Object of further amendment by the Constitution (Fourth Amendment) Act, 1955.

The object of this amendment is to take out not only laws relating to abolition of Zemindari but also other items of agrarian and social welfare legislation, which affect proprietary rights, altogether, from the purview of Arts. 14, 19 and 31. The object is thus explained in the Statement of Objects and Reasons—

"It will be recalled that the zemindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines, e.g., the following:—

(i) While the abolition of zemindaries and the numerous intermediaries between the State and the tillers of the soil has been achieved for the most part, our next objectives in land reform are the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings.

(ii) In the interests of national economy the State should have full control over the mineral and oil resources of the country, including in particular, the power to cancel or modify the terms and conditions of prospecting licences, mining leases and similar agreements.

(iii) It is often necessary to take over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution.

(iv) The reforms in company law now under contemplation, such as the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another etc., require to be placed above challenge.

It is accordingly proposed in clause 3 of the Bill to extend the scope of article 31A so as to cover these categories of essential welfare legislation."

### Arts. 31A and 31 (4).

The scope of Art. 31 (4) is at once narrower and wider than that of Art. 31A—

(i) Art. 31 (4) has application only to statutes which are pending in the Legislature at the commencement of the Constitution, whereas Art. 31A is subject to no such restriction.

(ii) Art. 31 (4) excludes attack only on the ground of contravention of Art. 31 (2), while Art. 31A bars objections based on contravention of Arts. 14 and 19 as well.<sup>14</sup>

11. *Jodan H. P. Admn.*, A. 1960 S.C. 1008 (1012) [The second proviso to Cl. (1) is an exception].

12. *State of Bihar v. Kameshwar. A.* (1952) S.C. 252 (236); (1952) S.C.R. 889; *Vishwanar v. State of M. P.*, (1952) S.C.R. 1020.

13. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).



(iii) On the other hand, Art. 31 (4) covers acquisition of *any kind of property*, while Art. 31A (1) (a) relates only to the acquisition of a *particular* kind of property, *viz.*, estates<sup>13-14</sup> and rights therein.

(iv) Though confined to estates or rights therein, Art. 31A (1) (a) covers not only laws for their acquisition but also for their extinguishment or modification.<sup>13-14</sup>

(v) While Art. 31 (4) relates to laws relating to acquisition or requisitioning, sub-cls. (b)-(e) of Art. 31A (1) deal with laws affecting rights of property other than by way of acquisition or requisitioning.

### 'Notwithstanding anything in Art. 13'.

1. The words in Art 31A (1) prior to the Amendment by the **Constitution (Fourth Amendment) Act, 1955**, were 'notwithstanding anything in the foregoing provisions of this Part'. The change is rather verbal, for either expression excludes the application of any of the fundamental rights conferred by the three Articles which are specified, *viz.*, Arts. 14<sup>15</sup> 19,<sup>16-21</sup> 31<sup>22</sup> (including the question of public purpose).<sup>20, 23, 24</sup>

2. But a challenge on the ground of contravention of other Articles is not precluded, *e.g.*, that certain provisions of a law authorising State management of the property of a Mutt infringed the provisions of Arts. 25-26.<sup>25</sup>

In this respect, the Constitution (Fourth Amendment) Act, 1955, is more liberal than the First Amendment Act, 1954, for, while the original Art. 31A precluded a challenge on the ground of violation of "any of the rights conferred by any provisions of this Part," *i.e.*, any of the fundamental rights, the amendment of 1954 has restricted it to the contravention of three specified Arts. only *viz.*, Arts. 14, 19, 31.

3. Prior to the amendment of Art 31 (2) by the Constitution (Fourth Amendment) Act, 1955, it was held by the majority of the Supreme Court in *State of Bihar v. Kameshwar*,<sup>16-21</sup> that the existence of a public purpose was an implied condition for compulsory acquisition of private property by the State. Such a contention would now be precluded since the amendment has laid down the existence of a public purpose as an express condition for requisition under Art. 31.<sup>1</sup>

4. Further, Entry 42 of List III having been amended at the same time, so as to omit any reference to compensation therefrom, it can no longer be contended that a provision for compensation is a condition for the exercise

14. *Ajit Singh v. State of Punjab* A. 196. S.C. 856 (859, 866).

15. *Cf. Amar Singh v. State of Rajasthan* (1955) 2 S.C.R. 303 (364-366).

16-21. *Cf. State of Bihar v. Kameswar*, (1952) S.C.R. 889; *Suryopal v. State of U. P.*, (1952) S.C.R. 1059.

22. *Cf. Umeg Singh v. State of Bombay* (1955) 2 S.C.R. 164 (182).

23. *Gangadharrao v. State of Bombay* A. 1961 S.C. 288.

24. *State of Bihar v. Kameswar*, A. 1961 S.C. 1649.

25. *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

1. This view of the Author, expressed at p. 184 of the previous Ed., now finds support from *State of Bihar v. Kameswar*, A. 1961 S.C. 1649, which holds that a law of acquisition may come under Art. 31A even though it is not for a public purpose. This decision has not, however, overruled *Kochuni v. State of Madras (II)* A. 1960 S.C. 1090 (1086-7) which held that a law, in order to come under Art. 31A (1) (a), must relate to agrarian reform (see p. 211, *post*). The two decisions have, therefore, to be reconciled and this can be done by holding that the question of absence of public purpose cannot be raised but if, *prima facie*, a law under Art. 31A (1) (a) has no relation to agrarian reform, it will fail, as not being covered by the latter part of the sub-clause—'extinguishment.....'.

of the legislative power conferred by that Entry. The obligation to provide for compensation is now exclusively contained in Art. 31 (2), and since an application of that Article is excluded by Art. 31A, a law which comes under Art. 31A can no longer be challenged as a **colourable legislation or as confiscatory** in nature.<sup>2</sup>

### 'Law'.

This word, being unqualified, would include pre-Constitution laws as well, provided they were valid when enacted. Consequently, a law which was void ab initio, owing to contravention of Art. 299 of the Government of India Act, 1935, cannot be saved by anything in Art. 31A.<sup>3</sup>

### Protection of amending Acts.

The protection of Art. 31A is available not only to Acts which come within its terms but also Acts amending such Acts, to include new items of property, provided the assent of the President is taken for such Amending Acts.<sup>4</sup>

**Sub-cl. (1)(a): 'Law providing for the acquisition by the State of any estate or of any rights therein'.**

1. For the application of this Article, it is not necessary that the Act must expressly state that the estate or the rights therein are transferred to<sup>4</sup> rest in the State. It is sufficient if the provisions of the Act by themselves show that the acquisition is by the State.<sup>4</sup> Nor is it essential that the acquisition must be immediate. There is nothing wrong in its happening gradually or on the initiative of the intermediary person, such as a tenant, if the actual extinguishment of the rights in the estate takes place on payment of compensation by the State. In other words, this clause would come into operation not only where all the rights of the owner in an estate are transferred to the State but also where *some* only of these rights are so transferred.<sup>4</sup>

2. The distinction between 'acquisition' and extinction or modification of the rights in an estate is that in the former case, the beneficiary is the State but not so in the latter case.<sup>4,5</sup> Thus, where the rights of a lessee are extinguished, it would be a case of 'acquisition' if the lease is held under the State, but one of 'extinguishment' if it is held under a private person.<sup>4</sup>

3. The 'State', in this Article, has the same meaning as under Art. 12.<sup>4</sup>

4. Where there is a law providing for the acquisition of an estate, any Act amending the same enacted after the coming into operation of Art. 31A, shall be entitled to the protection of that Article.<sup>6a</sup>

5. The protection of Art. 31A (1) is not lost merely because an Act is given retrospective effect and vests an estate in the Government from a date anterior to the coming into force of the Act.<sup>6b</sup>

6. Resumption of a jagir for breach of a condition of the grant is not acquisition but if the State wants to take the property of the jagirdar for a public purpose, it is an acquisition within the meaning of Art. 31A.<sup>6</sup>

2. *Jeejeebhoy v. Asst. Collector*, A. 1965 SC 1096 (1101).

3. *Mahant v. State of Orissa*, A. 1967 SC 59 (67).

4. *Ajit Singh v. State of Punjab*, A. 1967 SC 856 (859-860).

5. *Bhagat Ram v. State of Punjab*, A. 1967 SC. 927 (928).

5a. *Sankarsana v. Orissa State*, A. 1967 SC 59.

5b. *Raghubir v. State of Ajmer*, A. 1959 SC 476 (477).

6. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303.

On the other hand—

Acquisition of 'arrears of rent' due to a landlord is not acquisition of an estate or of any right therein within the meaning of Art. 31A but is an acquisition of money or of choses in action which falls outside the scope of Art. 31A (1) (a).<sup>7</sup>

**Ancillary measures may be included.**

A law for the acquisition of an estate etc. does not lose the protection of Art. 31A (1) merely because ancillary provisions<sup>8b</sup> are included in such law, e.g.,—

(i) A provision for acquisition of buildings as appurtenant to the estates within which they lie.<sup>8</sup>

(ii) A provision for the investigation into and annulment of transfers fraudulently made immediately preceding the enactment of an Act for abolition of zemindari, with the object of defeating the provisions of the Act.<sup>8b</sup> Such provision may be retrospectively inserted in a law of acquisition of estate.<sup>9</sup>

(iii) A provision for encouragement of self-cultivation of the land, after abolition of the intermediaries.<sup>8b</sup>

(iv) Development of vacant and waste land.<sup>10</sup>

'Estate'.—See under Cl. (2) (a), below.

**'Rights therein'.**

1. Cl. (1) (a) applies only if it is a right in an estate. It cannot therefore, include a *personal* right such as the right of pre-emption, arising out of a sale.<sup>11</sup>

2. On the other hand, the expression is wide enough to include the interests of a mortgagee<sup>12</sup> of a tenure, or of lessees and under-lessees of underground mineral rights in an estate,<sup>13</sup> or of holding a market or *mela* on one's land which is a transferable interest in land;<sup>14</sup> the right of an inamdar to appropriate the difference between the full assessment and the quit rent<sup>15</sup>

**'Extinguishment of such rights'.**

1. This expression means the extinguishment of the rights in an estate without involving the process of its 'acquisition' by the State,<sup>16</sup> but would not include mere taking over management of an estate.<sup>16a</sup>

2. Hence, it would save even legislation providing for the transfer of property from one person to another, provided it relates to a scheme of *agrarian reform*.<sup>17</sup> Thus,

A measure of agrarian reform which fixes the ceiling area for the holding of the landlord for his personal cultivation and transfers the excess to his tenants, would be protected by this clause.<sup>16, 18</sup>

3. On the other hand, in the absence of an 'agrarian reform', as

7. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

8. *Gajapati v. State of Orissa* (1954) S.C.R. 1; (1952-54) 2 C.C. 500 (507); *Kamakhya Narain v. Collector*, (1955) S.C.A. 494 (499).

9. *K. J. Coal Co. v. State of W. B.*, A. 1960 Cal. 646 (662).

10. *Ranjit Singh v. State of Punjab*, A. 1965 S.C. 632.

11. *Balabhan v. Bapwil*, (1958) 60 Bom.L.R. 12 (24); A. 1957 Bom. 233 F.B.

12. *Surpat v. State of N. B.*, (1959) 63 C.W.N. 571 (576).

13. *State of Bihar v. Umesh*, A. 1962 S.C. 50 (51).

14. *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649 (1654).

15. *Gangadhar v. State of Bombay*, A. 1961 S.C. 288.

16. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

16a. *Ramanlal v. State of Gujarat*, A. 1969 S.C. 168 (175).

17. *Kochumal v. State of Madras*, (II) A. 1960 S.C. 1080.

18. *Sonapur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137; (1962) 1 S.C.R. 724.

properly interpreted, Art. 31A (1) (a) will not enable the State to divest a proprietor of his estate and to vest it in another,<sup>17,18</sup> e.g., to provide for housing or slum clearance.<sup>19</sup>

4. 'Agrarian reform' has, however, been liberally interpreted since the *2nd Kochunni case*,<sup>17</sup> to include—

(i) Provisions for the development of rural economy,<sup>20</sup> including consolidation of holdings.<sup>20</sup>

(ii) Proper planning of rural and urban areas,<sup>19</sup> including slum clearance.<sup>19</sup>

(iii) Equitable distribution of lands between landlord and tenant, in order to prevent concentration of lands in the hands of a few landholders.<sup>15</sup>

(iv) Provisions ancillary to agrarian reform,<sup>20</sup> e.g., annulment of anticipatory transfers to defeat a law of agrarian reform.<sup>14</sup>

5. There is no 'extinguishment' of rights unless there is a complete termination of such rights. Mere suspension is not sufficient.<sup>20a</sup>

### 'Modification of any such rights'.

1. The word 'modification', in the context of Art. 31A, only means a substantive modification of the proprietary right of a citizen and has to be understood in juxtaposition with the word 'extinguishment'. It does not include a mere suspension of the right of management of a landlord who is disqualified to manage his own property,<sup>21</sup> as distinguished from a suspension of the right of ownership.<sup>22a</sup>

2. The following have been held to constitute a 'modification' within the meaning of this provision:

(i) A law which limits the maximum holding of a landlord.<sup>22</sup>

(ii) A law which limits the landlord's right to recover possession of the land held by a tenant, for his personal cultivation.<sup>25</sup>

(iii) A transfer of the landlord's title to the tenant, subject to a condition of defeasance.<sup>17</sup>

(iv) A law which modifies the rights of a landlord to settle his lands on any terms and to anyone he chooses.<sup>24</sup>

(v) A law which modifies a landlord's right to cultivate the surplus area of his estate.<sup>24</sup>

(vi) A law which modifies a landowner's right to transfer his lands.<sup>24</sup>

(vii) A law suspending the rights of the owner<sup>24</sup> for a limited period.

### 'Extinguishment or modification of rights in an estate'.

1. These words have been construed to refer to a law which seeks to bring about a change in the agricultural economy by affecting the system of land tenure, or the rights *inter se* between landlords and tenants.<sup>25</sup> The

19. *Vajravelu v Special Deputy Collector*, A. 1965 S.C. 1017.

20. *Ranjit Singh v. State of Punjab*, A. 1965 S.C. 632.

20a. *Ramanlal v. State of Gujarat*, A. 1969 S.C. 168 (175).

21. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049; A. 1953 S.C. 373.

21a. *Barrakar Coal Co. v. Union of India*, A. 1961 S.C. 954 (962).

22. *Bhagrat v. State of Punjab*, A. 1954 Punj. 167.

23. *Parashram v. State of Bombay*, A. 1957 Bom. 252.

24. *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

25. *Kochuni v. State of Madras (II)*, A. 1960 S.C. 1080 (1086-7).

Article would not, therefore, protect a law which has *no* reference to any agrarian reform,<sup>25</sup> e.g.,—

Divesting a proprietor of an estate and vesting it in the junior members of his family (not being tenants), without any object of agrarian reform,<sup>26</sup> and keeping the rights in the estate intact.<sup>25</sup>

2. On the other hand, the following are instances of measures for agrarian reform—

(i) A law which puts a ceiling on the holding of an intermediary,<sup>1</sup> or any other holder,<sup>2</sup> takes over the excess lands and settles them on actual cultivators,<sup>1</sup> even though for such settlement, the latter are required to reasonably contribute towards the compensation payable by the State to the intermediary for the acquisition of the excess land.<sup>3</sup>

(ii) A law which vests certain lands in a representative body, e.g., the Gram Panchayat, for the benefit of the rural community.<sup>2, 4</sup>

3. In order to determine whether the object of a law is agrarian reform, it is permissible to refer to other statutes which, together with the impugned statute, form a general scheme of reform.<sup>2</sup>

#### Sub-cl. (b): 'Taking over of management of any property'.

1. This sub-clause is intended to counteract the effects of the two *Sholapur cases*.<sup>5</sup>

2. It is to be noted that sub-clause (b) is not restricted to industrial undertakings only, but extends to any kind<sup>6a</sup> of property. Hence, the State can now take over the management of any property, movable or immovable, for a limited period, without being obliged to justify its action in a court of law, with reference to Arts. 14, 19 or 31.

3. Prior to the introduction of this clause it was held that the word 'modification' in cl. (a) meant the extinction of the proprietary right and that, accordingly, a mere suspension of the right of management of an estate for a definite time would not come under Art. 31A.<sup>5b</sup> The present clause covers such a case.

4. The conditions for the application of sub-cl. (b) are—

(a) The taking over must be for a limited<sup>6a</sup> and not an indefinite<sup>6c</sup> period of time. The management cannot be held to be for a limited period merely because there is a possibility of return of the land to the owner.<sup>5a</sup>

(b) It must be either in the public interest or in order to secure the proper management of the property, which must be objectively established.<sup>5a</sup> As instances of 'public interest' may be mentioned—prevention of infringement of the rights of tenants;<sup>6a</sup> full and efficient use of the land for agriculture;<sup>6d</sup> safeguarding of the interests of the holders of life insurance policies.<sup>6, 6</sup> There is no compliance with this condition where the taking over is made dependent upon the subjective satisfaction of an officer.<sup>5a</sup>

1. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459.

2. *Ranjit Singh v. State of Punjab*, A. 1965 S.C. 632; *Inder Singh v. State of Punjab*, A. 1967 S.C. 1776 (1778).

3. *Sonapur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137 (140).

4. *Tip Singh v. State of Punjab*, A. 1965 Punj 419 (F.B.).

5. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10: (1950) S.C.R. 869; A. 1951 S.C. 41; *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C. 674 (583).

5a. *Ramanlal v. State of Gujarat*, A. 1969 S.C. 168 (176).

5aa. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049; A. 1953 S.C. 373.

5b. As happened in *State of Rajasthan v. Manohar*, (1954) S.C.R. 996, or *Raghubir v. Court of Wards*, (1953) S.C.R. 1049, or *Ramanlal v. State of Gujarat*, (1968) S.C. [C.A. 1751/66].

5c. *Jayantilal v. State of Saurashtra*, A. 1952 Ssu. 59.

6. *Tropical Ina. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519).

5. As instances of taking over for proper management may be mentioned the management of the property of a 'ward' or disqualified proprietor.<sup>7</sup>

**Sub-cl. (c): Amalgamation of corporations.**

The object of this clause is to facilitate the elimination of unhealthy competition between rival concerns operating in the same field where the interests of the public call for such action, by precluding the objection that the amalgamation of existing companies constitutes an unreasonable restriction upon the rights of shareholders guaranteed by Art. 19 (1) (f).<sup>8</sup>

**Sub-cl. (d): Extinction or modification of rights of directors or share-holders etc.**

In *Chiranjit Lal's case*,<sup>9</sup> a question was raised whether the voting right of a shareholder in a company was a right of 'property' or a mere personal privilege flowing from his proprietary right. The amendment seeks to avoid any such question and provides that no question of infringement of Art. 19 (1) (f) or 31 will arise if the voting rights of share-holders are affected by *any law*. The rights of managing agents, secretaries and treasurers, managing directors, directors or managers are also similarly treated. In a sense, cl. (d) reinforces cl. (b); but it is of wider scope. Even where the State does not take over the management but makes some law which extinguish or modifies the rights of the persons referred to, such law will not be open to challenge on the grounds specified.

**Sub-cl. (e): Extinction or modification of rights under mining leases.**

1. In some cases, the reasonableness of the Mining Concession Rules, made under the Mines & Minerals (Regulation & Development) Act, 1948, which vested some amount of discretion in the Executive in the matter of granting and cancellation of licences, was challenged.<sup>10</sup> The insertion of the present sub clause precludes such attack on ground of contravention of Art. 19.

2. It also precludes any contention that compensation is payable under Art. 31 (2) on account of cancellation or modification of an existing lease licence. The scope of the amendment is even wider and includes not only licences but also agreements and leases. The Constitution Amendment Act thus empowers the State to affect even *contractual rights* relating to mineral development, without having to comply with Arts. 14, 19 or 31.

3. 'Extinction or modification' includes the *suspension* of the rights of the owner or lessee of a mine for a limited period, including the right of management.<sup>11</sup>

**'Winning any mineral'.**

'Winning', in the present context, does not mean merely getting or extracting the minerals from the mines but also other *incidental purposes*,<sup>12</sup> such as the working of the mines after the minerals have been extracted. Hence, the modification of a lease governing the working of a mine would come under this clause.<sup>12</sup>

7. *Kuldip v. State of Punjab*, A. 1954 Punj. 247

8. *Cf. Narayanprasad v. Indian Iron & Steel Co.*, A. 1953 Cal. 695.

9. *Cf. Mineral Development Ltd. v. Union of India*, A. 1954 Pat. 341.

10. *Gujarat Pottery Works v. Sood*, A. 1967 S.C. 964

11. *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (1962)

12. *Gujarat Pottery Works v. Sood*, A. 1967 S.C. 964 (1967-8).

**1st Proviso.**

1. The word 'law' in this Proviso means no more than a *Bill*.<sup>13</sup>

2. The Proviso keeps alive the alternative provisions in Art. 31 (3) for judging whether the State law has or has not complied with the requirements of Art. 31 (2). The provisions of Art. 31 (2), therefore, do not stand repealed by Art. 31A. The difference is that persons whose properties fall within the definition of the expression 'estate' in Art. 31A, are deprived of their remedy under Art. 32 and the President has been constituted the sole judge of deciding whether a State law acquiring 'estates' has or has not complied with the requirements of Art. 31 (2).<sup>14</sup>

3. The Proviso, however, does not require that a bill must receive the assent of the President once under Art. 31 (3) and again under the Proviso to Art. 31A (1).<sup>15</sup>

4. The Proviso applies not only to an original Bill coming under Art. 31A (1), but also a Bill to *amend* such Act.<sup>16</sup>

**2nd Proviso.**

1. The expression 'acquisition.....of an estate' in this Proviso has the same meaning as in cl. (1) (a).<sup>17</sup> Acquisition of the title is not necessary to attract this Proviso. The underlying idea of this Proviso is that a person who is cultivating land within the ceiling limit personally, which is the source of his livelihood, should not be deprived of that land under any law protected by Art. 31A unless compensation at the market rate is given;<sup>17</sup> and this condition must be complied with if the State has, *in substance*, acquired all the rights in the land for its own purposes, even if the title remains with the owner.<sup>17</sup> But the Proviso is not attracted unless the beneficiary of such acquisition is the State.<sup>17</sup>

2. Reservation of land for the income of the Panchayat which is 'State' within the meaning of Art. 12 is 'acquisition' by the State within the 2nd Proviso to Art. 31A (1);<sup>18</sup> but not reservation of land for common purposes such as paths, playgrounds etc., because the beneficiary, in this latter case, is not the State.<sup>17</sup>

**CL. (2) (a): 'Estate'.**

1. In order to find out whether a particular interest is an 'estate' within the meaning of this Article, we have to refer to the existing law relating to land tenure in force in the area to which the impugned law of acquisition relates.<sup>19</sup> In other words, Art. 31A (1) refers not only to an estate but also to its local equivalent.<sup>2</sup> Thus, the presence of a zemindar or other intermediary was *not* necessary to constitute an 'estate' in the ryotwari area.<sup>21</sup>

2. The basic concept of the word 'estate' in this clause is that the person holding the estate should be the proprietor of the soil and should be in direct relationship with the State, paying land revenue to it except where

13. *Ram Dubey v. Govt. of M. B.*, A. 1952 M.B. 57 (66).

14. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (310): (1952) S.C.R. 689.

15. *Sankarsana v. Orissa State*, A. 1957 Orissa 96 (98-9).

16. *Sankarshan v. State of Orissa*, A. 1967 S.C. 59 (62).

17. *Ajit Singh v. State of Punjab*, A. 1967 S.C. 856 (860-2).

18. *Bhagat Ram v. State of Punjab*, A. 1967 S.C. 927 (928).

19. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (468); *Mahadeo v. State of Bombay*, A. 1961 S.C. 1517.

20. *Sonapur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137 (139).

21. *Purushothaman v. State of Kerala*, A. 1962 S.C. 694 (704-5).

it is remitted in whole or in part,<sup>21, 22</sup> and hold it in accordance with a law relating to land tenure.

3. It is now settled<sup>23</sup> that the word 'estate' includes part of an estate. Hence, a law which modifies the rights of the landowners in certain portions of an estate (say, in some of the villages included in the estate), cannot be challenged on the ground that it is not covered by Art. 31A merely because it does not extend to the estate as a whole.<sup>24</sup>

4 The following interests in land have been held to be 'estates' within the meaning of Art. 31A:

- (a) The holdings of Mulgirassia, Bhyat and Talukdar in Saurashtra.<sup>25</sup>
- (b) Tikanas of Jaipur.<sup>1</sup>
- (c) Pre-settlement minor inams in the district of Ganjam.<sup>2</sup>
- (d) Bhomicharas of Rajasthan.<sup>30</sup> or Bhomias of Marwar.<sup>1</sup>
- (e) Vanta tenure in Bombay and Gujarat.<sup>5</sup>
- \* (f) Bhagdars, Narwadars and Khotes, landholders as well as occupants of unalienated lands, in Bombay.<sup>4</sup>
- (g) Jagirdars in Rajasthan.<sup>5</sup>
- (h) Inams in Bombay.<sup>3</sup>
- (i) Bhumiswami and Bhumidari interests in Madhya Pradesh.<sup>6</sup>
- (j) Holdings in Kerala.<sup>7</sup>
- (k) Villages Regunvare, Dholer Dnonoly under the Daman (Abolition of Proprietorship of Villages) Reg 1962.<sup>22</sup>
- (l) Pandaravaka Verumpattam lands in Cochin.<sup>22a</sup>

5 On the other hand the following have been held *not* to be 'estates'—

- (i) Lands held by ryotwari Pattadars in South Canara.<sup>8</sup>
- (ii) Villages Mondorta, Veracunda, Catra under the Daman (Abolition of Proprietorship of Villages) Reg 1962.<sup>22</sup>

**'Same meaning as in the existing law relating to land tenures'.**

Under the Bombay Land Revenue Code 1879, any interest in land, including that of occupants of unalienated lands is an 'estate'. As regards the area governed by the Code therefore, the word 'estate' in Art. 31A should receive the same interpretation.<sup>4</sup>

**Sub-cl. (i): 'Jagir or other similar grant.'**

1. The object of Art. 31A being to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil the words in the Article should be construed in that sense which would achieve that object in a full measure.<sup>1</sup>

2 Thus, the word 'jagir' should not be given the restricted meaning of a grant made for military service but should be construed in the popular sense so as to include all grants in respect of persons who were not cultivators which conferred on the grantees rights in respect of land revenue.<sup>1</sup>

22 *Gulabhai v. Union of India*, A 1967 S.C. 1110 (1115).

22a. *Purushothaman v. State of Kerala*, A 1962 S.C. 694.

23. *Atma Ram v. State of Punjab*, A 1959 S.C. 519 (527).

24 *Bhacirai v. State of Punjab*, A 1961 Puri 167 (171) F.B.

25 *Kalika v. Saurashtra State*, A 1952 Sau 111.

1 *Amar Singh v. State of Rajasthan* (1955) 2 S.C.R. 303 (352) A. 1955 S.C. 504.

2. *Sanbarsana v. State of Orissa* (1963) 2 S.C.R. 250 (251).

3. *Gangadharao v. State of Bombay*, A 1959 Bom 28.

4. *Sri Ram v. State of Bombay*, A 1959 S.C. 459 (468).

5. *Raghunir v. State of Ameer*, A 1959 S.C. 475 (480).

6. *Mahadeo v. State of Bombay*, A 1961 S.C. 1517.

7. *Nambudri v. State of Kerala*, A. 1962 S.C. 694.

8. *Karimbil v. State of Kerala*, (1962) 2 S.C.A. 1; A. 1962 S.C. 723.



3. The grant need not be express.<sup>9</sup>

4. 'Inam' includes any kind of inam, whether of whole village or of particular lands.<sup>1</sup>

5. Together with the words 'other similar grant,' the expression is wide enough to include—

(i) Maintenance grants in favour of members of the ruling family.<sup>9</sup>

(ii) The interest of an *istimrar* <sup>9</sup>

(iii) *Pargana Agori*.<sup>11</sup>

5. But it would not include any case where the element of concession from land revenue is absent, e.g.,—

Village Dholer Dhonoly or Varacunda under the Daman (abolition of Proprietorship of Villages) Reg. 1962.<sup>12</sup>

The reason is that the words 'other similar grant' are to be construed *eiusdem generis* <sup>10</sup>

### Sub-cl. (iii).

'Waste land,' 'forest land' etc would come within the definition of an estate as explained by this sub-clause only if they are being held or let for purposes *ancillary to agriculture* <sup>11</sup> It could not have been the intention of the Amendment to include all waste or forest lands in India within the concept of an estate for the purpose of carrying out agrarian reforms.<sup>11</sup>

### Cl. (2) (b). 'Rights in relation to an estate'.

This definition must receive a very liberal interpretation,<sup>13</sup> including a right to hold a *melu* on a land appertaining to an estate <sup>14</sup>

### "Other intermediary".

1. The words "*raiyat*" and "*under-raiyat*" were added in the definition of 'estate' by the Constitution (Fourth Amendment) Act, 1955. After this, a controversy arose whether the definition in clause 2 (b) included only the rights of intermediaries or *any* rights in an estate whether it is a right of a rent-receiver or of a person in actual possession of the land. The former view was held by the Allahabad High Court and the latter view was taken by the Calcutta<sup>15</sup> and Punjab<sup>16</sup> High Courts. The Calcutta view has since been confirmed by the Supreme Court in the *State of Bihar v. Rameshwar* <sup>17</sup>

*Raiyats* and *under-raiyats* are persons who hold land under the proprietor or a tenure holder for the purposes of cultivation, and are not intermediaries. The words "*raiyat*" and "*under-raiyat*" were introduced into the definition to specifically include these persons even though they were not intermediaries and the words "or other intermediary" occurring at the end do not qualify or colour the meaning to be attached to the words *raiyat* and *under-raiyat* which were specifically introduced into the definition.<sup>14</sup>

2. In the result, whenever any lands lie within an 'estate', the acquisition of such lands would be covered by Cl. (2) (b).<sup>18</sup>

9. *Amar Singh v. State of Rajasthan* (1955) 2 S.C.R. 303 (333).

10. *Mahant v. State of Orissa*, A. 1967 S.C. 59 (63).

11. *State of U.P. v. Anand* A. 1967 S.C. 661 (664).

12. *Gulabhai v. Union of India*, A. 1967 S.C. 1110 (1116-6).

13. *Sonapur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137 (140).

14. *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649 (1654).

15. *Suyendranath v. State of W. B.*, A. 1958 Cal. 96.

16. *State of Punjab v. Keshar*, A. 1959 Punj (17) (F.B.).

17. *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649.

**Effects of vesting of an estate in the State after acquisition.**

1. When an estate vests in the State as a result of compulsory acquisition under the power of 'eminent domain', the entire interest of the intermediaries in such estate vests in the State, free of all incumbrances. The State can, accordingly, ignore pre-acquisition contracts with the intermediaries which created a mere *personal* right in favour of a third party, e.g., a right to enter and catch fish<sup>17</sup> or a licence to do certain things upon the land.<sup>17a</sup>

2. If, in any case, any pre-acquisition contract be binding upon the State, the remedy of the person aggrieved is to bring a suit for enforcement of the contract and not a petition under Art. 32, for, no fundamental right is infringed by refusing to comply with a contractual obligation.<sup>18</sup>

3. Where the intermediary used to hold a market or a *mela* on his land, such right passes with the estate or tenure and the State is competent to let out the right to hold such market even though the erstwhile intermediary has become an occupancy *raiyat* under the State, after the acquisition.<sup>19</sup>

**(A) Acts held protected by Art. 31A—**

- Ajmer Abolition of Intermediaries & Land Reforms Act, 1955.<sup>17</sup>
- Assam Fixation of Ceiling on Land Holdings Act, 1957.<sup>17</sup>
- Assam State Acquisition of Zamindaries Act, 1951.<sup>19</sup>
- Bihar Land Reforms Act, 1950.<sup>20</sup>
- Bombay Provincial Inams Abolition Act, 1952.<sup>21</sup>
- Bombay Tenancy & Agricultural Lands (Amendment) Act, 1959.<sup>22</sup>
- East Punjab (Consolidation & Prevention of Fragmentation) Act, 1948.<sup>23</sup>
- Himachal Pradesh Abolition of Big Landed Estates & Land Reforms Act, 1954.<sup>24</sup>
- Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1951.<sup>25</sup>
- Mines & Minerals (Regulation & Development) Act, 1957.<sup>1</sup>
- Mysore Tenancy Act.<sup>2</sup>
- Pepsu Tenancy & Agricultural Land Act 1955,<sup>3</sup> as amended in 1962.<sup>4</sup>
- Punjab Consolidation of Land Act.<sup>4a</sup>
- Punjab Security of Land Tenure Act, 1953.<sup>5</sup>
- Rajasthan Land Reforms & Resumption of Jagirs Act, 1952.<sup>17a</sup>
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950,<sup>6</sup> as amended in 1963.<sup>7</sup>
- U. P. Thikadari Abolition Act, 1958.<sup>8</sup>
- Vindhya Pradesh Abolition of Jagirs & Land Reforms Act, 1922.<sup>9</sup>

17a. *Amar Singh v State of Rajasthan* (1955) 2 S.C.R. 303 (233): A. 1955 S.C.R. 504.

18. *Shantabai v State of Bombay*, A. 1958 S.C. 532.

19. *Bhairabendra v. State of Assam*, (1956) S.C.R. 303.

20. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889; *Kamakshya v. Collector*, (1955) 2 S.C.R. 968.

21. *Ganadharrao v. State of Bombay*, (1961) 1 S.C.R. 943; *Raneildas v Collector of Surat*, (1961) 1 S.C.R. 951.

22. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459.

23. *Ajit Singh v. State of Punjab*, A. 1967 S.C. 856 (866).

24. *Jadab v. H. P. Admn.*, A. 1960 S.C. 1008.

25. *Visheswar v. State of M. P.*, (1952) S.C.R. 1020.

1. *Bihar Mines Ltd. v. Union of India*, A. 1967 S.C. 887.

2. *Swamiji v State of Mysore*, A. 1966 S.C. 1172 (1176).

3. *Pritam Singh v. State of Punjab*, A. 1967 S.C. 930.

4. *Inder Singh v. State of Punjab*, A. 1967 S.C. 1776.

4a. *State of Punjab v. Kchar Singh*, (1967) S.C. [C.A. 116/65, d. 31 3-67].

5. *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

6. *Surya Pal v. State of U. P.*, (1952) S.C.R. 1056.

7. *State of U. P. v Anand*, A. 1967 S.C. 661.

8. *Chooramani v. State of U. P.*, A. 1969 All. 43.

9. *State of V. P. v. Moradkhwaj*, A. 1960 S.C. 796.

**(B) Acts held not protected by Art. 31A—**

Assam Acquisition of Land for Flood Control & Prevention of Erosion Act, 1955.<sup>10</sup>

Bombay Land Tenure Abolition Laws (Amendment) Act, 1958.<sup>17</sup>

Bombay Tenancy and Agricultural Lands Act, 1948.—The latter part of s. 65(1).<sup>18</sup>

Land Acquisition (Bombay Amendment) Act, 1948.<sup>11</sup>

Land Acquisition (Madras Amendment) Act, 1961.<sup>12</sup>

**31B.** *Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force*

**Validation of certain Acts and Regulations.** Amendment.—Art. 31B was added to the Constitution by s. 5 of the Constitution (First Amendment) Act, 1951.

**Effects of Amendment.**

The amendment is retrospective, and validates the Acts included in the 9th Schedule, *ab initio*, even though when enacted, the Act contravened the provisions of s. 299 of the Government of India Act, 1935.<sup>15</sup>

**Object of Art. 31B.**

1. Art. 31B has been inserted, by way of abundant caution, to save the particular Acts included in the 9th Schedule of the Constitution, notwithstanding any decision of a Court or tribunal that any of those Acts is void for contravention of any fundamental right. Nothing in Art. 31B shall be read as restricting the scope of Art. 31A.<sup>16</sup>

2. On the other hand, Art. 31B is not illustrative of the rule contained in Art. 31A, but stands independent<sup>21</sup> of it, and validates certain Acts specified in the Ninth Schedule, e.g., the Madhya Pradesh Abolition of Proprietary Rights Act (I of 1951), the validity of which has, accordingly, been upheld by the Supreme Court, though it was argued that the compensation provided was not real or adequate.<sup>18</sup>

**Scope of Art. 31B.**

1. Not only the Acts themselves but notifications subsequently issued in exercise of powers conferred by these Acts are also entitled to the protection of Art. 31B.<sup>19</sup>

2. Acts included in the Ninth Schedule should be interpreted by giving their words their ordinary meaning, uninfluenced by any preconceived notion.<sup>20</sup>

10. *Dy Commr. v. Durga Nath*, (1967) S.C. [C.A. 110/66].

11. *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096 (1101).

12. *Vajravelu v. Sp. Dy. Collector*, A. 1965 S.C. 1017 (1022); *Mudaliar v. Special Dy. Collector*, (1965) 1 S.C.R. 614.

13. *Ramanlal v. State of Gujarat*, A. 1969 S.C. 168 (176).

14. *Kochummi v. State of Madras*, (II), A. 1960 S.C. 1080.

15. *Dhirubha v. State of Bombay*, (1955) 1 S.C.R. 691 (195); A. 1955 S.C. 47; *State of U. P. v. Brijendra*, A. 1961 S.C. 14; (1961) 1 S.C.R. 362.

16. *State of Bihar v. Kameshwar*, (1962) S.C.R. 889.

17. *Jayvatsinghji v. State of Gujarat*, (1962) Supp. (2) S.C.R. 411.

18. *Visheswar v. State of M. P.*, (1952) S.C.R. 1020.

19. *Chimankut v. State of Bombay*, A. 1954 Bom. 397.

20. *Venkatagiri v. State of A. P.*, A. 1960 S.C. 32; (1960) 1 S.C.R. 552.

3. Art. 31B saves a law coming under it from inconsistency with *any* of the fundamental rights included in Part III, e.g., arts. 19 (1) (f)<sup>21</sup>; 31 (2),<sup>22-24</sup> or, if it is a pre-Constitution law, from invalidity for contravention of s. 299 (2) of the Govt. of India Act, 1935.<sup>25-2</sup>

### Power to amend the Acts specified in the Ninth Schedule.

1. The protection given by Art. 31B only applies to the Acts as they stood at the date when the Constitution (First Amendment) Act, 1951, which inserted Art. 31B, was enacted. If the Legislature subsequently seeks to amend any of these Acts, such amendment must be consistent with the fundamental rights conferred by Part III of the Constitution,<sup>23</sup> and other limitations imposed by the Constitution upon the legislative powers of that Legislature,<sup>4</sup> unless otherwise protected by Art. 31A.<sup>23</sup>

2. But, subject to such limitations, the Legislature in question does not lose its power to amend or repeal the Act merely because of its inclusion in the Ninth Schedule.<sup>3</sup>

### Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part.

**32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.**

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warrant* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

### Scope of Art. 32: Enforcement of Fundamental Rights by Supreme Court.

1. The sole object of Art. 32 is the enforcement of the fundamental rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Art. 32, where no 'fundamental' right has been infringed.<sup>4</sup>

Hence, an application under Art. 32 does not lie in the following cases—

(i) A person, who has entered into a voluntary settlement under the provision of a statute, cannot challenge the constitutionality of the statute under Art. 32 until the settlement is cancelled in appropriate proceedings.<sup>4</sup>

21. *State of W. B. v. Naba Kumar*, A. 1961 S.C. 16 (21).

22. *Sarwanlal v. State of Hyderabad*, A. 1960 S.C. 862 (866).

23. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470); *Ramandal v. State of Gujarat*, A. 1969 S.C. 168 (175).

24. *Ram Kissen v. Divl. Forest Officer*, A. 1965 S.C. 625 (628).

25. *Dhirubha v. State of Bombay*, A. 1955 S.C. 47; (1955) 1 S.C.R. 691.

1. *State of U. P. v. Brijendra*, A. 1951 S.C. 14; (1961) 1 S.C.R. 362.

2. *Jeejeebhoy v. Asstt. Collector*, A. 1966 S.C. 1096.

3. *Sajjan Singh v. State of Rajasthan*, A. 1965 S.C. 845 (859).

4. *Gopal Das v. Union of India*, A. 1955 S.C. 1; (1955) 1 S.C.R. 1; *Haji Esmail v. Competent Officer*, (1967) S.C. [W.P. 14/63, d. 8-3-67].

(ii) The Court will not, under Art. 32, interfere with an administrative order, however erroneous, where the constitutionality of the statute or the order made thereunder is *not* challenged on the ground of contravention of a fundamental right.<sup>5</sup>

(iii) A person cannot come to the Supreme Court under Art. 32, where the right infringed is a *personal right* of contract, not amounting to a right of property within the meaning of Art. 19 (1) (f)<sup>6</sup> or Art. 31 (1),<sup>7</sup> not amounting to an interference with the right to carry on a profession or business under Art. 19 (1) (g).<sup>8</sup>

(iv) As there is no fundamental right to enter into a business with the Government;<sup>9</sup> or to obtain recognition from the Government,<sup>8</sup> an application under Art. 32 would not lie for an alleged violation of such rights, under Art. 19 (1) (g).

(v) Where a person's licence to ply buses has been extinguished under a valid law, he cannot, in a petition under Art. 32, question the right of the State Transport Undertaking to ply buses without permits.<sup>9</sup>

(vi) Since Art. 21 itself is confined to deprivation of liberty by the State, no petition under Art. 32 lies where a person has been detained by a private individual,<sup>10</sup> or where the petitioner has been affected by his voluntary action without any compulsion by the State.<sup>4</sup>

2. For the same reason,—

(i) No question other than relating to a fundamental right will be determined in a proceeding under Art. 32.<sup>11</sup>

(ii) If the validity of other provisions of the statute is challenged on grounds *other than* the contravention of fundamental rights, the Court, would not entertain that challenge in a proceeding under Art. 32.<sup>12</sup>

3. Art. 32 is not directly concerned with the determination of the constitutional validity of a particular legislative enactment. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competency of the particular legislature as not being covered by any of the items in the legislative lists, but also that it affects or invades his fundamental rights guaranteed by the Constitution of which he could seek enforcement by an appropriate writ or order.<sup>13</sup>

In other words—

Even where the Supreme Court finds that a law must be held to be void, being in contravention of some provision of the Constitution, the Court cannot give relief under Art. 32 unless it is satisfied that the right the infringement of which is complained of by the petitioner is a fundamental right.<sup>14</sup>

### Applications under Arts. 32 and 226.

1. An application under Art. 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Art. 226.<sup>15</sup>

5. *Sadhu Singh v. Delhi Administration*, A. 1965 S.C. 91 (95).
6. *Rameshwar v. Commrs. Land Reforms*, A. 1959 S.C. 498, *Shantabai v. State of Bombay*, (1959) S.C.R. 265 (269).
7. *Achutan v. State of Kerala*, A. 1959 S.C. 490 (492).
8. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (239).
9. *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1183; *Sobhraj v. State of Rajasthan*, A. 1963 S.C. 640.
10. *Vidya Verma v. Shri Narain*, A. 1956 S.C. 108.
11. *Amarsinghi v. State of Rajasthan*, A. 1955 S.C. 504.
12. *Khyerbati Tea Co. v. State of Assam*, A. 1964 S.C. 925 (941).
13. *Chitranjit Lal v. Union of India*, (1950) S.C.R. 809; (1950-51) CC 10 (13): A. 1950 S.C. 163.
14. *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184. [See also *Cooverjee v. Excise Commr.*, (1964) S.C.R. 873].
15. *Ramesh Thapper v. State of Madras*, (1950-51) C.C. 40 (51): (1950) S.C.R. 894.

2. There has been some wavering on the question whether an application under Art. 32 lies to the Supreme Court after an application under Art. 226 on the same ground has been heard and rejected by the High Court.

A. In some early cases<sup>16-20</sup> the Court simply observed that it would not encourage, except for good reasons, the practice of "direct approach" to the Supreme Court in matters which have been taken to the High Court and found against, without obtaining leave to appeal therefrom. No question of *res judicata*, however, was raised in these cases.

B. But a unanimous Bench in *Daryao v. State of U.P.*<sup>1-7</sup> has held that the principle of *res judicata* being one of universal application and a final judgment being binding on the parties thereto, an applicant under Art. 226 cannot apply on the same grounds under Art. 32 without getting the adverse judgment under Art. 226 set aside on appeal. The Court has, however, made a distinction between cases where the application under Art. 226 has been dismissed on the merits and cases where they have been dismissed on some preliminary ground thus<sup>1-7</sup> —

(i) Where the application has been dismissed on merits an application under Art. 32 will not be maintainable on the same facts and on the same grounds and for obtaining similar writs or orders.<sup>8-20</sup>

This proposition has even been extended to a case where a speaking order on the merits is passed *ex parte*, i.e., without issuing notice to the respondent.<sup>10</sup>

(ii) Where the petition under Art. 226 is dismissed as withdrawn or it is dismissed on the ground that disputed facts cannot be decided in a writ proceeding and the petitioner must therefore bring a regular suit, and application under Art. 32 would not be heard.

(iii) If the petition under Art. 226 is dismissed *in limine*, without passing a speaking order, such dismissal cannot create a bar of *res judicata*.

(iv) If the petition under Art. 226 has been dismissed not on the merits but on the grounds of laches, acquiescence or on the ground that there was alternative remedy<sup>8</sup> available to the petitioner the dismissal would not operate as a bar to an application under Art. 32 though of course the Court in disposing of the application might consider whether those grounds would suffice to dismiss the application also.

(v) Nor can there be *res judicata* on a question which has been left open.<sup>11</sup>

(vi) Fortunately, the Supreme Court has made an exception in respect of petitions for *habeas corpus* and held that even where an application under Art. 226 has been dismissed by a High Court, it will not bar another application for the same writ under Art. 32, "either because it is not a judgment or because the principle or *res judicata* is not applicable to a fundamentally lawless order".<sup>11</sup>

3. While the Supreme Court is competent to give relief, under Art. 32, against any authority within the territory of India, the power of a High Court, under Art. 226 is confined to its territorial jurisdiction, so that even where fundamental rights have been infringed, a High Court cannot grant

16-25. *M. K. Gopalan v. State of M. P.*, (1955) 1 S.C.R. 168 (174).

1-7. *Daryao v. State of U. P.*, A. 1961 S.C. 1457.

8. *Joseph v. State of Kerala*, A. 1965 S.C. 1514 (1515).

9. *Virudhunagar S. R. Mills v. Govt. of Madras*, A. 1968 S.C. 1196 (1198).

10. *Mohan Lal v. C. T. O.*, (1968) S.C. [W.P. 158/67, 12-2-68].

11. *Ghulam Sarwar v. Union of India*, A. 1967 S.C. 1335 (1337).

relief against an authority located outside its territorial jurisdiction, save where the new cl. (1A) of that Article is applicable.<sup>12</sup>

4. Since Art. 21 itself is confined to deprivation of liberty by the State, no petition under Art. 32 lies where a person has been detained by a private individual,<sup>13</sup> or where the petitioner has been affected by his voluntary action without any compulsion by the State.<sup>14</sup>

### CL. (1): Effects of the Guarantee.

1. Cl. (1) *guarantes* the right to move the Supreme Court for such writs for the purpose of enforcing the Fundamental Rights included in Part III. In other words, the right to move the Supreme Court where a fundamental right has been infringed is itself a fundamental right.<sup>15</sup> The effects of such guarantee are that—

(a) The power of Court to issue the writs cannot be suspended except as provided by Art. 359 read with cl. (4) of the present Article; and the power of the Supreme Court to issue these writs cannot be taken away by any legislation,<sup>16</sup> or by anything short of amendment of the Constitution.

(b) Any law which renders nugatory or illusory the exercise of the Supreme Court's powers under Art. 32, is void,<sup>16</sup> except where the Constitution itself shields a law from challenge on the ground of contravention of fundamental right, e.g., art. 31 (5), saving pre Constitution laws etc.<sup>17</sup>

(c) Since the right to move the Supreme Court, in case of violation of a fundamental right, is itself a fundamental right,—the Supreme Court is constituted the protector and guarantor of fundamental rights, and it is the *duty* of the Supreme Court to grant relief under Art. 32, where the existence of a fundamental right and its breach, actual or threatened,<sup>18</sup> is *prima facie* established<sup>17</sup> however laudable the object of the respondent might be.<sup>19</sup> Hence, consistently with this responsibility, the Supreme Court cannot refuse an application under Art. 32, *merely* on the following grounds—

(i) That such application has been made to the Supreme Court in the first instance, without resort to a High Court under Art. 226.<sup>20</sup>

(ii) That there is some adequate alternative remedy available to the petitioner.<sup>21</sup>

(iii) That the application involves an inquiry into disputed questions of fact or the taking of evidence.<sup>17</sup>

(iv) That declaratory relief, such as a declaration as to the unconstitutionality of an impugned statute, together with consequential reliefs, has been prayed for.<sup>15</sup>

(v) That the proper writ or direction has not been prayed for in the application.<sup>15</sup>

(vi) That the common law writ has to be modified in order to give proper relief to the applicant.<sup>15, 22</sup>

12. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144; *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738, *Musaliar v. Potti*, (1955) 2 S.C.R. 1196.

13. *Vidya Verma v. Shiv Narain*, A. 1956 S.C. 108.

14. *Gopal Das v. Union of India*, (1955) 1 S.C.R. 773.

15. *Kochummi v. State of Madras*, A. 1959 S.C. 725 (729).

16. *Gopalan v. State of Madras*, (1950) S.C.R. 88.

17. *Semawanti v. State of Punjab*, A. 1964 S.C. 151 (165).

18. *Tata Iron & Steel Co. v. Sarkar*, A. 1961 S.C. 66 (68).

19. *Bishan Das v. State of Punjab*, A. 1961 S.C. 1570 (1575).

20. *Romesh Thapper v. State of Madras*, (1950) S.C.R. 594.

21. *Uthamathal v. State of M. P.*, (1954) S.C.R. 1122.

22. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

2. It follows from the above that even the Supreme Court, acting administratively, cannot fetter the fundamental right under Art. 32, by imposing an unreasonable condition, such as the furnishing of security for the presentation of a petition under Art. 32 and, any such Rule made by the Court under Rules made in exercise of power under Art. 145 of the Constitution would be void.<sup>23</sup>

But a similar rule made with respect to an application for a review of order made in a Petition under Art. 32 cannot be challenged on the same ground inasmuch as there is an essential distinction between an application for the enforcement of a fundamental right and an application for review of an order made therein.<sup>24</sup>

3. Even though it has been established that it is the duty of the Supreme Court to enforce a fundamental right and to strike down a law which violates a fundamental right, in *Golak Nath's case*,<sup>25</sup> the Supreme Court has evolved the much debated doctrine of 'prospective overruling', according to which even where the Supreme Court holds an existing law to be unconstitutional, it may refuse to strike it down, leaving its determination to operate against future legislation of the same kind.

### Amplitude of Supreme Court's Jurisdiction under Art. 32.

1. The powers given to the Supreme Court under Art. 32, for the enforcement of Fundamental Rights, are not confined to issuing prerogative writs only, and are not necessarily circumscribed by the conditions which limit the exercise of the prerogative writs.<sup>1</sup>

2. The language used in articles 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of the High Courts in India extend to issuing orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of the Constitution, there is no need to look back to the procedural technicalities of these writs in English law. The Court can make an order in the nature of these prerogative writs in all appropriate cases and in an appropriate manner, so long as the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law are observed.<sup>2</sup>

5. An application under Art. 32 cannot be thrown out simply because the proper direction or writ has not been prayed for. Thus, where an order in the nature of mandamus is sought in a particular form, nothing debars the Court from granting it in a different form. Art. 32 gives the Court a very wide discretion in the matter of framing the writs to suit the exigencies of particular cases.<sup>3</sup>

6. Under Art. 32, the Supreme Court may set aside Rules made by the Court itself, in its administrative capacity.<sup>4</sup>

7. But, under Art. 32, the Supreme Court will not—

(i) give a declaration which will not serve any useful purpose to the Petitioner;<sup>5</sup>

23. *Prem Chand v. Excise Commr.*, (1963) 1 Supp. 855 (902): A. 1963 S.C. 996 (1004).

24. *Lala Ram v. Supreme Court of India*, A. 1968 S.C. 847 (848).

25. *Golak Nath v. State of Punjab*, A. 1967 S.C. 1643 (1667-9).

1. *Rashid Ahmad v. Municipal Board*, (1950) S.C.R. 566: A. 1950 S.C. 163.

2. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250 (1952-4) 2 C.C. 475 (477).

3. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (35): (1950) S.C.R. 869.

4. *Prem Chand v. Excise Commr.*, A. 1963 S.C. 996.



(ii) issue *certiorari* against a High Court;<sup>5</sup> the remedy of a person affected by the order of a High Court is to appeal under Art. 136.<sup>6</sup>

### Who may apply under Art. 32.

(i) Any person who complains of the infraction of any of the Fundamental Rights guaranteed by the Constitution is at liberty to move the Supreme Court, including corporate bodies, except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons.<sup>7</sup> Conversely, one cannot apply under Art. 32 in respect of a fundamental right which he does not possess.<sup>8</sup>

(ii) A company and its shareholders are separate legal entities. Hence, when some fundamental right of a company is infringed, it is the company and not any of its shareholders that must come forward to vindicate its rights.<sup>9</sup>

(iii) The rights that could be enforced under Art. 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief, and the proper subjects for investigation by the Court would be what rights, if any, of the petitioner have been violated by the impugned legislation. An exception to the above general proposition is admitted in the case of *habeas corpus*, not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating the person who has been illegally imprisoned.<sup>10</sup>

(iv) There are certain fundamental rights which are conferred on citizens alone e.g., the rights under Art. 19.<sup>11</sup> A non-citizen cannot, therefore, apply for the enforcement of any such right.<sup>12</sup>

(v) No fundamental right is infringed if Government refuses to grant a lease, as owner of a land, in favour of the Petitioner.<sup>13</sup>

(vi) No question of title to a property will be decided under—Art. 32.<sup>14</sup>

(vii) A person who seeks to enforce a fundamental right under Art. 19 (1) (f) will not be entitled to maintain a Petition under Art. 32 if he had lost his right to the property<sup>15</sup> or business<sup>16</sup> by an order or decision under the general law which had become final before the institution of the petition, but not where there has been no decision at all on the question of title.<sup>17</sup>

(viii) Under Art. 32, the Court cannot exercise appellate powers to interfere with an *intra vires* order of an inferior tribunal, where there is no question of unconstitutionality, merely on the ground that the decision is vitiated by an error of law which is not apparent on the record.<sup>18</sup>

(On the other hand, -

(i) The right to apply under Art. 32 arises not only where a funda-

5. *Katafis v. Union of India*, (1968) S.C. [W.P. 54/68, d. 28-10-68].

6. *Natesh v. State of Maharashtra*, A. 1967 S.C. 1.

7. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

8. *Rameshwar v. Commsr.*, A. 1969 S.C. 498.

9. *Cf. Sharma v. Srikrishna*, A. 1959 S.C. 395 (402).

10. *Pyarelal v. Union of India*, A. 1966 S.C. 175.

11. *State of M. P. v. Tej Raj*, (1964) S.C. [C.A. 573/63, d. 14-2-64].

12. *Esmail v. Competent Officer*, A. 1967 S.C. 1244 (1249).

13. *Sobhai v. State of Rajasthan*, A. 1963 S.C. 640.

14. *Kalyan Singh v. State of M. P.*, A. 1962 S.C. 1183.

15. *Joseph v. State of Kerala*, (1965) S.C. [W.P. 95/64, d. 3-2-65].

16. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621.

mental right has been actually infringed, but also where a serious threat to infringe it has been offered by the State, e.g., a threat to use the coercive machinery of the State to realise an *ultra vires* or unconstitutional impost, affecting one's freedom of business under Art. 19 (1) (g).<sup>17</sup>

There may be cases when the very coming into operation of an enactment infringes a fundamental right of a citizen so that he may apply under Art. 32 without waiting for any overt act to be done by the State under the enactment in question. Thus, in *Kochunni v. State of Madras*<sup>18</sup> the Supreme Court entertained an application under Art. 32 as soon as a State Act which would have the effect of depriving the petitioner of his estate was brought into force even though the State had not yet issued notifications under the Act which were required to vest same in the State.

(ii) A person who has a right of property, even though the nature of that right might be disputed, is entitled to challenge the constitutionality of a statute affecting that right of property.<sup>19</sup>

(iii) An order which is a nullity will be set aside under Art. 32.<sup>20</sup>

The last word on this topic does not appear to have been said as yet. The following propositions emerge from the decisions of the Supreme Court so far:

1. The High Court is not subject to the *certiorari* jurisdiction of the Supreme Court<sup>21</sup>. Hence, no decision of the High Court can be challenged in an application under Art. 32.<sup>21</sup>

2. Inferior civil courts of competent jurisdiction have been equated with the High Court for the purposes of the *certiorari* jurisdiction under Art. 32.<sup>22</sup>

The decision of these Courts can, therefore, be challenged only on appeal, even if they may affect fundamental rights<sup>21</sup> of a party thereto or a third party.<sup>21</sup>

3. The order of an inferior quasi-judicial authority cannot be quashed under Art. 32 where the order is within its jurisdiction though erroneous,<sup>23-25</sup> but it may be quashed—

(i) where the order is without jurisdiction;<sup>23</sup>

(ii) where the action taken is procedurally *ultra vires*, e.g., in violation of the principles of natural justice;<sup>22</sup>

(iii) where the action is taken under a statute which is *ultra vires* the Constitution;<sup>23</sup> or

(iv) where the authority has given itself jurisdiction by trying a collateral fact wrongly;<sup>26</sup>

provided, of course, such order affects a fundamental right.

17. *Tata Iron & Steel Co. v. Sankar*, A. 1961 S.C. 65 (68); *State of Bombay v. United Motors* (1953) S.C.R. 1069; *Himmatlal v. State of M. P.* (1954) S.C.R. 1122; *Roop Chand v. State of Punjab* A. 1963 S.C. 1503.

18. *Kochunni v. State of Madras*, A. 1959 S.C. 725 (731, 733).

19. *Mahendra v. State of U. P.*, A. 1963 S.C. 1019.

20. *Roop Chand v. State of Punjab*, A. 1963 S.C. 1503.

21. *Narash v. State of Maharashtra*, A. 1967 S.C. 1 (11-12; 15; 17).

22. *Majority view in Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621; *Sahibzada v. State of M. B.*, (1960) S.C.R. 138.

23. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621.

24. *Kunhamina v. Min. of Rehabilitation*, A. 1962 S.C. 1616; (1962) 1 S.C.R. 505; *Venkatanarayana v. Collector of Central Excise*, (1962) S.C. [W.P. 118/58, d. 17-12-62].

25. *Parbhani Transport Society v. R. T. A.*, A. 1960 S.C. 801 (806); *Bhatnagar v. Union of India*, (1957) S.C.R. 701; *Sadhu Ram v. Custodian-General*, (1955) 2 S.C.R. 1113; *B. I. Corpn. v. Collector of Central Excise*, A. 1963 S.C. 104; *Pioneer Traders v. Chief Controller*, A. 1963 S.C. 734.

### Application under Art. 32 against an order of taxation.

1. Though the right not to be taxed except by authority of law is embodied in Art. 265, which is not a fundamental right,<sup>1</sup> an application under Art. 32 will lie if that tax relates to a person's right to carry on a business or profession and thus constitutes an infringement of his fundamental right guaranteed by Arts. 14;<sup>2</sup> 15;<sup>3</sup> 19 (1) (f);<sup>4</sup> 19 (1) (g).<sup>5</sup>

2. Where the impugned order is a quasi-judicial order which violates the fundamental right, application under Art. 32 will lie if such order is—

(i) made under an *ultra vires* statute<sup>6</sup>;

or (ii) without jurisdiction,<sup>7</sup> though the statute may be *intra vires*;

or (iii) made under a procedure which is *ultra vires*<sup>8</sup>;

(iv) violative of a principle of natural justice, which is also regarded as an instance of order without jurisdiction.<sup>9</sup>

3. But an application under Art. 32 will *not* lie where the order of the taxing<sup>10</sup> or other<sup>11</sup> quasi-judicial authority, which has violated a fundamental right, is *intra vires*, though based on a *misconstruction* of the law<sup>11</sup> or an error of fact.<sup>11-12</sup>

4. Except where the impugned State Act constitutes an infringement of a fundamental right included in Part III, an application under Art. 32 shall not lie for a violation, *simpliciter*, of Art. 265<sup>13</sup> or Art. 301.<sup>14</sup>

### Art. 32 and Privileges of the Legislature.

Though the situation on this topic is in a state of turmoil, so long as the opinion of the majority of the Supreme Court in the Special Reference Case<sup>14</sup> is not superseded by an amendment of the Constitution, the following propositions may be asserted:

I Since, under Art. 208 (1) of the Constitution, the rules made by the Legislature are subject to the provisions of the Constitution, the privileges of a Legislature in India cannot be asserted in contravention of the fundamental rights guaranteed by Arts. 20 and 21.<sup>15-16</sup>

II It follows that, whatever be the position in England, when a person is committed for contempt of a Legislature in India, such person is entitled to approach the High Court under Art. 226<sup>17</sup> and the Supreme Court under Art. 32<sup>18</sup> with the complaint that he has been deprived of his

1. *Ranjilal v Income Tax Officer*, A. 1951 S.C. 97, (1950-51) S.C. 242
2. *Meenakshi Mills v. Viswanatha*, (1955) 1 S.C.R. 787
3. *Chhotabhai v. Union of India*, A. 1962 S.C. 1006 (1021).
4. *Kunnathath v. State of Kerala*, A. 1961 S.C. 552.
5. *Kailash Nath v State of U P*, A. 1957 S.C. 790; *Balaji v. I T. O.*, A. 1962 S.C. 123.
6. *Himmattal v State of M. P.*, (1954) S.C.R. 1122
7. *Tata Iron & Steel v Sarkar*, (1961) 1 S.C.R. 379; *Gokal v Asstt Collector*, (1960) 2 S.C.R. 852; *Mohanlal v State of M. P.*, (1955) 2 S.C.R. 509; *Madanlal v. E. & T. O.*, A. 1961 S.C. 1565
8. *Narendra v. Union of India*, A. 1960 S.C. 430 (438)
9. *Sinha Govindji v. Dy. Collector*, (1962) 1 S.C.R. 540
10. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621.
11. *Galabdas v. Asstt. Collector*, A. 1957 S.C. 733; *Bhatnagars v. Union of India*, (1957) S.C.R. 701; *Kunhamina v. Ministry of Rehabilitation*, 1962 S.C. 1616.
12. *Ranjilal v. Income-Tax Officer*, A. 1951 S.C. 97: (1950-51 C.C. 242).
13. *Ramchandra v. State*, (1956) S.C.R. 28 (42)
14. *Ref. under Art. 143 of the Constitution*, A. 1965 S.C. 745 (784).
15. *Ibid.*, p. 786.
16. *Sharma v. Krishna Sinha*, A. 1960 S.C. 395 Supp. (1) S.C.R. 806.
17. *Ibid.*, p. 787.
18. *Ibid.*, p. 787.

liberty in contravention of Art. 21<sup>14</sup>. The English principle that a general warrant issued by the Parliament is not questionable by a court of law is not applicable in India, in view of these provisions of *our* Constitution.<sup>15</sup> Otherwise the constitutional powers of these superior Courts would be rendered nugatory.<sup>16</sup>

### **Delay and acquiescence, how far grounds for refusing relief under Art. 32.**

1. Though delay, acquiescence and the like do not take away the jurisdiction of the Supreme Court under Art. 32, the Court may refuse to grant relief in the exercise of its jurisdiction where delay affects the merits of the Petitioner's claim.<sup>17</sup>

2. Where the relief claimed in a petition relates to a claim of money which would be barred by limitation if a suit had been brought for the purpose, the Supreme Court may refuse to grant the relief.<sup>18</sup>

3. Where the Petitioner submitted to the jurisdiction of the inferior tribunal, he is not entitled to invoke the jurisdiction of the Supreme Court under Art. 32.<sup>19</sup>

4. The Court cannot, under Art. 32, give relief to a person who has given up his right by a voluntary settlement.<sup>21</sup>

On the other hand—

Where an order under a statute violates a person's fundamental right he cannot be said to have lost his right to challenge the constitutionality of the statute merely on the ground that he had applied for an order in his favour under that statute.<sup>22</sup>

### **How far existence of alternative remedy bars applications under Art. 32.**

1. Though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writs, this is not an absolute ground for refusing a writ under Art. 32 of the Constitution, because the powers given to the Supreme Court under Art. 32, are much wider and are not confined to the issue of prerogative writs only.<sup>23</sup> The existence of an alternative remedy is no bar to the issue of a writ where a fundamental right has been infringed.<sup>24</sup>

2. There is no question of an alternative relief where the inferior tribunal was not competent to decide the issue, e.g., the issue as to constitutionality or infringement of a fundamental right.<sup>25</sup>

### **Whether determination of facts possible in a proceeding under Art. 32.**

1. Since the right to approach the Supreme Court is itself guaranteed under Art. 32, once the petitioner has, *prima facie*, established by his affidavit the breach of a fundamental right, the Court is bound to hear the application on the merits. The Court would not be justified to reject a petition under Art. 32 on the simple ground that it involved a determination of disputed questions of fact.<sup>1</sup>

19. *Tilokchand v. Munshi*, (1968) S.C. [W.P. 53/68, 22-11-68].

20. *Panna'ul v. Union of India*, (1967) S.C.R. 233.

21. *Suraj Mall v. Viswanatha*, A. 1953 S.C. 545; *Gopal Das v. Union of India*, (1955) 1 S.C.R. 773 (774).

22. *Rama Rao v. State of A. P.*, A. 1961 S.C. 564 (572).

23. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566; A. 1950 S.C. 163.

24. *Himatlal v. State of M. P.*, (1954) S.C.R. 1122; A. 1964 S.C. 408; *Kharak Singh v. State of M. P.*, A. 1963 S.C. 1295; (1964) 1 S.C.R. 332.

25. *New Munk Mills v. Ahmedabad Municipality*, A. 1967 S.C. 1801 (1810).

1. *Kochummi v. State of Madras*, A. 1959 S.C. 725 (734); [The contrary view in *Gulabdas v. Asst. Collector*, A. 1957 S.C. 733, is not sound].

2. But the Court cannot enter into the truth or adequacy of the grounds upon which a statutory authority, such as an authority under the Preventive Detention Act or the Defence of India Rules, issued the impugned order, because under Art. 32 the Supreme Court does not sit in appeal.<sup>2</sup>

### Whether evidence can be taken in a proceeding under Art. 32.

1. Prior to the Supreme Court decision in *Kochunni v. State of Madras*,<sup>3</sup> the generally accepted view was that in a writ proceeding,—

A disputed question of fact could not be determined by taking evidence as in a suit.

(i) In a number of cases it was held by the High Courts as well as by the Supreme Court<sup>4</sup> that an application under Art. 226 is to be determined on admitted facts or on facts established by affidavits and that the Courts cannot take evidence to determine the disputed questions of fact.

(ii) Even as regards an application under Art. 32, the Supreme Court held that it is only on facts admitted or taken as proved that the question of violation of a fundamental right can be decided by the Supreme Court under Art. 32. When facts are in dispute, the matter is to be inquired into and decided by proper legal proceedings.<sup>5</sup>

II. (a) But in *Kochunni's case*,<sup>3</sup> the Supreme Court has laid down that in a proceeding under Art. 32, the Supreme Court is not debarred from taking evidence of witnesses by issuing commission or examining witnesses in Court, where necessary, because fundamental rights are affected.

(b) Instead of itself taking evidence, the Supreme Court may also ask for a report on facts from the High Court.<sup>6</sup>

### Whether declaratory relief may be given under Art. 32.

1. It has already been stated (p. 223, *ante*) that the jurisdiction under Art. 32 is not confined to the issue of 'prerogative writs' and that the Supreme Court has a wide discretion in the matter of framing the writs to suit the exigencies of particular cases.<sup>7</sup>

2. The Supreme Court had early held that a declaration that an impugned Act is invalid and a consequential relief by way of injunction were inappropriate to an application under Art. 32, and in *Umegh Singh v. State of Bombay*,<sup>8</sup> the Court relegated the petitioner to filing a regular suit.

3. But a declaration that the impugned Act was void was made in other cases<sup>9</sup> and in *Kochunni v. State of Madras*,<sup>3</sup> the Supreme Court has, on a review of the previous authorities, laid down that the Court's powers under Art. 32 are wide enough to make even a declaratory order (with consequential relief by way of injunction), where that is the proper relief to be given to the aggrieved party. Such declaration has also been made in later decisions.<sup>10</sup>

2. *Lakshampal v. Union of India*, A. 1967 S.C. 908 (915).

3. *Kochunni v. State of Madras*, A. 1969 S.C. 725 (734).

4. *Sohan Lal v. Union of India*, A. 1967 S.C. 529; *Union of India v. Varma*, A. 1967 S.C. 862 (884).

5. *Kathi Raning v. State of Saurashtra*, A. 1962 S.C. 123; *Ramakrishna v. Tendolkar*, A. 1968 S.C. 538; *Kailash v. State of U. P.*, A. 1967 S.C. 790 (792); *Gulabdas v. Asstt. Collector*, 1957 S.C. 733 (737).

6. *Cf. Triloknath v. State of J. & K.*, A. 1967 S.C. 1283.

7. *Chironjit Lal v. Union of India*, (1950) S.C.R. 869.

8. *Umegh Singh v. State Bombay*, (1955) 2 S.C.R. 164; A. 1955 S.C. 540.

9. *Ebrahim v. State of Bombay*, A. 1954 S.C. 229; (1954) S.C.R. 983 (1941); *Express Newspaper v. Union of India*, A. 1968 S.C. 878 (643).

10. *Cf. Hamdard Dawakhana v. Union of India*, (1980) 2 S.C.R. 810.

**Res Judicata.**

1. The principle of *res judicata* has been applied to judgments pronounced on petitions under Art. 32,<sup>11-12</sup> so that, in the absence of new circumstances arising since the dismissal of petition under Art. 32, the same matter cannot be reargued by a fresh petition.<sup>13</sup>

2. Where a Petition under Art. 32 has been dismissed on the merits by a speaking order, it would constitute *res judicata* even though the order was made *ex parte*, i.e., without issuing notice to the other side.<sup>14</sup>

3. But the doctrine of constructive *res judicata* would not generally be applied to writ petitions under Art. 32 or 226.<sup>15</sup>

4. The decision in a proceeding for tax relating to a previous period would not, accordingly, operate as *res judicata* in a proceeding for a subsequent period except where a basic and general issue, e.g., as to the validity of the taxing statute, has been decided in the previous proceeding.<sup>12</sup>

**Whether decision under Art. 226 bars petition under Art. 32—**

See p. 221, *ante*

**Practice and Procedure.**

1. It would not be right to permit the Petitioner to raise questions which depend on facts which were not mentioned in his petition but were put forward in a rejoinder to which the respondents had no opportunity to reply.<sup>16</sup>

2. A *rule nisi* may be revoked and the petition dismissed with costs, in case of a clear misrepresentation in the petition.<sup>16</sup>

**Nature of Order.**

Though ordinarily an application should be dismissed where the applicant fails to establish his case, the Court may, in its discretion, simply reject an application, where he is not ready with evidence, with the observation that he may bring a fresh application with adequate particulars supported by evidence.<sup>17-21</sup>

**33. Parliament may by law determine to what extent any of the**

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and

the maintenance of discipline among them.

**'Parliament may by law'.**

The power to restrict, under the present article, can be exercised only by a law made by Parliament. The President, exercising his powers of the State Legislature, by virtue of a delegation by Parliament under Art. 356, is not competent to make a law as contemplated by Art. 33.<sup>1</sup> On the

11. *Sharma v. Sree Krishna (II)*, 1961 1 S.C.R. 96; *Jagannath v. State of U. P.*, A. 1962 S.C. 1963 (1566)

12. *Amalgamated Coalfields v. Jangpada Sabha*, A. 1964 S.C. 1013.

13. *Lakshmpal v. Union of India*, A. 1967 S.C. 908 (910)

14. *Virudhnagar Mills v. Govt. of Madras*, A. 1968 S.C. 1196 (1198).

15. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407); (1959) Supp. (1) S.C.R. 806.

16. *Indian Sugar v. Union of India*, (1968) S.C. [P. 183/66, d. 12-3-68].

17-25. *Sahas Karam v. State of Rajasthan*, (1960) S.C. [Petr. 137-58].

1. *Dalbir Singh v. State of Punjab*, A. 1962 S.C. 1106 (1108).

other hand, the validity of a law made under the present article, such as the Army Act, cannot be challenged on the ground of contravention of Fundamental Rights.<sup>2</sup>

**34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.**

Restriction on rights conferred by this Part while martial law is in force in any area

**35. Notwithstanding anything in this Constitution,—**

Legislation to give effect to the provisions of this Part. (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

*Explanation*—In this article, the expression “law in force” has the same meaning as in article 372.

## PART IV.

### DIRECTIVE PRINCIPLES OF STATE POLICY

Definition.

**36. In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.**

**37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.**

Application of the principles contained in this Part.

2. *Rajnarain v. Union of India*, A. 1966 S.C. 247.

### Utility of the Directive Principles.

The Articles included in Part IV of the Constitution (Arts. 36-51) contain certain Directives which it shall be the duty of the States to follow both in the matter of administration as well as in the making of laws. They embody the aims and objects of the State under the republican Constitution,<sup>1</sup> e.g., that it is a 'Welfare State' and not a mere 'Police State'. The Directives, however, differ from the Fundamental Rights contained in Part III of the Constitution or the ordinary laws of the land, in the following respects:

(i) The Directives are not enforceable in the Courts and do not create any justiciable rights in favour of individuals.<sup>2</sup>

(ii) The Directives require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.<sup>3</sup>

(iii) The Directives, *per se*, do not confer upon or take away<sup>4</sup> any legislative power from the appropriate Legislature. Legislative competence must be sought from the Legislative Lists contained in the 7th Schedule of the Constitution.

(iv) The Courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.<sup>5</sup>

(v) The Courts are not competent to compel the Government to carry out any Directive, e.g., to provide for free compulsory education within the time limited by Art. 45.<sup>6</sup>

On the other hand—

Though the Courts cannot declare any law to be void on the ground of contravention of any of the Directives, the Courts have already taken cognisance of the tendency of the Directives for the purpose of upholding social legislation. Thus, it has been held that—

(a) Restrictions, which are imposed on the exercise of Fundamental Rights for the purpose of securing the objectives enjoined by any of the Directives, would be regarded as 'reasonable' restrictions within the meaning of cls (2) to (6) of Art. 19.<sup>7,8</sup>

(b) Acquisition of land for the purpose of achieving the objects of the Directives contained in Art. 39 (b) (c) should be held to be for a 'public purpose' within the meaning of Art. 31 (2).<sup>9</sup>

(c) A favourable classification of an object, the promotion of which is encouraged by the Directive Principles, should be regarded as a reasonable classification.<sup>10</sup>

### Conflict between Directive Principles and Fundamental Rights.

In case of any conflict between the Fundamental Rights and the Directives, the Fundamental Rights shall prevail.

1. *Lokenath v. State of Orissa*, A. 1952 Orissa 42 (47).
2. *Sikshak Santh v. State of Rajasthan*, (1961) S.C. [WP 34/59, d. 11-4-61].
- 3-4. *Mangru v. Commissioners of Budget Budget*, (1951) 87 C.L.J. 369.
5. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (664); *Fram Narananji v. State of Bombay*, A. 1951 Bom. 210.
6. Reference on the Kerala Education Bill, 1957, A. 1958 S.C. 956.
7. *State of Bombay v. Balsara*, (1951) S.C.R. 682; (1950-51) C.C. 307 (316).
8. *Bijay Cotton Mills v. State of Ajmer*, (1955) 1 S.C.R. 752; *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731; (1959) S.C.R. 629.
9. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (Mahajan & Aiyar II).
10. *Orient Weaving Mills v. Union of India*, A. 1963 S.C. 99.



Though it is the duty of the State to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the State.<sup>11</sup> Thus, Art. 13 (2) prohibits the State from making any law which takes away or abridges the fundamental rights conferred by Part III. The Directive Principles cannot override this categorical limitation upon the legislative power of the State.<sup>12</sup> Further, the Directive principles, which are not enforceable by a court of law, cannot override the fundamental rights which are expressly made enforceable by appropriate writs or orders under Art. 32.<sup>11-12</sup>

But though the Directives cannot override the fundamental rights, in determining the scope and ambit of the fundamental rights the Court may not entirely ignore the Directive principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible.<sup>13</sup>

**38. The State shall strive to promote the welfare of the people**  
 State to secure a social order for the promotion of welfare of the people. by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

**39. The State shall, in particular, direct its policy towards securing—**  
 Certain principles of policy to be followed by the State (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

**40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.**  
 Organisation of village panchayats

**41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.**  
 Right to work, to education and to public assistance in certain cases.

11. *State of Madras v. Champakam*, (1951) S.C.R. 525 (531); (1950-51) C.C. 188 (185).

12. *Hamir Chandra v. State of Bihar*, A. 1958 S.C. 731.

Provision for just and humane conditions of work and maternity relief.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage,<sup>12a</sup> conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Uniform civil code for the citizens.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

#### Scope of the Directive.

1. Not being justiciable, the present Article does not confer any legally enforceable right upon primary schools to receive grants in-aid from the Government.<sup>13</sup>

2. The Directive does not empower the State to override the fundamental right of minority communities to establish educational institutions of their own choice under Art 30 (1). It is possible for the State to discharge its obligation under the present Article through Government owned and aided schools.<sup>14</sup>

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

#### Art. 46: Promotion of educational and economic interests of the weaker sections.

This section merely declares the objective of the State and, like other Directives, does not confer any justiciable right. Hence, a member of a backward class cannot obtain relief from the Court when he is denied any concession in school fees.<sup>15</sup>

Under the present Article, the State is at liberty to promote the educational and economic interests of the weaker sections of the people, but only so long as no fundamental rights are infringed.<sup>16</sup> Two provisions relating to Fundamental rights, *vis*, Arts. 15 and 29 (2), have, however,

12a. *C. J. R. B. Employees' Assn. v Reserve Bank*, A. 1966 SC (317); *Crown Aluminium Works v. Workmen*, (1968) S.C. 651.

13. *Joseph v. State of Kerala*, A. 1968 Ker. 290 (297).

14. *Re Kerala Education Bill*, A. 1968 SC. 956 (966).

15. *In re Thomas*, A. 1962 Mad. 21.

16. *State of Madras v. Champakam*, (1960-51) C.C. 183 (187); (1961) S.C.R. 525.

been amended (see pp. 60, 63, *ante*) by the Constitution (First Amendment) Act, 1951, in order to give effect to the present Article, notwithstanding the existence of those two Fundamental Rights, to the contrary. By virtue of this amendment, thus, it will be *now* possible for the State to make a special provision, *e.g.*, to build a State colony, for the habitation of Harijans, notwithstanding the bar against discrimination on the ground of caste.<sup>17</sup>

**47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.**

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

#### Prohibition.

Restrictions imposed by a law providing for the prohibition of consumption or production of liquor upon the rights conferred by Art. 19(1)(f) are 'reasonable', restrictions, having regard to the Directive in Art. 47.<sup>18</sup>

**48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.**

Organisation of agriculture and animal husbandry.

#### Prohibition of cow slaughter.

The directive contained in the latter part of the Article is quite specific and enjoins the prohibition of slaughter of any of the species of cattle mentioned, irrespective of their utility from the standpoint of agriculture or animal husbandry,<sup>19</sup> and such prohibition cannot be held to be an unreasonable restriction upon the right conferred by Art. 19(1)(g).<sup>20</sup> But the protection recommended by this part of the directive is confined to cows and calves and to those other animals which are *presently* or *potentially* capable of yielding milk or doing work as draught cattle but does not extend to cattle which were at one time milch or draught cattle but which have ceased to be such.<sup>19-20</sup>

**49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.**

Protection of monuments and places and objects of national importance.

**Amendment.**—The words "declared by or under law made by," have been inserted before the words 'Parliament' and the words 'by law' have been omitted, by the Constitution (Seventh Amendment) Act, 1956.

**Object of amendment.**—The object has been thus explained in the Statement of Objects and Reasons:

17. *Cf. Jagwant v. State of Bombay*, A. 1952 Bom. 461.

18. *State of Bombay v. Balsara*, (1951) S.C.R. 682: (1950-51) C.C. 308 (319).

19. *Hanif Qureshi v. State of Bihar*, A. 1958 S.C. 731 (1959) S.C.R. 628.

20. *Buddhu v. Allahabad Municipality*, A. 1951 753.

21. *Abdul Majid v. State of Bihar*, A. 1951 S.C. 448.

"Entry 67 of the Union List refers to "ancient and historical monuments and records, archaeological sites", etc., have been declared by Parliament by law to be of national importance. A large number of ancient monuments archaeological sites, etc., have been declared to be of national importance by an Act of Parliament. It requires another Act of Parliament to make the slightest alteration in, or addition to the lists in that Act, which seems to be an unduly cumbrous procedure. It is, therefore, proposed to amend the entry substituting for the words "declared by Parliament by law", the words "declared by or under law made by Parliament". The same amendment is also proposed to be made in the connected provisions,—entry 12 of the State List, entry 40 of the Concurrent List and article 49."

Separation of judiciary from executive.

50. The State shall take steps to separate the judiciary from the executive in the Public services of the State.

51. The State shall endeavour to—

Promotion of inter- (a) promote international peace and security;  
national peace and (b) maintain just and honourable relations between nations;  
security.

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) encourage settlement of international disputes by arbitration.

Art. 51: Promotion of international peace.

This Article embodies the object of India in the international sphere. It does not lay down that international treaties or agreements entered into by India shall have the force of municipal law without appropriate legislation undertaken under Art. 253, *post*.

## PART V

### THE UNION

#### CHAPTER 1.—THE EXECUTIVE

##### *The President and Vice President*

The President of India.

52. There shall be a President of India.

53. (1) The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

### **No theory of Separation of Powers underlying the Constitution.**

Though Art. 53 of our Constitution vests the executive power in the President, there is no similar provision in the Constitution vesting the legislative and judicial powers also in other bodies. Further, by introducing the principle of ministerial responsibility, i.e., by making the Executive head (the President or the Governor) liable to act on the advice of Ministers who are responsible to the Legislature, the Constitution of India has departed from the theory of Separation of Powers which underlies the American Constitution. Again, there are certain provisions in the Constitution itself which provide for the conferment of legislative powers on the Executive or the Judiciary and so on. Thus, Art. 140 provides that Parliament may confer upon the Supreme Court the power to make rules (which is a legislative power). Art. 357 provides that under a Proclamation of Emergency, it shall be competent for Parliament to provide that the powers of the State Legislature to make laws shall be exercised by the President.<sup>1</sup> The power of the President to make Ordinance during recess of the Legislature is another instance of legislative power in the hands of the Executive.

But though our Constitution has not strictly adhered to the doctrine of Separation of Powers,<sup>1</sup> it does not follow that under our Constitution any organ of the Government can encroach upon the constitutional powers of any other organ<sup>2</sup> or delegate its constitutional functions to any other organ or authority. A written Constitution, by its very nature, involves a distribution of powers. Though the legislative and executive powers are not vested by the Constitution in the Legislature and the Judiciary expressly, it is clear from the different provisions of the Constitution that, barring specified exceptions, the power of making laws shall be exercised by Parliament and the Legislatures of the States and the power of adjudication and interpretation of the Constitution shall be exercised by the Courts. This is a constitutional trust imposed by the Constitution upon the Legislature and the Courts which they cannot, themselves, delegate to others.<sup>1</sup>

### **'Executive power'.**

1. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away<sup>3</sup> subject, of course, to the provisions of the Constitution or of any law.<sup>2</sup>

2. The executive function comprises both the determination of the policy as well as carrying it into execution, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy; in fact, the carrying on or supervision of the general administration of the State.<sup>2</sup> It includes political and diplomatic activities.<sup>2a</sup>

3. By reason of Art. 208, *post*, it also includes<sup>2</sup>—(a) the carrying on of trading operations; (b) the acquisition, holding and disposing of property; (c) the making of contract for any purpose.

### **Exercise of executive power not dependent on prior legislation.**

1. It is one of the functions of the Executive to execute the laws. This does not mean, however, that the executive function is confined to the

1. In re Delhi Laws Act, 1912 (1951) S.C.R. 747 (835, 884, 943-5, 968).

2. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (296).

3. *Jaganath v. Rama, A.*, 1964 S.C. 848 (855).

3a. *Sahmurti Singh v. Asstt. Passport Officer, A.* 1957 S.C. 1836 (1846).

execution of laws or that in order to enable the executive to function in respect of any subject there must be a law already in existence. Specific legislation, may, of course, be necessary to incur expenditure of the public funds or to encroach upon private rights, which cannot, under the Constitution, be done without legislation. But, apart from this, it cannot be held that in order to undertake any function, such as, entering into any trade or business, the Executive must obtain prior legislative sanction.<sup>3b</sup>

2. In the exercise of its executive power, therefore a Government may do any act provided—

(i) It is not an act assigned by the Constitution to any other authority or body such as the Legislature or the Judiciary or the Public Service Commission (*e.g.*, matters specified in Art. 3).<sup>4b</sup>

(ii) It is not contrary to the provisions of any law.

(iii) It does not encroach upon or otherwise infringe the *legal* rights of an individual.<sup>4</sup>

3. On the same principle, it has been held<sup>4</sup> that the making of a treaty is an executive act and the municipal courts cannot question the validity of a treaty entered into by the Government of India, in exercise of its power under Art. 53, on the ground that there was no legislation to support it.

Legislation may, however, be required to give effect to a treaty—

(a) Where it provides for payment of money to a foreign power,<sup>4</sup> which must be withdrawn from the Consolidated Fund of India.

(b) Where the treaty affects the private rights of a citizen of India. Thus, though no legislative sanction is required for 'acquiring' property ceded to India by a foreign power, an amendment of the Constitution itself would be necessary to cede Indian territory to a foreign State.<sup>4</sup>

#### **'Officers subordinate to him'.**

1. Ministers are officers subordinate to the President [Art. 53 (1)] or the Governor<sup>5,7</sup> [Art. 154 (1)], as the case may be. Hence, they are also 'public servants' within the meaning of s. 21 of the Penal Code.<sup>1</sup>

2. It has been held by the Supreme Court that there are certain powers which are vested by the Constitution in the President, apart from the executive power of the Union. Hence, these powers cannot be delegated by the President to any other person or authority, either under Art. 53 (1)<sup>2a</sup> [or Art. 154, in the case of a Governor] or under Art. 258 (1),<sup>2b</sup> such as the powers under Arts. 123; 356; 360; 309-310.

**54. The President shall be elected by the Election of President. members of an electoral college consisting of—**

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the Legislative Assemblies of the States.

3b. *Nirmal v. Union of India*, A. 1969 Cal. 506 (515).

4. *Moti Lal v. Uttar Pradesh Govt.*, A. 1951 All. 257 (F.B.).

5. *Re Berubari Union*, (1960) 3 S.C.R. 250.

5a. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751.

5b. *Jayantilal v. Rana*, A. 1964 S.C. 648.

6. *Emp. v. Sibnath*, A. 1945 P.C. 156.

7. *Shri Bahadur v. State of V. P.*, (1963) S.C.R. 1188 (1210).

Manner of election of President.

55. (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner:—

- (a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly;
- (b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one;
- (c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

*Explanation*—In this article, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

56. (1) The President shall hold office for a term of five years  
Term of office of President. from the date on which he enters upon his office:

Provided that—

- (a) the President may, by writing under his hand addressed to the Vice-President, resign his office;
- (b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61;
- (c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

57. A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.  
Eligibility for re-election.

58. (1) No person shall be eligible for election as President unless he—

Qualifications for election as President.

- (a) is a citizen of India,
- (b) has completed the age of thirty-five years, and
- (c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor<sup>a</sup>.....of any State or is a Minister either for the Union or for any State.

59. (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

Conditions of President's office.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances, and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

60. Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the President.

“I, A. B., do swear in the name of God that I will faithfully solemnly affirm execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

Procedure for impeachment of the President.

61. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless—

- (a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days'

<sup>a</sup> The words 'or Rajpramukh or Uparajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.



notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

62. (1) An election to fill a vacancy caused by the expiration

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.

of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

Time-limit mandatory.

The election of the President must be completed within the time fixed by the article.<sup>9</sup>

The Vice-President of India.

63. There shall be a Vice-President of India.

64. The Vice-President shall be *ex officio* Chairman of the Council of States and shall not hold any other office of profit:

The Vice-President to be *ex-officio* Chairman of the Council of States

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under article 97.

65. (1) In the event of the occurrence of any vacancy in the office

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

9. *Narayan Bhaskar v. Election Commn.*, (1967) S.C.R. 1061.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

66. (1) The Vice-President shall be elected by the members of  
 Election of Vice- *an electoral college consisting of the members of*  
 President. *both Houses of Parliament. . . . .*<sup>10</sup> in accordance  
 with the system of proportional representation  
 by means of the single transferable vote and the voting at such election  
 shall be by secret ballot.

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President unless he—

- (a) is a citizen of India;
- (b) has completed the age of thirty-five years; and
- (c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor. . . . .<sup>11</sup> of any State or is a Minister either for the Union or for any State.

*Amendment.* The italicised words have been substituted by the Constitution (Eleventh Amendment) Act, 1961.

#### Object of Amendment.

"Under article 66(1) of the Constitution, the Vice-President in India has to be elected by the members of both Houses of Parliament assembled at a joint meeting. Where there is only one duly nominated candidate the necessity for a joint meeting is not apparent and section 8 of the Presidential and Vice-Presidential Election Act, 1952, states that in such a case the Returning Officer shall forthwith declare the candidate to be duly elected. Even where there is a contest, conformity with article 66 can

10. Substituted for the words "members of both Houses of Parliament assembled at a joint meeting", by the Constitution (Eleventh Amendment) Act 1961.

11. The words "or Rajpramukh or Uparajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

only be more formal than real in that important proceedings relating to the election, like the receipt of nominations, scrutiny of nominations and withdrawal of candidature, take place before the members of the two Houses of Parliament assemble at a joint meeting, and only the polling and declaration of results take place at that meeting. In practice also, there can be no meeting in the usual sense, but the electors will be coming in as and when they like, casting their votes and going away. The requirement that members should assemble at a joint sitting seems to be totally unnecessary and is also likely to cause practical difficulties. It may be noticed that article 54 contains no such requirement in the case of the Presidential election.

This clause therefore seeks to omit the requirement as to joint meeting and incidentally brings the language of this clause into conformity with the language of article 54". [Notes on Clauses].

**Effect of amendment.**—The original Cl. (1) of Art. 66 provided for election of the Vice-President by the members of both Houses of Parliament *assembled at a joint meeting*. Though Art. 54 also provides for indirect election of the President and the members of both Houses of Parliament form a part of the electoral college for this purpose, no provision for a joint sitting of the two Houses has been prescribed for the voting. The members cast their votes individually. The Eleventh Amendment brings the election of the Vice-President in line with that of the President, by removing the obligation of summoning a joint sitting of the Houses for this purpose. But members of the Legislative Assemblies of States shall not be members of the electoral college for electing the Vice-President as in the case of the President.

Term of office of Vice-President.

**67. The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:**

**Provided that—**

- (a) a Vice-President may, by writing under his hand addressed to the President, resign his office;
- (b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;
- (c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**68. (1) An election to fill a vacancy caused by the expiration of**

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

**the term of office of Vice-President shall be completed before the expiration of the term.**

**(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office,**

**69. Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—**

Oath or affirmation by the Vice-President.

“I, A. B., do swear in the name of God that I solemnly affirm  
will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”

Discharge of President's functions in other contingencies.

**70. Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.**

**71. (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.**

Matters relating to or connected with the election of a President or Vice-President

**(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.**

**(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.**

**(4) The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.<sup>12</sup>**

**Amendment.—**Cl. (4) has been added by the Constitution (Eleventh Amendment) Act, 1961.

#### Object of Amendment.

“In *Narayan Bhaskar Khare v. The Election Commission of India*, (1957) S.C.R. 1081, a point was made that for a valid election of the President, all elections to the two Houses of Parliament should be completed before the date of the Presidential election, as otherwise some members would have been denied the right to take part in the election. But the Supreme Court expressed no opinion on the point as it was not necessary to do so

Every effort is made to complete such elections before the date of the Presidential election. It is, however, possible that the elections to the two Houses of Parliament may not be completed before the President or the Vice-President is elected. It is, therefore, proposed to amend article 71 of the Constitution so as to make it clear that the election of the President or the Vice-President cannot be challenged on the ground of any vacancy for any reason in the appropriate electoral college.

In *Dr. Khare's case*, when the notification for the election of the President was issued, elections in certain snow-bound areas in the North had not been completed. There may be vacancies for other reasons also. It is therefore desirable to make it

<sup>12</sup> Inserted by the Constitution (Eleventh Amendment) Act, 1961, w.e.f. 19.12.61.

clear that the election of a President or Vice-President cannot be challenged on the ground that there are vacancies in the appropriate electoral college for whatever reasons." [Notes on Clauses].

**Effects of Amendment.**—Art. 71 (1) provides that disputes relating to the election of a President or a Vice-President shall be decided by the Supreme Court. The Amendment is intended to take away one of the grounds for challenging any such election, namely, that the Houses of Parliament, which form the electoral college, were not fully constituted at the time of the election.

### CL (1): Decision of doubts and disputes relating to Presidential election.

The jurisdiction under this clause can be exercised by the Supreme Court only after the election has been over<sup>13</sup> and a candidate has been declared elected.<sup>14</sup> A petition presented before that is liable to be rejected as premature.<sup>14</sup>

#### 'Shall be decided'.

Art. 71 (1) merely prescribes the forum in which doubts and disputes in connection with the Presidential election shall be inquired into. It does not prescribe the conditions under which the petition could be presented to or determined by the Supreme Court.<sup>15a</sup>

The power of Parliament under cl. (3) includes the power to lay down such conditions.<sup>14</sup>

### 72. (1) The President shall have the power to grant pardons,

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor.....<sup>16</sup> of a State under any law for the time being in force.

**Pardoning Power.**—See under Art. 161, *post*.

Any pardoning power belonging to the erstwhile Rules of Indian States ceased to exist after the commencement of the Constitution, being inconsistent with it.<sup>16</sup>

13. *Khare v. Election Comm.*, A. 1967 S.C. 694.

14. *Narayan v. Election Comm.*, (1967) S.C.R. 1081 (1090).

14a. *Khare v. Election Commission (II)*, A. 1968 S.C. 139 (140) (1968) S.C.R. 648.

15. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

16. *Venud v. State of T. C.*, (1955) 2 S.C.R. 1022.

**73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—**

Extent of executive  
power of the Union.

(a) to the matters with respect to which  
Parliament has power to make  
laws; and

(b) to the exercise of such rights, authority and jurisdiction as  
are exercisable by the Government of India by virtue of  
any treaty or agreement.

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State.....<sup>17</sup> to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

#### **Art. 73: Extent of executive power of the Union.**

(1) The Union shall have exclusive executive power for (a) the administration of laws made by Parliament under its exclusive powers; (b) the exercise of its treaty powers. [Cf. Art. 253].

By virtue of Cl. (1) (a), the executive power of the Union shall be co-extensive with the legislative power of the Union Parliament. In other words, it will extend over the whole of the territory of India, with respect to the matters enumerated in Lists I and III of the 7th Schedule. But this is subject to the two exceptions engrafted in the Proviso to Cl. (1), and in Cl. (2).

(u) The Proviso to Cl. (1) says that executive authority in regard to matters in the Concurrent List shall be ordinarily left to the States, for, Parliament shall be entitled to provide that in exceptional cases the executive power of the Union shall also extend to these subjects.

#### **'Subject to the provisions of the Constitution'.**

Apart from the provisions of Arts. 73 and 162, executive power is conferred upon the Union as well as a State Government as regards three specified matters—

- (i) carrying on of any trade or business [Art. 298];
- (ii) acquisition, holding and disposal of property [Art. 298];
- (iii) making of contracts for any purposes [Art. 299].

**'Executive power'**.—See under Art. 53, *ante*.

**Whether specific legislation is required for the exercise of executive power relating to a particular subject.**

1. The Supreme Court has held that under *our Constitution*, the functions of the Executive are not confined to the execution of laws made by the Legislature and already in existence. Arts. 73 and 162 indicate that the powers of the Executive of the Union and of a State are co-extensive

17. The words "specified in Part A.....First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1966.

with the legislative power of the Union and of a State, as the case may be. While the Executive cannot act against the provisions of a law, it does not follow that in order to enable the Executive to function relating to a particular subject, there must be a law already in existence, authorising such action.<sup>18</sup>

2. Once a law is passed, the executive power can be exercised only in accordance with such law so far as it goes, but the Government is not debarred from exercising its executive power merely because a Bill relating to the subject is pending before the legislature.<sup>19</sup>

3. Legislation may, however, be required where the Constitution itself provides that the act can be done only by legislation, e.g., for the imposition of a tax [Art. 265], for expenditure of money [Art. 266(3)].<sup>17, 20</sup>

#### **Proviso.**

The effect of this Proviso is that in the Concurrent sphere, the Union will not have executive power, unless—

(a) the Constitution itself; or

(b) a law made by Parliament, expressly provides to that effect.

It follows that the executive power which is specifically vested in the Union by Art. 298 (carrying on of trade, disposal of property, and making of contracts) will not be governed by the Proviso to Art. 73.<sup>20</sup>

**74. (1) There shall be a Council of Ministers with the Prime**

Council of Ministers  
to aid and advise Presi-  
dent.

**Minister at the head to aid and advise the President in the exercise of his functions.**

**(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.**

#### **Relation between the President and the Council of Ministers.**

Though we have an elected President, the present Article introduces the same system of parliamentary executive as in England and reduces the President to a formal or constitutional head of the executive, the real power being exercised by the Council of Ministers<sup>18</sup>. All the powers that are vested by the Constitution in the President, are *expected* to be exercised on the advice of the Ministers responsible to the Legislature as in England, though there is no obligatory provision in the Constitution itself, to this effect.

**75. (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.**

Other provisions as to  
Ministers.

**(2) The Ministers shall hold office during the pleasure of the President.**

**(3) The Council of Ministers shall be collectively responsible to the House of the People.**

**(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.**

18. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (232-8). [Specific legislation is not required for enabling the State to carry on a trade or business].

19. *Joseph v. State of Kerala*, A. 1956 Ker. 280 (301).

20. *T. D. Gupta v. State of Assam*, A. 1961 Assam 133 (139).

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

*The Attorney-General for India*

76. (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

*Conduct of Government Business*

77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.  
Conduct of business of the Government of India

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

Execution of orders and instruments. See under Art 166 *post*

78. It shall be the duty of the Prime Minister —

Duties of Prime Minister as respects the furnishing of information to the President, etc.

- (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
- (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.



## CHAPTER II.—PARLIAMENT

*General*

79. There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Constitution of Parliament.

80. (1) The Council of States shall consist of—

Composition of the Council of States.

(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(b) not more than two hundred and thirty-eight representatives of the States and of the *Union territories*<sup>21</sup>

(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the *Union territories*<sup>21</sup> shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art and social service.

(4) The representatives of each State \* \* \*<sup>22</sup> in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the *Union territories*<sup>23-24</sup> in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

**Amendment.**—The changes made by the Constitution (Seventh Amendment) Act, 1956, are indicated in *italics*.

**Effects of Amendment.**

(a) In the original Constitution, representation in the Council of States was confined to the States in Parts A, B and C. It has now been extended to all the *Union territories* which include the Islands which were included in Part D of the First Schedule

(b) Consequential changes in the allocation of seats have been made in the Fourth Schedule, maintaining in tact the original formula of "one seat per million for the first five millions and one seat for every additional two millions or part thereof exceeding one million."<sup>25</sup>

Composition of the House of the People. <sup>181.</sup> (1) *Subject to the provisions of article 331, the House of the People shall consist of—*

(a) *not more than five hundred members chosen by direct election from territorial constituencies in the States, and*

21. Inserted by the Constitution (Seventh Amendment) Act, 1956.

22. The words and letters "specified in Part A or Part B of the First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

23-24. Substituted for the words "States specified in Part C of the First Schedule", by the Constitution (Seventh Amendment) Act, 1956.

25. Statement of Objects & Reasons of the Constitution (Ninth Amendment Bill), 1958.

1. Substituted by the Constitution (Seventh Amendment) Act, 1956.

(b) *not more than twenty five members to represent the Union territories, chosen in such manner as Parliament may by law provide*

(2) *For the purposes of sub clause (a) of clause (1),—*

(a) *there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and*

(b) *each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the States*

(3) *In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published*

**Amendment.**— (a) Art 81 has been substituted by the **Constitution (Seventh Amendment) Act, 1956**, for the original Article

(b) In sub-cl (b) of cl (1), the figure 25 has been substituted by the **Constitution (Fourteenth Amendment) Act, 1962**.

#### Effects of Amendment.

(a) The provision for the grouping of States for the purpose of forming territorial constituencies in cl. (1) (b), has been omitted since after reorganisation each of the States would be large enough to be divided into a number of constituencies and will not permit of being grouped together with other States for this purpose of being "formed" into a single territorial constituency.

(b) The principle of uniformity of representation amongst the States *inter se* and as amongst territorial constituencies of the same State has been substituted for the numerical minimum prescribed in the original cl (1) (b)

(c) Provision has been made for representation of the Union territories. Since the maximum of 20 members had already been filled up by the time Pondicherry was admitted as a Union Territory, the maximum has been raised to 25 in order to provide for the representation of Pondicherry and any other Territory as may be constituted in future

**\*82.** *Upon the completion of each census, the allocation of seats in the*

**Readjustment after each census.**

*House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as*

*Parliament may by law determine*

*Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House*

**83. (1) The Council of States shall not be subject to dissolution,\***

**but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf**

**Duration of Houses of Parliament.**

**by Parliament by law.**

2. Substituted for the word 'twenty' by the Constitution (Fourteenth Amendment) Act, 1962.

3. Statement of Objects and Reasons to the Constitution (Ninth Amendment) Bill, 1956.

4. Substituted by the Constitution (Seventh Amendment) Act, 1956.

5. *Vide Purushottaman v. State of Kerala*, A. 1962 S.C. 694 (700).

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

84. A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(a) is a citizen of India, and *makes and subscribes before some person authorized in that behalf by the Election Commission on oath or affirmation according to the form set out for the purpose in the Third Schedule;*<sup>5a</sup>

Qualification for membership of Parliament

(b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and

(a) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

85. (1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session

Sessions of Parliament, prorogation and dissolution.

(2) The President may from time to time—

(a) prorogue the Houses or either House,

(b) dissolve the House of the People

Right of President to address and send messages to Houses.

86. (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

87. (1) At the commencement of *the first session after each general election to the House of the People and at the commencement of the first session of each year* the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

Special address by the President.

(2) Provision shall be made by the rules regulating the procedure

5a. The italicised words were added by the Constitution (Sixteenth Amendment) Act, 1963, w.e.f. 6-10-63

6. Substituted by the Constitution (First Amendment) Act, 1951, s. 6, for the original article.

7. Substituted by *ibid.*, s. 7, for "every session".

of either House for the allotment of time for discussion of the matters referred to in such address \* \* \*.

**88.** Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Rights of Ministers and Attorney-General as respects Houses.

#### *Officers of Parliament*

**89. (1)** The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

The Chairman and Deputy Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

**90.** A member holding office as Deputy Chairman of the Council of States—

Vacation and resignation of, and removal from, the office of Deputy Chairman.

(a) shall vacate his office if he ceases to be a member of the Council;

(b) may at any time, by writing under his hand addressed to the Chairman, resign his office; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

**91. (1)** While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

**92. (1)** At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 91 shall apply in relation

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

8. The words "and for the precedence of such discussion over other business of the House" were omitted by the Constitution (First Amendment) Act, 1951, a. 8.

to every such sitting as they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

**93. The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.**

The Speaker and Deputy Speaker of the House of the People,

**94. A member holding office as Speaker or Deputy Speaker of the House of the People—**

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker,

(a) shall vacate his office if he ceases to be a member of the House of the People;

(b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

**95. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.**

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

**96. (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 95 shall apply in relation**

The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

97. There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the

Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker

Second Schedule.

98. (1) Each House of Parliament shall have a separate secretarial staff:  
Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

Secretariat of Parliament

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

### *Conduct of Business*

99. Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.

100. (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

Voting in Houses. power of Houses to act notwithstanding vacancies and quorum.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

### *Disqualifications of Members*

101. (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

Vacation of seats.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State....., and if a person is chosen a member both of Parliament and of a House of the Legislature of a State....., then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Vacation of seats.—See under Art. 190, *post*.

102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

Disqualifications for membership.

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

9. The words "specified in Part A.....First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

### Scope of Art. 102.

This article lays down the same set of disqualifications for election as well as continuing as a member<sup>10</sup>. In other words, it provides for both pre existing and supervening disqualification<sup>10</sup>.

### Disqualification for membership.

Preventive detention is not a disqualification under this Article or under the Representation of the People Act, 1951.

**'Office of profit'.** See under Art. 191 (1) (a), *post*. The words 'under any local or other authority' which occur at the end of Arts. 58 (2) and 66 (4) are absent in Art. 102 (1) (a). In the result, though the holding of an office of profit under an authority subject to the control of the Government is a disqualification for the office of the President or the Vice-President, it is not a disqualification for membership of the Legislature.<sup>11</sup> Office under a statutory body is not an office 'under' the Government.<sup>11</sup>

- 103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.**

Decision on questions as to disqualifications of members.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

### 'Has become'.

These words refer to disqualifications incurred by the member subsequent to his election<sup>12</sup>. The President or the Commission has, therefore, no jurisdiction to inquire into disqualifications which arose prior to election<sup>13</sup>.

- 104. If a person sits or votes as a member of either House of Parliament before he has complied with the requirements of article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each**

Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified.

10. *Election Commn. v. Venkata*, (1953) S.C.R. 1144.

11. *Abdul Shakoor v. Election Tribunal*, A. 1958 S.C. 52 (55).



day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

**'Not qualified or disqualified'.**

These words cover both pre election and supervening disqualifications.<sup>12</sup>

*Powers, Privileges and Immunities of Parliament and its Members*

105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

Powers, privileges etc of the Houses of Parliament and of the Members and committees thereof

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

**Privileges of the Legislature.**—See under Art 194, *post*

106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

Salaries and allowances of members

*Legislative Procedure*

107. (1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

12. *Election Commn. v. Venkata*, (1952-54) 2 C.C. 450 (453).

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

**CL. (3) : 'Pending.'**

This expression includes a Bill pending for the assent of the President.<sup>13</sup> Such Bill does not lapse either on prorogation or on dissolution.<sup>13</sup>

Once a Bill has been validly introduced, it remains pending even when it is referred to a Select Committee. There is therefore no question of the Bill being introduced again after the Select Committee has submitted its report.<sup>13a</sup>

**108. (1) If after a Bill has been passed by one House and transmitted to the other House—**

- (a) the Bill is rejected by the other House;  
or  
(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or  
(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill.

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in the sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting --

- (a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;  
(b) if the Bill has been so passed and returned, only such amend-

13. *Parushottaman v State of Kerala*, A. 1962 S.C. 694 (700).

13a. *Kotwar v. K. R. B. & Co.*, A. 1969 S.C. 504 (510).

ments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Special procedure in respect of Money Bills. 109. (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

Definition of "Money Bills."

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;
- (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;
- (d) the appropriation of moneys out of the Consolidated Fund of India;
- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clause (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

#### Fees.

1. The fees which are excluded from the definition of 'Money Bill' are fees levied by the State Government or its administrative agencies other than instruments of Local Self-Government, because municipal taxation, as a whole, is outside the definition of 'money bill'.<sup>14</sup>

2. The condition for exclusion of a fee levied by such authority is that it is either a fee for a licence or a fee for services rendered.<sup>14</sup>

3. It would, therefore, not exclude a *tax*, such as an excise duty, which is sought to be levied through the medium of a licence fee.<sup>14</sup>

**111.** When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Assent to Bills.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

#### *Procedure in Financial Matters*

**112. (1)** The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this

14. *Corpn. of Calcutta v. Liberty Cinema, A.* 1955 S.C. 1107 (1180).

**Constitution as expenditure charged upon the Consolidated Fund of India; and**

- (b) **the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India,**

**and shall distinguish expenditure on revenue account from other expenditure.**

**(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—**

- (a) **the emoluments and allowances of the President and other expenditure relating to his office;**
- (b) **the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People;**
- (c) **debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;**
- (d) (i) **the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court,**  
 (ii) **the pensions payable to or in respect of Judges of the Federal Court,**  
 (iii) **the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Governor's Province of the Dominion of India<sup>15</sup>;**
- (e) **the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India;**
- (f) **any sums required to satisfy a judgment, decree or award of any Court or arbitral tribunal;**
- (g) **any other expenditure declared by this Constitution or by Parliament by law to be so charged.**

**113. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.**

Procedure in Parliament with respect to estimates.

**(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.**

**(3) No demand for a grant shall be made except on the recommendation of the President.**

**114. (1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the**  
 Appropriation Bills.

15. Substituted for the words "corresponding to . . . First Schedule", by the Constitution (Seventh Amendment) Act, 1956.

appropriation out of the Consolidated Fund of India of all moneys required to meet—

- (a) the grants so made by the House of the People; and
- (b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

115. (1) The President shall -

- (a) if the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or
- (b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for the year,

cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

Votes on account,  
votes of credit and excep-  
tional grants.

116. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

- (a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure;
- (b) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude

or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

- (c) to make an exceptional grant which forms no part of the current service of any financial year,

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

117. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States;

Special provisions as to financial Bills.

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

### *Procedure Generally*

118. (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sitting of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.

### Rules of Procedure.

1. 'Subject to the provisions of the Constitution,' each House of Parliament or of a State Legislature [Art. 208, *post*] may make Rules for regulating its procedure or conduct of business,<sup>16</sup> as well as ancillary matters.<sup>16</sup>

2. Courts have no power to interfere with such Rules or their administration<sup>16</sup> unless there is a contravention of some provision of the Constitution.<sup>16</sup>

3. Each House has the absolute right of interpreting its Rules and the Courts have no jurisdiction to interfere with the Speaker's discretion in the matter of application of the Rules relating to the internal management of the House, e.g., whether a motion related to a matter of 'recent occurrence'<sup>17</sup> or whether a Committee of Privileges reported in time.

4. The Rules framed under the present Article [or Art. 208] (if otherwise valid) constitute 'procedure established by law' within the meaning of Art. 21.<sup>18</sup>

**119. Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made is inconsistent with any rule made by a House of Parliament under clause (1) of article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail.**

Regulation by law of procedure in Parliament in relation to financial business.

**120. (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in Parliament shall be transacted in Hindi or in English:**

Language to be used in Parliament.

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

**(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.**

**121. No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.**

Restriction on discussion in Parliament.

16. *Godaratis v. Nandkishore*, A. 1953 Orissa 111.

17. *Cf. Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

18. *Sharma v. Sri Krishna*, A. 1959 S.C. 395.



**122. (1)** The validity of any proceedings in Parliament shall not be called in question on the ground of any Courts not to inquire into proceedings of alleged irregularity of procedure. Parliament.

**(2)** No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

**Courts not to inquire into proceedings of Legislature.**--See under Art. 212, *post*.

### CHAPTER III - LEGISLATIVE POWERS OF THE PRESIDENT

**123. (1)** If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require. Power of President to promulgate Ordinances during recess of Parliament.

**(2)** An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance--

**(a)** shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

**(h)** may be withdrawn at any time by the President.

**Explanation.**--Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

**(3)** If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

**Comments.**--See under Art. 213, *post*

### CHAPTER IV --THE UNION JUDICIARY

**124. (1)** There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven<sup>1</sup> other Judges. Establishment and constitution of Supreme Court.

**(2)** Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

**Provided** that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

1. Raised to 'thirteen' by the Supreme Court (Number of Judges) Act, 1960,

**Provided further that—**

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office in the manner provided in clause (4).

*“(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.*

**(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and -**

- (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
- (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- (c) is, in the opinion of the President, a distinguished jurist.

*Explanation I* - In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

*Explanation II* - In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

**(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.**

**(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).**

**(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.**

**(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.**

#### **CL (2A).**

This Clause is analogous to cl. (3) of Art. 217 in so far as the object of both the provisions is to take away the jurisdiction of Courts to determine the age of a Judge of a superior Court. But while in the case of a Judge of a High Court, the power to determine the question is vested in the President, deciding after consultation with the Chief Justice of India, in the case of a Supreme Court, the Constitution does not provide the procedure but leaves it to Parliament to prescribe the machinery by making a law.

**125. (1) There shall be paid to the Judges of the Supreme Court such salaries as are specified in the Second Schedule.**  
Salaries, etc., of Judges

2. Inserted by the Constitution (Fifteenth Amendment) Act, 1963.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and until so determined, to such privileges, allowances and rights as are specified in the Second Schedule:

Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

126. When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of acting Chief Justice.

127. (1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

Appointment of *ad hoc* Judges.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties of a Judge of the Supreme Court.

128. Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court<sup>3</sup> to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court.

Attendance of retired Judges at sittings of the Supreme Court

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

129. The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

Supreme Court to be a court of record.

3. The italicised words were inserted by the Constitution, (Fifteenth Amendment) Act, 1963, w.e.f. 6-10-63.

### Power to punish for contempt of itself.

1. Though as a Court of Record the Supreme Court would have the power to punish for contempt of itself, Art. 129 specifically mentions this power in order to remove any doubts. 'This is a summary power.'<sup>4</sup>

2. The object of this power to punish is not the protection of the Judges personally from imputations to which they may be exposed as individuals,<sup>5</sup> but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired.<sup>6</sup>

3. Even on the ground of interference with the due course of justice the Court does not proceed by way of contempt "unless there is *real prejudice* which can be regarded as a *substantial interference*" as distinguished from a mere question of *propriety*."<sup>6</sup>

4. This is an extraordinary power which must be used sparingly, but where the public interest demands it the Court will not shrink from exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adequate.<sup>7</sup>

### Power cannot be abridged by legislation.

The powers conferred upon the Supreme Court and High Court by Arts. 129 and 215, respectively, cannot be abridged by legislation,<sup>8</sup> nor are they controlled by anything in the C.P.C.<sup>8</sup>

### What constitutes contempt of Court.

Anything which tends to bring the administration of justice into disrespect or interfere with the administration of justice constitutes contempt of Court. Some of such acts are as follows:

(a) *Scandalising the Judge himself*, e.g., by imputing corruption.<sup>9</sup>

(i) The power to punish for scandalising the Court is a weapon to be used sparingly and always with reference to the administration of justice<sup>9</sup> and not for vindicating personal insult to a judge, not affecting the administration of justice.

There are two primary considerations which should weigh with the Court in such cases, *viz.*—(a) whether the reflection on the conduct or character of the Judge is within the limits of fair and reasonable criticism, and (b) whether it is a mere libel or defamation of the Judge or amounts to a contempt of the court.<sup>9</sup>

Where the question arises whether a defamatory statement directed against a Judge is calculated to undermine the confidence of the public in the competency or integrity of the Judge, or is likely to deflect the Court itself from a strict and unhesitant performance of the duties, all the surrounding circumstances under which the statement was made and the degree of publicity that was given to it would be relevant circumstances. The question is not to be determined solely with reference to the language or contents of the statement made. Mere publication to third party, which would be sufficient to establish an ordinary libel may not be conclusive for establishing contempt. That would depend upon the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public and thereby lead to an interference with the administration of justice.<sup>9</sup>

4. *Hiralal v. State of U. P.*, A. 1954 S.C. 743.

5. *Brahma Prakash v. State of U. P.*, (1953) S.C.R. 1169.

6. *Risan-ul-Hasan v. State of U. P.*, (1953) S.C.R. 581.

7. *Shereef v. Judges*, (1955) 1 S.C.R. 767; *Roy v. State of Orissa* A. 1960 S.C. 190.

8. *Sodhi v. Chief Justice*, (1954) S.C.R. 545 (563).

9. *Bathina v. State of Madras*, (1952) S.C.R. 425 (434).

"Although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character".<sup>9</sup>

At any rate, defamation of a Judge who has retired cannot be punished as contempt of Court.<sup>10</sup>

(ii) *Fair and reasonable* criticism of a judicial act in the interest of the public good does not amount to contempt.

But the limits of *bona fide* criticism are transgressed when improper motives are attributed to judges and this cannot be viewed with placid equanimity by a Court in a proceeding for contempt. Imputation made against judicial officers without reasonable care and caution cannot be said to be *bona fide*.<sup>9</sup>

Thus, it is a gross contempt to impute that Judges of the highest Court of Justice acted on extraneous considerations in deciding a case.<sup>11</sup>

(b) *Obstruction of or interference with the due course of justice.* Any speech or conduct which tends to influence the result of a pending trial, civil or criminal, or otherwise tends to interfere with the proper course of justice, amounts to contempt of Court.<sup>10</sup> Thus,--

(i) Any threat to a party to a pending litigation which would force him to withdraw his action or to abandon it, amounts to contempt.<sup>11</sup> The threat may be offered by issuing a circular that disciplinary action would be taken against a Government servant if he seeks redress to a court of law in matters arising out of his employment without first exhausting the official channels of redress.<sup>12</sup>

(ii) It is contempt to prejudice a party to a *pending* judicial proceeding, e.g., by holding a parallel inquiry on a matter which is *sub judice*,<sup>13</sup> provided the scope of the inquiry is the same.<sup>11</sup>

(iii) It is contempt on the part of any party to a prohibitory order issued by the Court to commit a breach of it after (a) service of such order upon him, or (b) otherwise acquiring definite knowledge that such an order had been made.<sup>14</sup>

(iv) It is contempt on the part of a subordinate Court to *intentionally* disobey the order of a superior Court.<sup>12</sup> But there cannot be an intentional disobedience unless the subordinate Court had knowledge of the orders of the superior Court.<sup>15</sup>

(v) The uttering of words or an action in *jace* of the Court or in the course of proceeding may be a contempt, provided it *interferes* with the *course of justice*.<sup>16</sup>

An Advocate who signs an application or pleading containing matter scandalising the Court, which tends to prevent or delay the course of justice, is himself guilty of contempt of Court, unless he reasonably satisfies himself about the *prima facie* existence of adequate grounds therefor.<sup>16</sup>

**130. The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.**

Seat of Supreme Court.

10. *Gaya Singh v. Ram Bheja*, A. 1959 Punj 319 (321) ;

11. *In re Times of India*, (1953) S.C.R. 215.

12. *Pratap Singh v. Gurbaksh*, A. 1962 S.C. 1172.

13. *S. K. Gupta v. B. K. Sen*, A. 1961 S.C. 633.

14. *Hoshiar Singh v. Gurbachan Singh*, A. 1962 S.C. 1089.

16. *Kar v. Chief Justice of Orissa*, A. 1961 S.C. 1367 (1370).

16. *Shareef v. Judges*, (1955) 1 S.C.R. 757.

**131. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—**

- (a) between the Government of India and one or more States; or
- (b) between the Government of India and any State or States on one side and one or more other States on the other; or
- (c) between two or more States,

**if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:**

*Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.<sup>17</sup>*

**Amendment.**—Owing to the abolition of Part B States, reference to such States has been omitted and the original Proviso has been substituted by the **Constitution (Seventh Amendment) Act, 1956.**

#### **Art. 131: Scope of the Original Jurisdiction of the Supreme Court.**

The Supreme Court's Original Jurisdiction is limited by the following conditions:

(a) The parties to the dispute must be as specified in clauses (a) to (c), i.e., the constituent units of the federation. It will not entertain suits to which citizens are a party.<sup>18</sup>

(b) The dispute must involve a question relating to a legal right. The expression 'legal' right is used to distinguish it from 'political' rights over which the Courts have no jurisdiction. But it is confined to rights which are enforceable by an action in a Court of Law. The validity of a law of the Union or of a State is itself a question as to a legal right.<sup>19</sup>

(c) The question must not be one which is excepted by the Provisos to Art. 131 or by any other provision of the Constitution.<sup>20</sup>

#### **'Subject to the provisions of this Constitution'.**

The jurisdiction of the Supreme Court in dispute as to the existence of a legal right between the Union and the States or between the States *inter se* is *exclusive*, except in certain matters *excepted* by other provisions of the Constitution. The following matters appear to be excluded from the original jurisdiction of the Supreme Court and vested in other tribunals by the Constitution:

(i) Disputes specified in the Constitution:

Complaints as to interference with inter State water supplies, referred to the statutory tribunal mentioned in Art. 262 read with s. 11 of the Inter-State Water Disputes Act [XXXIII of 1956]

(ii) Matters referred to the Finance Commission [Art. 280].

(iii) Adjustment of certain expenses as between the Union and the States [Art. 290].

17. Substituted for original Provisos (i) and (ii) by the Constitution (Seventh Amendment) Act, 1956.

18. *Ramgark State v. Prov. of Bihar*, A. 1939 F.C. 55

19. *United Prov. v. Governor-General*, A. 1939 F.C. 58.

20. *State of Setaikella v. Union of India*, (1950-51) C.C. 271: A. 1951 S.C. 253.

### The Proviso.

The proviso excludes from the jurisdiction of the Supreme Court disputes of the kind mentioned in the Proviso, whether they arose before or after the commencement of the Constitution.<sup>20</sup>

**132. (1)** An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

**(2)** Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

**(3)** Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

*Explanation*—For the purposes of this article, the expression “final order” includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

### Arts. 132-136: Appellate Jurisdiction.

These Articles deal with the appellate jurisdiction of the Supreme Court which may be classified under the following heads—

**(1)** Appeals on constitutional questions: (a) By certificate of High Court [Article 132 (1)]. (b) By special leave of Supreme Court [Article 132 (2)].

**(2)** Appeals involving no constitutional questions: (a) Civil [Article 133]. (b) Criminal [Art. 134].

**(3)** Appeal by special leave of Supreme Court in any case other than the above [Article 136].

### Art. 132: Appeals involving constitutional questions.

1. The Article deals with appeals involving interpretation of the Constitution, arising out of any proceeding in a High Court,—civil, criminal or otherwise.<sup>21</sup>

2. It says that an appeal shall lie to the Supreme Court from any judgment, decree or final order of any High Court, in the territory of India in any civil, criminal or other proceeding—provided it involves a substantial question of law as to the interpretation of this Constitution, and—

(i) either the High Court certifies to the above effect; or

(ii) the Supreme Court itself grants special leave on the above ground where the High Court has refused such certificate.

3. This Article thus ensures that though a High Court may pronounce upon the validity of an Act or decide any other question involving the interpretation of the Constitution, in all such cases the decision of the High Court shall not be final and that the final authority of interpreting the Constitution must rest with the Supreme Court.<sup>21</sup> Constitutional appeals are

21. *Election Commission v. Venkata, A.* 1953 S.C. 210 (212): (1953) S.C.R. 1144 (1149).

thus placed by the Constitution in a special category irrespective of the nature of the proceedings in which they arise, and a right of the widest amplitude is allowed in cases involving such questions.<sup>21</sup>

**CL. (1): 'Judgment, decree or final order'.—**See under Art. 133, and the Expl. to the present Article, pp. 273, 276, *post*.

**'High Court'.**

The decision of a Single Judge is decision of the High Court for purposes of appeal under Art. 132<sup>22</sup> though it is not so under Art. 133 (3). A Single Judge is, accordingly, competent to give a certificate under Art. 132 (1).<sup>21</sup>

**'Civil proceeding'.—**See under Art. 133, 262, *post*.

**'Criminal proceeding'.—**See under Art. 134, *post*.

**'Other proceedings'.**

1. These words, which were not in s. 205 (1) of the Government of India Act, 1935, have been deliberately introduced by the framers of the Constitution to confer a right of appeal from a judgment, decree or final order in *any* proceeding provided a substantial question as to the interpretation of the Constitution is involved. There is no reason to apply a narrow interpretation to these words.<sup>23</sup>

2. The expression would thus include proceedings other than civil and criminal proceedings,<sup>24</sup> e.g., revenue proceedings under the Sales-tax Act,<sup>25</sup> Income-tax Act,<sup>1</sup> proceedings for disciplinary action against lawyers.<sup>2</sup>

**'Substantial question as to interpretation of this Constitution'.**

1. Under the present article there is no scope for appeal unless there is some substantial question of law as to the interpretation of some provision of the Constitution involved in the case. The constitutional question must arise upon the findings of either the High Court or the subordinate Court.<sup>3</sup>

2. The word 'substantial', in this context, does not mean a question of general importance but a question regarding which there is a difference of opinion.<sup>23</sup>

(a) A question which has been settled by previous decisions of the Supreme Court is not a substantial question.<sup>23</sup> Thus, it has been held by the Supreme Court<sup>2</sup> that Art. 14 has been already interpreted by the Court in a number of cases and that a mere application of the article to the facts of a new case does not raise any substantial question of law as to the interpretation of the Constitution. A substantial question, according to this decision, is raised only where a new interpretation is suggested to a provision of the Constitution.<sup>23</sup>

Similar view has been taken about Art. 311.<sup>4</sup>

(b) On the other hand, the question whether a previous decision of the High Court has ceased to be good law in view of a decision of the Supreme Court which has not directly overruled it<sup>5</sup> is a substantial question.

22. *Hindusthan Commercial Bank v. Bhagwan Das*, A. 1955 S.C. 1142 (1143).

23. *State of J. & K. v. Ganga*, A. 1960 S.C. 356 (369).

24. *Narayan Rao v. Ishwarlal*, A. 1965 S.C. 1818.

25. *Cf. Poppattal v. State of Madras*, (1952-4) 2 C.C. 537: A. 1953 S.C. 274.

1. *Allen Berry v. I. T. O.*, A. 1956 Pat. 175 (177).

2. *P. a Pleader v. Judges*, A. 1937 All. 167; *Krishnaswami v. Council of Chartered Accountants*, A. 1953 Mad. 79.

3. *Sudhir v. The King*, (1948) D.L.R. (F.C.) 4.

4. *State of Mysore v. Chablani*, A. 1958 S.C. 325 (328).



3. The following may be cited as instances where a question of constitutional interpretation is involved—

(i) A suit challenging<sup>5</sup> a statute as *ultra vires*<sup>6</sup> or inconsistent with a mandatory provision of the Constitution.<sup>7</sup>

(ii) A conviction under a law which is challenged as *ultra vires*.<sup>8</sup>

(iii) Cases directly involving the interpretation of some particular provision of the Constitution<sup>9-10</sup> unless the point has already been settled<sup>11</sup> by a previous decision.

(iv) Whether a law<sup>12</sup> or an executive order<sup>13</sup> or a custom<sup>14</sup> contravenes any fundamental right.

4. On the other hand, the following has been held *not* to involve question of law as to the interpretation of the Constitution—

(i) A wrong interpretation of an Act even though the writ of mandamus<sup>15</sup> or habeas corpus<sup>16</sup> has been refused on such interpretation.

(ii) Whether an Act has been correctly applied to the facts of a case.<sup>17</sup>

(iii) Whether a reasonable opportunity has been given within the meaning of Art. 311 (2) is a question of fact,<sup>18</sup> but there may be cases where the question of reasonable opportunity is inextricably mixed up with the nature and content of the constitutional guarantee under the Article.<sup>19</sup>

(iv) Whether the holder of a contractual service under a statutory corporation or a 'Government company' can invoke Art. 311 (2) of the Constitution.<sup>19</sup>

### Form of certificate.

There is no form prescribed for the certificate required under Art. 132; it can be granted by the Court by an observation at the end of the judgment.<sup>19a</sup>

### CL (2): Leave of Supreme Court.

While the Supreme Court's discretion to grant special leave under Art. 136 is altogether unfettered, under Art. 132 (2), there is no scope for granting a special leave unless two conditions are satisfied—(i) the case should involve a question of law as to the interpretation of the Constitution, (ii) the said question must be a substantial question<sup>20</sup>

### CL (3): Appeal on other grounds.

1 This clause means that when an appeal comes up to the Supreme Court on the strength of a certificate under Art. 132 (1), the appellants

5. *Lf. State of Punjab v. Shadi Lal*, A. 1960 S.C. 397 (399)

6. *Bhairabendra v. State of Assam*, (1956) S.C.A. 736.

7. *State of Assam v. Ramish*, A. 1962 S.C. 107

8. *Kishori v. King*, A. 1950 F.C. 37.

9. *Corpn. v. St. Thomas School*, (1949) F.L.J. 361

10. *Cf. Hari Vishnu v. Ahmad*, A. 1965 S.C. 233.

11. *Krishnaswami v. Governor-General*, A. 1947 F.C. 37.

12. *Cf. Ganpati v. State of Bihar*, A. 1955 S.C. 188; *Budhan v. State of Bihar*, A. 1955 S.C. 191 (192).

13. *Namazi v. Dy. Custodian*, (1951) 2 M.L.J. 1.

14. *Ram Bhan v. Raj Bhan*, A. 1951 V.P. 38.

15. *Lachman v. Govt. of Bihar*, A. 1952 Pat. 386.

16. *Kishorilal v. State*, A. 1961 Assam 169.

17. *R. v. Abdul Majid*, (1949) F.L.I. 133.

18. *State of Mysore v. Chablani*, A. 1958 S.C. 325 (28).

19. *Ranjit v. Union of India*, A. 1969 Cal. 95 (104).

19a. *S. V. Oil Co. v. C. T. O.*, A. 1967 Cal. 528.

20. *State of J. & K. v. Ganga*, A. 1960 S.C. 356 (359).

are not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the certificate was given except with the leave of the Supreme Court itself.<sup>21</sup>

2. Such leave is, however, generally granted by the Supreme Court where the trial before the High Court has resulted in a grave miscarriage of justice and leave to appeal on that ground would have been granted on an application under Art. 136<sup>22</sup> e.g., where the accused has been convicted upon an admission which did not exist on the record.<sup>23</sup>

3. Hence, if in an appeal under Art. 132, the appellant wants to urge any ground other than the ground mentioned in the certificate, he must, after obtaining the leave to appeal under either clause (1) or (2), obtain further leave of the Supreme Court under cl. (3).<sup>22, 23</sup> Even in the matter of constitutional ground, if the certificate is given on the question of interpretation of one Article (say, Art. 226), the appellant cannot, in the Supreme Court, raise the question of interpretation of another Article (say, Art. 311), without leave of the Supreme Court under the present clause.<sup>21</sup>

### Explanation.

1. The Explanation governs the meaning of the expression 'final order' in cl. (1) of this Article. The commentary at pp. 278-280, *post*, explains the meaning of the expression, generally with reference to the expression as it occurs in all the three Articles - 132, 133 and 134, but in the context of the present Article, the commentary is to be read subject to the Explanation.

2. The object of the *Explanation* is to override the decision in *Kuppuswami v. The King*<sup>24</sup> so far as appeals on constitutional questions are concerned. In *Kuppuswami's case*,<sup>24</sup> it was held that an order rejecting an objection as to the validity of a prosecution for want of sanction was not a 'final order'. But it would be a final order for the purpose of an appeal, if a constitutional question was involved, for the *Explanation* says that for the purposes of Art. 132, an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case, would be a final order. If the High Court had allowed an objection that the prosecution was not maintainable, that would have resulted in the final disposal of the case, acquitting the accused-appellant. According to the *Explanation*, therefore, an order rejecting such objection is also a 'final order' for the purposes of Art. 132, though not for the purposes of appeal under Art. 134.

3. Similarly, where constitutional questions are involved, the following orders would constitute 'final orders' for purposes of appeal under Art. 132, though they may not be final orders for the purposes of Art. 133:

(i) An order remanding a suit for hearing on the merits after deciding a preliminary issue as to non-maintainability of the suit.

(ii) In a proceeding under Art. 226 for *mandamus* against the Government, the High Court, while declining to investigate the rights of the parties, passed an order that the Government should refrain from disturbing the Petitioner's possession till three months from the date of the order or one week after the institution of the suit contemplated by the Petitioner. Held, by the Supreme Court, that the order finally disposed of the petition under Art. 226 and the fact that its operation was limited to a particular

21. *State of Mysore v. Chabiani*, A. 1969 S.C. 325 (327).

22. *Than Singh v. Supdt.*, A. 1964 S.C. 1419 (1422).

23. *Darshan Singh v. State of Punjab*, A. 1953 S.C. 83.

24. *Kuppuswami v. The King*, (1947) F.C.R. 180.

period would not make it other than a 'final order', for the purposes of an appeal under Art. 132 against such order.<sup>25</sup>

4. On the other hand, a certificate under the present Article cannot be given against an interlocutory finding, which is not sufficient to dispose of the case.

5. The present Explanation cannot be applied to the interpretation of the words 'final order' in Art. 133.<sup>26</sup>

### Practice and Procedure.

1. The Supreme Court will not entertain a plea which was never raised before the High Court.<sup>3</sup>

2. The Supreme Court would not, in an appeal under this Article, interfere with a finding of fact.<sup>4</sup>

3. The Supreme Court may not entertain an application for special leave under Art. 136 where the applicant could have moved for a certificate under Art. 132 (1).<sup>5</sup>

4. Where several assessment orders were challenged by one petition under Art. 226, and an appeal has been brought before the Supreme Court from the decision in that petition, only one set of court-fee is payable as in a single appeal.<sup>6</sup>

The case would be otherwise where separate applications for reference to the High Court under the Income-tax Act is made but the High Court deals with them by one order of reference.<sup>7</sup>

### 133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

of a High Court in the territory of India if the High Court certifies—

- (a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or
- (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or
- (c) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

25. *State of Orissa v. Madan Gopal*, (1952) S.C.R. 28 (34).

1. *Saifuddin v. State of Bombay*, (1958) S.C.R. 1007.

2. *Banudevamund v. Raghubir*, A. 1956 Pat. 241.

3. *Sudhansustkhar v. State of Orissa*, A. 1951 S.C. 196 (199-200).

4. *Sobhraj v. State of Rajasthan*, A. 1963 S.C. 640.

5. *Hindusthan Commercial Bank v. Bhagwan Das*, (1964) S.C. (C.A. 58/64, d. 26-11-64).

6. *Chandra Bhan v. State of Orissa*, A. 1967 S.C. 767.

7. *Kishinchand v. Commr. of I. T.*, A. 1963 S.C. 390.

**(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the Judgment, decree or final order of one Judge of a High Court.**

### **Art. 133: Civil Appeals.**

1. While Art. 132 is confined to constitutional questions only, but comprises appeals from civil, criminal and other cases, Art. 133 is confined to civil appeals only, on questions *other than the interpretation of the Constitution* [subject to Cl. (2)].

2. This Article lays down, that apart from appeal by special leave under Art. 136 and appeal on constitutional ground under Art. 132, appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, only on the following conditions:

(a) The subject of appeal is a 'judgment, decree or final order'.

(b) The High Court grants a certificate for such appeal:

(i) The certificate is obtained as of right when the value of the subject matter in dispute is not less than Rs. 20,000 (or such sum as may be fixed by Parliament) or some claim or question of like value is involved in such judgment, etc. But in cases where the decree sought to be appealed from is one of *affirmance* of the decree of the immediate lower Court, there is no right of appeal unless the High Court further certifies that some 'substantial question of law' is also involved in the appeal.

(ii) In other cases, *irrespective* of the value of the subject matter or of the fact of *affirmance*, appeal would lie to the Supreme Court if the High Court, in its discretion, certifies that the case is a fit one for appeal to the Supreme Court, *e.g.* by reason of its importance.<sup>1</sup>

3. In an appeal under cl. (a) or (b) of Art. 133, if the conditions laid down in the article are satisfied, the appellant need not show further, that the appeal raises a substantial question of law.<sup>2</sup>

4. The provisions of this Article cannot be overridden or modified.<sup>3</sup>

5. In an application for certificate under this Article the Petitioner must specify the particular sub clause of cl. (b) under which the certificate is asked for.<sup>2</sup>

### **Art. 133 is prospective.**

Art. 133 applies only to decrees and orders passed by High Courts established under the Constitution.<sup>4</sup>

Suits or proceedings instituted prior to the Constitution would be governed by Art. 135, even though the decrees or orders are passed after the commencement of the Constitution.<sup>5</sup>

### **Art. 133 and ss. 109-110, C. P. Code.**

1. The constitutional rights of a litigant under Art. 133 cannot be controlled by anything in ss. 109-110 of the C. P. Code. On a therefore the conditions of Art. 133 (1) are satisfied, a certificate cannot be refused on the ground that the person has no right of appeal, in the circumstances of the case, under ss. 109-110, C. P. Code.<sup>6</sup> In case of conflict between Art.

8. *Udaythan v. Firm Shankar Lal*, A. 1953 M.B. 209 (F.B.).

9-25. *State of Punjab v. Jas Singh*, (1967) S.C. [C.A. 1001/61, d. 32-67]

1. *Moti Das v. Sahi*, A. 1959 S.C. 942 (1951)

2. *Dist. Board v. Tahir*, A. 1959 All. 372 (F.B.).

3. *Daji Saheb v. Shankar Rao*, (1935) 2 S.C.R. 872.

4. *Ganikapati v. Subbiah*, (1957) S.C.R. 688.

5. *Rudra v. Mirtunjay*, A. 1957 All. 29 (32).

133 and ss, 109-110, the former is to prevail.<sup>6</sup> On the other hand, where there is no right of appeal under Art. 133, s. 110 of the C. P. Code cannot be read as supplementing the provisions of Art. 133.<sup>7</sup>

2. While s. 109 of the C. P. Code applies also to 'other Courts of final appellate jurisdiction', Art. 133 is confined only to decisions of the High Court.<sup>8</sup>

3. Under s. 109 (a), appeal lies only from an order 'passed on appeal' by a High Court, but under Art. 133 (1), appeal lies from any 'final order', including final orders in civil revision proceedings, and this provision of the Constitution will now prevail against the narrower provision in the C. P. Code.<sup>7</sup>

4. The words used in s. 110, para. 1, is '...value of the subject-matter of the *suit* in the Court of first instance', while the words in Art. 133 (1) (a) are "...value of the subject-matter of the *dispute* in the Court of first instance."<sup>9</sup>

5. It was held in some cases,<sup>8</sup> that para. 2 of s. 110 was dependent on para. 1 so that there would be no appeal as of right unless the amount or value of the subject-matter of the suit in the Court of first instance exceeded the specified amount. But no such construction is possible under Art. 133, and sub-cl. (b) of cl. (1) cannot but be held to be independent of sub-cl. (a).<sup>9</sup>

6. Under s. 109 (c), the certificate of fitness can be granted in respect of 'any decree or order'. But under Art. 133 (1) (c), the certificate can be granted only if the order is 'final and the decree or final order is passed in a *civil* proceeding. Since the Constitution is to prevail, there is no longer any appeal by a certificate of the High Court from an order in a civil proceeding which is not final.<sup>5,10</sup> The provision to the contrary in s. 109 (c) has become *ultra vires*.<sup>9</sup>

### CL. (1): 'Judgment, decree or final order'.

1. This Article is not confined to suits as distinguished from proceedings. The only condition is that the judgment etc. must be passed in a 'civil proceeding'.

2. Nor need the judgment or order be made by the High Court in its appellate jurisdiction (as s. 109 (a) of the C. P. Code requires).<sup>12</sup> Under the present Article, appeal lies to the Supreme Court from the decision of a High Court whether under its original, appellate or *revisional*<sup>13-14</sup> jurisdiction and even though the law may provide for only one appeal to the Supreme Court.<sup>12</sup>

3. The word 'judgment' itself indicates a judicial decision given on the *merits* of the dispute before the Court,<sup>15</sup> and does not include an *interlocutory* judgment.<sup>16</sup> The omission of the word 'final' to qualify 'judgment' does not make any change.<sup>17</sup>

6. *Ramaswami v. Receiver*, A. 1951 Mad. 1051.

7. *Probst v. Bernhampore Bank*, (1953) 57 C.W.N. 933 (939).

8. *Cf. Champamani v. Yung*, A. 1951 Pat. 177.

9. *Lalima v. Kamal*, A. 1952 Pat. 450.

10. *Prohit v. Subhakaran*, A. 1955 Raj. 208.

11. *Pramatha v. Sanatkumar*, A. 1949 F.C. 69 (62).

12. *Joy Chand v. Kamalaksha*, A. 1949 P.C. 239.

13. *Lalima v. Lakshmikanta*, (1951) 30 Pat. 1274 (1279).

14. *Rudra v. Mirtunjay*, A. 1957 All. 28 (33).

15. *Kuppuswami v. The King*, A. 1949 P.C. 1.

16. *Amin Bhai v. Dominion of India*, A. 1950 F.C. 77.

17. *Tobacco Manufacturers v. State*, A. 1951 Pat. 29 (F.B.).

4. There is no 'judgment' or 'order' where the function of the Court is merely *advisory* or *consultative*,<sup>18</sup> as distinguished from proceedings under its original or appellate jurisdiction.<sup>19</sup> Thus, there is no application of Art. 133 to a decision of the High Court, on a reference under s. 66 of the Indian Income Tax Act,<sup>19, 20</sup> or under s. 21 (3) of the Bihar Sales Tax Act, 1944.<sup>17</sup>

5. Nor can there be a 'judgment, decree or order' within the meaning of the present Article where the High Court exercises a jurisdiction not as a Court but as a *persona designata*,<sup>21</sup> e.g., appeal from an award under s. 19 (1) (f) of the Defence of India Act, 1939, or from an award under the Calcutta Improvement Act, 1911,<sup>22</sup> or under the U. P. Town Improvement Act.<sup>23</sup>

6. 'Judgment, decree or final order' is a compendious expression and each one of the parts of this expression bears the same connotation, viz., that there is a final adjudication by the Court upon the rights of the parties, who appear before it,<sup>24, 25</sup> whether in a civil or criminal proceeding.<sup>4</sup> There is no judgment or final order where there is no determination of any right, e.g.,

(i) An order rejecting a petition under Art. 226 to issue a direction to the Commissioner of Sales Tax to admit the Petitioner's appeal.<sup>1</sup>

(ii) An order under s. 10 of the C. P. Code for the stay of a trial.<sup>2a</sup>

(iii) An order refusing stay of proceedings under s. 19 of the Arbitration Act.<sup>2</sup>

(iv) An order appointing or removing a Receiver,<sup>3</sup> or a provisional liquidator.<sup>4</sup>

### 'Judgment'.

1. This word, in Art. 133, has been used in the sense of a decision finally determining the rights of the parties in the proceeding,<sup>5</sup> and not as defined in the C. P. Code.<sup>26, 27</sup> The decision of a vital issue which may ultimately affect the fate of the proceeding is not enough.<sup>7</sup>

2. It follows that an order which is not 'final' cannot be deemed to be a judgment.<sup>8, 11, 12</sup>

3. In order to be a 'judgment' it must be a *decision* pronounced by a *Court* in a cause which it hears on the merits.<sup>21</sup> Hence, the following are not judgments within the meaning of this Article—

(i) The order of the Court in a proceeding for the filing of an arbitration award, which in substance, is nothing but the adjudication of a private tribunal with the

18. *Premchand v. State of Bihar*, (1950) S.C.R. 799 (1804).

19. *Pehladi v. Commr. of I. T.*, A. 1952 Punj. 299.

20. *Jamnadas v. Commr. of I. T.*, (1952) 54 Bom.L.R. 609; A. 1952 Bom. 479, *Jagannath v. I. T. Commr.*, A. 1956 Hyd 136 (138).

21. *Hanskumar v. Union of India*, A. 1958 S.C. 947.

22. *Sery. of State v. Hindustan Co-operative Ins. Society*, A. 1931 P.C. 149.

23. *Union of India v. Qabool*, A. 1962 Punj. 373.

24. *Mohanlal v. State of Gujrat*, A. 1958 S.C. 733.

25. *Tatapore & Co. v. Tractors Export*, (1968) S.C. [C.M.P. 3981/68, d. 15-11-68].

1. *Hossen Kasam v. State Govt. M. P.*, A. 1962 Nag. 305.

1a. *Central Brokers v. Ramnarayana*, A. 1954 Mad. 1057 (F.B.).

2. *Ramchand v. Goverdhandas*, A. 1920 P.C. 85.

3. *Mangaraju v. Varahamma*, A. 1956 Andhra 47.

4. *Jhavar v. Punjab Pictures*, A. 1949 E.P. 261.

5. *Kuppuswami v. The King*, A. 1949 F.C. 1.

6-11. *Saifuddin v. State of Bombay*, A. 1956 S.C. 253.

12. *Amin Bros. v. Dominion of India*, A. 1960 F.C. 77.

imprimatur of the Court stamped on it.<sup>13</sup> An order of the High Court in appeal from an award in an arbitration proceeding is also not a 'judgment, decree or final order'.<sup>10</sup>

(ii) The decision of the High Court in its consultative or advisory jurisdiction, e.g., answering certain questions of law referred to under an Income-tax Ordinance.<sup>14</sup>

### 'Decree'.

This word, in Art. 133 (1), includes both preliminary and final decrees. Hence, appeal lies to the Supreme Court from both.<sup>15</sup> Certain questions are finally determined by a preliminary decree.<sup>15</sup>

### 'Final order'.

1. An order is final only if it satisfies the following tests:<sup>16</sup>

(a) That it is not interlocutory;<sup>17</sup>

(b) That it should not leave the original proceeding alive;<sup>17</sup>

(c) That there should be a final determination of the rights of the parties or should of its own force<sup>18</sup> dispose of the rights of the parties.<sup>19</sup>

2. It must be an order which finally determines the points in dispute in the civil proceeding and brings it to an end.<sup>19</sup> The test for determining the finality must be in relation to the suit; the fact that the order decides an important or vital issue is by itself immaterial unless that decision puts an end to the suit<sup>12</sup> or proceeding.<sup>19</sup> In order to be final, the controversy raised in the suit or proceeding must be finally over.<sup>20</sup>

Hence, no certificate under s. 133 (1) is available against the following orders—

(i) An order of the High Court remanding a suit<sup>21</sup> for retrial<sup>19</sup> or an execution petition for further proceeding holding that it is not barred by limitation<sup>22</sup> or *res judicata*.<sup>23,25</sup>

But an order remanding a suit may be a final order and appealable under Art. 133 (1), if it is made after finally determining *all the material issues*,<sup>1</sup> and practically directing the lower Court to draw up a decree in terms of the order of remand.<sup>2,3</sup>

(ii) An order deciding a preliminary issue.<sup>4</sup>

(iii) An appellate order, directing the lower Court to entertain an application filed under O. 9, r. 9, treating it as one under O. 47, r. 1.<sup>5</sup>

(iv) An appellate order, reversing the dismissal of a suit under s. 92 of the C. P. Code, and directing a scheme for management of the property in suit.<sup>6</sup>

(v) An order rejecting an application for leave to appeal in *forma pauperis*.<sup>7</sup>

13. *Hanskumar v. Union of India*, A. 1958 S.C. 947.

14. *Commr. of I. T. v. Patel & Co.*, A. 1960 S.C. 278 (280).

15. *Cf. Rahimbhoy v. Turner*, (1891) 15 Bom. 155 P.C.

16. *Bhagwan v. I. T. O.*, A. 1958 All. 800 (802).

17. *Tatapore & Co. v. Tractors Export*, (1968) S.C. [C.M.P. 3981/68, d. 15-11-68].

18. *Premchand v. State of Bihar*, (1960) S.C.R. 799; A. 1961 S.C. 14.

19. *Jeihanand & Sons v. State of U. P.*, A. 1961 S.C. 794.

20. *Deshpande v. Gendalal*, A. 1966 S.C. 1445.

21. *Abdul Rahman v. Cassim & Sons*, A. 1933 P.C. 5.

22. *Sindhuram v. Krishna Dutta*, A. 1951 Assam 73.

23-25. *Daulat Ram v. Swami Dayal*, A. 1955 All. 252; *Basudevanand v. Raghubir*, A. 1954 Pat. 241.

1. *Gurdwara Prabandhak Committee v. Shiv Rattan*, A. 1955 S.C. 676 (582).

2. *Venkayya v. Venkatarama*, A. 1936 Andhra 126.

3. *Savitri v. Raju*, A. 1961 All. 245 (253).

4. *Taher v. State of Bombay*, A. 1958 S.C. 253.

5. *Rajeswara v. Venkataramanadao*, A. 1961 A.P. 310.

6. *Mohammad v. Enaytullah*, A. 1951 Mys. 104.

7. *Jagat Ram v. Ganga*, A. 1951 Punj. 30.

(vi) An order setting aside a compromise decree and directing the trial Court to dispose of the suit on merits.<sup>8</sup>

(vii) An order refusing to grant an interim injunction.<sup>9</sup>

(viii) Where there has been a reference to arbitration in a suit, an order of the Court deciding that there was a valid arbitration agreement or an order refusing to revoke the authority of the arbitrator.<sup>10</sup>

(ix) An order refusing to stay a suit under s. 19 of the Arbitration Act.<sup>11</sup>

(x) An order under s. 34 of the Arbitration Act, 1940.<sup>12</sup>

(x) An order dismissing an application under s. 66 (3), of the Income-Tax Act to direct the Commissioner of I. T. to state a case.<sup>13</sup>

2. In order to be 'final', the order must, in its own force, bind or affect the rights of the parties.<sup>14</sup>

On this principle, the following are *not* final orders—

(i) An order of the High Court dismissing an application under s. 21 (3) of the Bihar Sales Tax Act, 1944, to direct the Board of Revenue to state a case and refer it to the High Court is not a 'final order', because the order of the High Court, standing by itself, does not affect the rights of the parties, and the final order in the matter is the order which will be ultimately passed by the Board of Revenue.<sup>14</sup>

(ii) An order dismissing an application under Art. 226 of the Constitution for issuing a direction to the Commission of Sales Tax to admit an appeal without deposit of the tax assessed as required by s. 22 (1) of the C. P. & Berar Sales Tax Act, 1947, is not a final order, because it does not determine the rights of the parties in the appeal, but merely decides the question whether the appeal can be prosecuted without depositing the tax assessed as required by the statute.<sup>15</sup>

(iii) An order dismissing an application under Art. 226 *in limine*, e.g., on the ground that it is not maintainable,<sup>16</sup> or that there was an alternative and convenient remedy,<sup>17a</sup> because such order of dismissal does not determine the rights of the parties but leaves them to be agitated in appropriate proceedings.<sup>16b</sup>

(iv) An order refusing to restore an appeal, dismissed for default, for, the right of the parties had already been disposed of by dismissal of the appeal for default. The order complained of only refused to allow the matter to be re-agitated.<sup>16, 17</sup>

(v) An order appointing or removing a receiver; for, such order does not affect the rights of the parties at all but merely relates to the preservation of the estate during pendency of the suit.<sup>18, 20</sup> For the same reason, an order made in an appeal filed against an order directing the appointment of a receiver is not a final order.<sup>21, 22</sup>

(vi) An order rejecting an application for excusing delay, under s. 5 of the Limitation Act.<sup>23</sup>

8. *Yasin v. Himmat*, A. 1952 Ajmer 15.

9. *Tarapore & Co. v. Tractors Export*, (1968) S.C. [C.M.P. 3981/68, d. 15-11-68].

10. *Union of India v. Gopal Singh*, (1967) S.C. [C.A. 1635/66, d. 27-7-67].

11. *Ramchand v. Govardandas*, A. 1920 P.C. 86.

12. *Gaya Electric Suppl. Co. v. State of Bihar*, (1951) 30 Pat. 853; A. 1951 Pat. 619.

13. *Jamnadas v. Commr. of I. T.*, A. 1952 Bom. 479.

14. *Premchand v. State of Bihar*, (1950) S.C.R. 799; A. 1951 S.C. 14.

15. *H. K. Dadg v. State Government*, A. 1952 Nag. 305.

16. *Viswanathan v. Abdul*, A. 1960 Mys. 261.

16a. *Deshpande v. Gendalal*, A. 1966 S.C. 1445.

16b. *Dhanalakshmi v. I. T. O.*, A. 1958 Mad. 151.

17. *Mohammad Hassan v. Govt. of U. P.*, A. 1965 All. 457; *Janaki v. Sritangammal*, A. 1953 Mad. 38.

18. *Rayarappan v. Madhavi*, A. 1950 Mad. 215.

19. *Viswanath v. Kanakmal*, A. 1953 M.B. 204.

20. *Madangopal v. State of Orissa*, A. 1955 Orissa 71.

21. *Mangaraju v. Varahamma*, A. 1955 Andhra 47.

22. *Narasimha v. Venugopala*, A. 1955 Andhra 159.

23. *Chandammul v. Mohanlal*, A. 1953 Mad. 727; *Purnendu v. Kanai*, (1948) 2 Cal. 202.



(vii) An appellate order of the High Court reversing the order of the trial Court recording a compromise.<sup>24</sup>

(viii) An order under s. 116 of the C. P. Code refusing to interfere with the decision of the lower Court as to whether the notice under s. 80 was valid.<sup>25</sup>

(ix) An order for appointment of an arbitrator.<sup>2</sup>

(x) An order returning a memorandum of appeal for presentation to set aside an *ex parte* decree.<sup>3</sup>

3. On the other hand, where the order finally disposes of the matter, the fact that the operation of the order is limited to a certain period does not prevent the order from being final.<sup>4</sup> Nor is it essential that there should be a speaking order.<sup>5</sup> An order may be final for one purpose and interlocutory for another or final in one part and interlocutory in another part.<sup>6a</sup>

The following are instances of final order—

Where the order of an inferior tribunal is quashed or affirmed, under Art. 226, on the ground of jurisdiction of the tribunal.<sup>5</sup>

4. The finality may be with respect to a proceeding subsequent to the suit. Hence, the following is a final order—

An order dismissing an appeal for default.<sup>6</sup>

### Civil Proceedings<sup>7</sup>.

1. Generally speaking, a proceeding is a civil proceeding only if it relates to a civil right,<sup>7</sup> whether resting on common law or created by statute.<sup>7</sup>

"The nature of the proceeding ... depends not upon the nature of the tribunal which is invested with an authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc".<sup>7</sup>

The expression covers all proceedings which directly affect civil rights.<sup>8</sup>

2. Since the test of a 'civil proceeding' is the nature of the right which is sought to be enforced, a proceeding other than a suit may also be a civil proceeding for the purposes of Art. 133, e.g.,—

(i) A proceeding under Art. 226 of the Constitution against a revenue authority which seeks to levy a tax<sup>9</sup> or threatens other action affecting the civil rights of the Petitioner.<sup>7</sup>

(ii) An order under Art. 227, with respect to a decision of the Election Tribunal.<sup>10</sup>

3. It has thus been settled that a proceeding under Art. 226 of the

24. *Savitri v. Rajul*, A. 1961 All. 245 (F.B.); *Somendra v. Tarubala*, A. 1925 Cal. 857; *Shanker v. Narsinha*, A. 1922 Bom. 383.

25. *State of Madras v. U. P. Agencies*, A. 1955 Nag. 287.

1. *Union of India v. Naliniranjan*, A. 1955 Cal. 257.

2. *Mukunda v. Bidhan*, A. 1960 Cal. 77.

3. *Ramaswami v. Ramenathan*, A. 1942 Mad. 357.

4. *State of Orissa v. Madanlal*, (1952) S.C.R. 28 (34).

5. *Deshpande v. Gendalal*, A. 1966 S.C. 1445.

5a. *Mohanlal v. State of Gujarat*, A. 1968 S.C. 733 (735).

6. *Ganesh v. Mahna*, A. 1948 All. 375.

7. *Narayan v. Ishwari*, A. 1955 S.C. 1818 (1821).

8. *Arbind v. Nand Kishore*, A. 1968 S.C. 1227.

9. *State of U. P. v. Nigam Bros.*, (1965) S.C. [C.A. 803/64, d. 29-11-65].

10. *CJ. Tirth v. Bachhitler Singh*, A. 1955 S.C. 830.

Constitution will be a 'civil proceeding' where the action which is challenged affects the civil rights of the Petitioner.

On this principle, the following have been held to be or treated as 'civil' proceedings:

An application under Art. 226 -

(i) For a writ to quash an order terminating the Petitioner's service.<sup>11-17</sup>

(ii) For a writ to quash a reference to an Industrial Tribunal under Industrial Disputes Act<sup>18</sup> or to quash an order of the Regional Transport Authority in the matter of granting a State Coach permit;<sup>19</sup> or to quash an order of the State Government under s. 64A of the Motor Vehicles Act, setting aside the order of a Regional Transport Authority.<sup>20</sup>

(iii) For a writ to quash an order of the Board of Revenue in relation to a proceeding for ejectment,<sup>21</sup> or an order relating to allotment of land under the Administration of Evacuee Property Act, 1950.<sup>22</sup>

(iv) For a writ to quash proceeding under the Taxation of Income (Investigation Commission) Act, 1947.<sup>23</sup>

(v) For a writ sought on the ground that the Bombay Taluqdari Tenure Abolition Act, 1949, was unconstitutional.<sup>24</sup>

(vi) For a writ to compel Government to grant a mining lease;<sup>25</sup> or to reconsider the question of making a reference to an industrial Tribunal;<sup>26</sup> or to set aside a decision of an Industrial Tribunal.<sup>27</sup>

4 There are some proceedings which are deemed to be 'civil proceedings' by reason of statutory provisions e.g., appeal from order of Election Tribunal under s. 116A of the Representation of the People Act, 1950.<sup>4</sup>

5 A civil proceeding is distinguished from a criminal proceeding which, if carried to its conclusion, may result in the imposition of sentences, such as death, imprisonment or fine or forfeiture of property." But the whole area of proceedings which reach a High Court is not exhausted by classifying them as civil or criminal. There are certain proceedings which are neither civil nor criminal, e.g. -

(i) a proceeding for contempt of court;<sup>5</sup>

(ii) disciplinary proceedings against lawyers or other professionals, such as Chartered Accountants.

### 'High Court'.

1 In order to constitute a 'judgment' or 'order' of a High Court under this Article, the jurisdiction of the High Court must be as a Court and

11-17 *Ramayya v State of Madras*, A. 1952 Mad 300; *State of U. P. v Muktar Singh*, A. 1957 All 503 (522).

18. *Cf D. C. Bork v. State of Saurashtra*, A. 1957 S.C. (267).

19. *Ramayya v State of Madras*, A. 1952 Mad 300.

20. *Raman & Raman v State of Madras*, A. 1956 S.C. 463.

21. *Inda Devi v. Board of Revenue*, A. 1957 All 116.

22. *Keshu Singh v. Custodian-General*, A. 1959 Punj 58.

23. *Rashid & Son v. I. T. I. Commr.*, (1954) S.C.R. 738.

24. *Dhirsabha v. State of Bombay*, A. 1955 S.C. 47.

25. *State of Bombay v. Krishnan*, A. 1960 S.C. 1222.

1. *N. U. C. Employees v. Industrial Tribunal*, A. 1962 S.C. 1080.

2. *Tirth Singh v. Bachittar Singh*, A. 1955 S.C. 830; *Budhinath v. Manilal*, A. 1960 Pat. 861 (F.B.).

3-4. *Kishore v. Raghunath*, A. 1960 Orissa 1 (2).

5. *Narayan v. Ishwarlal*, A. 1956 S.C. 1818 (1821).

not as a *persona designata*, e.g., as an appellate authority from the decision of an arbitrator where no appeal would have lain under the general law.<sup>6</sup>

2. Decisions by the High Court under the following jurisdictions have been held to be judgments of the High Court, within the meaning of Art. 133 (1)—

- (i) Appeal under s. 76 of the Trade Marks Act.<sup>7</sup>
- (ii) Appeal from orders of Election Tribunals under s. 116A, Representation of the People Act, 1951.<sup>8</sup>

### **Sub-clause (a): Value of the subject-matter.**

1. Under clause (a), the pecuniary value of the suit in the Court of first instance as well as that of the subject-matter of appeal to the Supreme Court must be Rs. 20,000/- or upwards.<sup>9</sup> Both the requirements must be fulfilled separately.<sup>11,12</sup> Where the value of the claim in the plaint filed in the Court of first instance is less than the specified sum, the plaintiff cannot be allowed to increase that valuation at the time of applying for leave to appeal.<sup>9,10</sup>

2. 'Subject-matter of dispute' means the cause of action, that is, the right which one party claims as against the other and demands the judgment of the Court upon.<sup>13</sup>

### **Whether an appellant can be allowed to change the value given in his plaint for the purposes of appeal.**

1. It has already been stated that, ordinarily, the valuation in the plaint determines the valuation of the subject matter of the suit for the purposes of appeal. A plaintiff, who sets a lower value on a claim which he is required to value according to the real or market value, cannot be permitted to change it subsequently because this would amount to approbation and reprobation.<sup>10</sup>

The test to be applied for invoking this principle is whether the party who seeks to vary the earlier valuation has obtained an advantage on the basis of the earlier valuation.<sup>11</sup> Thus—

(i) Where during the pendency in the High Court, the valuation is increased by the appellant, and the respondent does not object to such increase and obtains costs on the basis of such increased valuation, he cannot object to an appeal to the Supreme Court on the ground that the correct value was less than the revised value upon which he had obtained costs.<sup>12</sup>

(ii) On the same principle, when one party revises the original valuation for the purposes of appeal to the High Court, without objection from other party, the latter cannot resist an appeal to the Supreme Court on the plea that the revised valuation is incorrect.<sup>14</sup>

(iii) Where the suit is required to be valued according to a certain standard, say, the *market value*, not by some fiscal statute such as the Court

6. *Hanskumar v. Union of India*, A. 1958 S.C. 947.

7. *National Sewing Thread Co. v. Jones*, (1953) S.C.R. 1028.

8. *Lakmi Shankar v. Sripal*, A. 1960 All. 548.

9. *Chitermal v. Pennalal*, A. 1955 S.C. 1440 (1442).

10. *Kesavan v. Philip*, A. 1964 S.C. 164.

11. *Annapurna Cotton Mills v. Bhaduri*, A. 1958 Cal. 187 (190).

12. *Cf. Brajmandar v. Rajendra*, A. 1941 Pat. 269.

13. *See — Hareman v. Hareman* (1874) 1 I.A. 84.

fees Act, but by some statute affecting jurisdiction, such as the Suits Valuation Act,—

(a) the plaintiff cannot be allowed to urge, for the purposes of appeal to the Supreme Court, that the real value was higher than that stated in the plaint,<sup>14</sup>

(b) if the defendant does not object to the valuation made in the plaint and obtains advantage of the suit being tried in a lower forum, the defendant, cannot, while applying for leave to the Supreme Court, urge that the real value of the suit was higher.<sup>15</sup>

2 On the other hand, since the 'value of the subject matter', in the present context, means the real or market value, where the Court-fees or the Suits Valuation Act prescribes a valuation on a basis *other than* that of the market value,<sup>16-17</sup> no question of estoppel arises in such a case,<sup>18-20</sup> and the High Court may direct an inquiry for determining the market value in the proceeding under Art. 133.<sup>21</sup>

(a) In a suit for *specific performance*, while the amount of consideration in the contract of sale is the value of the court-fees, the value for purposes of appeal is the market-value of the property contracted to be sold, at the time of institution of the suit and at the time of the decree of the High Court.<sup>22,23</sup>

(b) In a suit for a declaration with consequential relief (where the Court-fees Act or the Suits Valuation Act allows the plaintiff to put his own valuation), the appellant (whether plaintiff or defendant) is entitled to show that the market value of the property for the purposes of appeal<sup>24</sup> exceeds the amount prescribed by Art. 133 and that he is entitled to appeal as of right.

This principle is, however, *subject to the following limitation*.

Neither party can depart from the original valuation where there has been a judicial determination of the correctness of the original valuation, so as to attract the principle of *res judicata*.<sup>25</sup> Thus,

By reason of O. VIII, r. 2, C. 1 Code the defendant cannot, for the purposes of appeal, urge a value which would have thrown out the case from the jurisdiction of the trial Court, because the defendant was bound to plead in his written statement all points which would have rendered the suit not maintainable.<sup>26</sup>

### 'Value of the subject-matter of the dispute in the Court of first instance.'

1 This expression means the value of the subject-matter at the time of institution of the suit.<sup>27</sup> Hence, —

Mesne profits and interest *subsequent* to the institution of the suit,<sup>28</sup> though awarded by the decree, or costs<sup>29</sup> cannot be added in computing the

14. *Kunju Kisharan v. Philip*, A. 1961 S.C. 164 (166).

15. *Prabrendra v. Bithampore Bank*, (1953) 57 C.W.N. 933 (941).

16. *Mahendra v. Janaki*, A. 1931 Cal. 417; *Radhika v. Midnapore Zamindary*, A. 1937 Cal. 292.

17. *Jaratonnuszu v. Fazul Rahman*, A. 1955 Assam 126; *Govindbhai v. Dahyabhai*, A. 1937 Bom. 326.

18. *Haramani v. Balaram*, A. 1967 Orissa 109.

19. *Kupanna v. Peruma*, A. 1961 Mad. 511 (F.B.).

20. *Kashi Prasad v. Rajju*, A. 1953 Pat. 24 [contra *Muggeram v. Kaldas* (1955) 59 C.W.N. 681].

21-25. *Rajendra v. Raskbhar*, A. 1931 P.C. 125.

1. *Chittamal v. Pannalal*, A. 1965 S.C. 1440 (1442).

value of the suit in the Court of first instance.<sup>2</sup> For the same reason, increase in the market value of the property during pendency of the suit cannot be taken into consideration for the purpose.<sup>3</sup>

2. Ordinarily, the value of the claim made in the plaint represents the value of the dispute in the Court of first instance.<sup>4-5</sup> Thus,—

The value of the subject-matter is—

(a) In a suit on *mortgage*,—the mortgage money or the amount of loan, and not the value of the property given as security.<sup>6-7</sup>

(b) In a suit for *redemption*,—the amount of loan or the price of redemption, and not the security given for the loan.<sup>4</sup>

(c) In a *partition suit*,—value of the share claimed and not that of the entire property.<sup>8</sup>

### 'Court'.

In Art. 133 (1), the 'Court of first instance' refers to a 'Civil Court'.<sup>9-10</sup> Hence, it does not include—

(i) An arbitrator.<sup>9</sup>

(ii) A Rent Controller.<sup>10</sup>

### 'Value of the subject-matter in dispute on appeal'.

1. This expression refers to the value of the *issue* between the parties in appeal, which may not always be identical with the value of the suit.<sup>11</sup> It does not mean the amount or the value of the subject-matter of all disputes between the parties but that of what is in stake in the appeal itself.<sup>12</sup> The material date for the valuation is the date of the decree or order appealed from,<sup>13-14</sup> and the value is the portion of the decree sought to be got rid of by appeal to the Supreme Court from the point of view of the appellant.<sup>12, 15</sup>

2. If a suit raises between two co-defendants an issue different from the issue between the plaintiff and the defendants, as between the co-defendants the value of the subject-matter of dispute will be the value of the issue in which they are interested *inter se*.<sup>16</sup>

### Whether appellant entitled to consolidate appeals for raising value.

1. Where the requisite conditions for consolidation under O. 45, r. 4, C. P. Code are satisfied, an appellant is entitled to an order for consolidation of appeals for the purpose of showing that the value of the appeal is higher than what would have been the value if the appeals were considered individually.<sup>16</sup>

2. *Dy. Commr. v. Rama Krishna*, A. 1954 S.C. 521; *Shevantibai v. Janardan*, A. 1944 P.C. 65.

3. *Radhakrishnan v. Ramchandra*, A. 1964 Nag. 267.

4. *Kesavan v. Philip*, A. 1964 S.C. 164.

5. *Gopalan v. Commr., H. R. E.*, (1966) S.C. [C.A. 230/64].

6. *Vishwanath v. Siremal*, A. 1955 M.B. 66.

7. *Satiabala v. Chotanagpur Banking Assoc.*, (1948) I.L.R. 27 Pat. 237; A. 1949 Pat. 448.

8. *Shevantibai v. Janardan*, A. 1944 P.C. 65.

9. *Balesubramania v. Radhakrishnamurthi*, A. 1959 Mad. 741; (1959) Mad. 254.

10. *Jatiya Estate v. B. C. & Co.*, (1966) 60 C.W.N. 927.

11. *Prabirendra v. Berhampore Bank*, A. 1954 Cal. 289 (292-3); 57 C.W.N. 933.

12. *Rajaram v. Radhakrishnayya*, A. 1961 S.C. 1795 (1800).

13. *Kishore v. Chorani*, A. 1960 A.P. 286 (289) F.B.

14. *Brij Mohan v. Bhumeswar*, A. 1941 Pat. 255 (F.B.).

15. *Appalanarayana v. Rajagopala*, A. 1966 A.P. 13 (15).

16. *Lakshminarasimha v. Ratnam*, A. 1949 Mad. 739 (F.B.).

17. *Balanayya v. Varadarejulu*, I.L.R. (1939) Mad. 593.

2. But the fact that there was a question common to a *number of suits* would not entitle an appellant to an order for consolidation if there were other questions which were not common<sup>17</sup>. Further, if the suits have been decided by *separate* judgments, there can be no consolidation under O. 45, r. 4, C. 1<sup>18</sup> Code<sup>18</sup>.

3. In the case of a *suit* comprising several *items of property* in which different defendants are interested, and such defendants prefer separate appeals, the aggregate value of all the items in dispute shall be the value for purposes of appeal, because the subject matter in dispute is one<sup>22</sup>. The appeals would, however, be treated separately where each of the several appellants sued or was sued in respect of some distinct or *unrelated cause of action*, in which case, the subject matters in dispute in appeal would be more than one.<sup>19</sup>

**Sub-clause (b): 'Question respecting property of the like amount or value'.**

1. Under sub-cl (a) what is decisive is the amount or value of the subject matter in the court of first instance and 'still in dispute' in appeal to the Supreme Court, under sub-cl (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from.<sup>2</sup>

2. Having regard to the use of the word *money*, the word 'property' would apparently include money. But the property in respect of which the claim or question arises must be property *in addition to or other than* the subject matter of the dispute.

11. In a proposed appeal there is no claim or question raised respecting property other than the subject matter, sub-cl (a) will apply. (ii) If there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 *in addition to or other than* the subject matter of the dispute sub-cl (b) will apply. If the value of such other property involved is less than Rs. 20,000, sub-cl (b) cannot apply.<sup>21</sup> Value of the property refers to the value at the date of the decree or order.<sup>22</sup>

3. Sub-clause (b) would also apply where the claim itself is incapable of money valuation *e.g.*, *credentia* but the property to which it relates has a value of Rs. 20,000/ or above.

The following suit has been held to come under this head—

A suit for a declaration that the defendant was not pregnant at the time of her husband's death and that her alleged posthumous child was not the son of her husband.<sup>3</sup>

4. Unlike the second part of Art. 110 of the C.P. Code, sub-cl (b) of Art. 133 (1) of the Constitution is to be read independently of sub-clause (a) of the Art, so that sub-cl (b) will be satisfied if the judgment of the High Court indirectly involves a question respecting property the value of not less than Rs. 20,000, even if the value of the subject matter in dispute in the Court of first instance was less than that and also that in view of

18. *Aisha v. Kundan*, A. 1946 All 181.

19. *Pethu v. Rajambai*, A. 1948 P.C. 97.

20. *Chittarnul v. Pannamul*, A. 1965 S.C. 1140 (111).

21. *Birbal v. Sohanlal* (1968) S.C. [CA 1035/66, d. 23.9.69].

22. *Surendra v. Dwarka* (1917) 44 Cal 119.

23. *Central Talkies v. Dwarka Prasad*, A. 1956 All 348.

24. *Lalubhai v. Bhimbhai*, A. 1929 Bom 541.

25. *Kastar Singh v. Ramkumar*, A. 1963 Pat 377.

1. *Amarsingh v. Karnail*, A. 1956 Raj. 168.

conflict between s. 110 of the C. P. Code and Art. 133 (1) (b) of the Constitution, the latter must prevail. This means that a certificate under art. 133 can now be claimed under *any one or more* of the three paragraphs marked (a), (b) and (c), principally or in the alternative and it is not necessary to satisfy the requirements of para. (b) as an alternative to the restriction 'the amount or value of the subject matter...twenty thousand rupees'.<sup>2-6</sup>

**'Involves directly or indirectly'.**

It is not easy to give clear-cut answer to the question whether any claim or question to property is directly or indirectly involved in a suit, though it is obvious that the connection between the decree or order and the property must not be too remote.<sup>7</sup>

(A) In the following cases, it has been held that such a question was involved—

(i) A decree for mandatory injunction for demolition of property of the specified value, though the suit itself was valued at a nominal sum.<sup>8</sup>

(ii) A decree involving construction of a deed of gift or validity of an award respecting property of the specified value, though the value of the subject-matter of the suit in which the decree was passed was a lesser sum.<sup>9</sup>

(iii) A petition for amendment of a decree under s. 152, C. P. Code, is not a continuation of the suit but is an independent proceedings.<sup>10</sup> The present clause would be satisfied, for the purposes of appeal from an order passed on such petition, if the value of the decree which is sought to be amended exceeds the specified amount.<sup>11</sup>

(B) In the following cases, on the other hand, it has been held that *no* such claim or question was involved—

(i) A decree refusing to set aside an award of a lower value, though, had the award been set aside, plaintiff could have proceeded with a suit for damages for breach of contract valued at the above specified sum.<sup>12</sup>

(ii) A decree refusing a right of irrigation of agricultural lands, where the injury resulting from such refusal is less than the specified value, even though the value of the property itself may exceed that sum.<sup>13</sup>

(iii) An order as to the lunacy of a person under Sec. 63 of the Lunacy Act even though the property of the person concerned was worth more than the specified sum.<sup>14</sup>

(iv) A suit for declaration as to status, e.g., trusteeship<sup>15</sup> or adoption.<sup>16</sup>

(v) In a suit for partition, it is the value of the share claimed by the plaintiff, and not the value of the entire joint property, that determines the right of appeal under sub-clause (a) as well as (b).<sup>16, 17</sup>

(vi) In a suit for redemption, the mere fact that if the loan is not

2-6. *Lalmina v. Lakshmikanta*, (1951) 30 Pat. 1274 (1281); Cf. *Champamani v. Yunus*, A. 1951 Pat. 177; *Narany v. Jivram*, A. 1952 Kutch 29.

7. *Udoychand v. Guzdar*, A. 1925 P.C. 159.

8. *Amar v. Shosi*, (1904) 31 Cal. 305 (P.C.).

9. *Sri Kishan v. Kashmitao*, (1913) 25 All. 445.

10. *Ganpat Raj v. Aggarwal Chamber of Commerce*, (1953) S.C.R. 730 (756).

11. *Rudra v. Mirlunjay*, A. 1957 All. 28 (35).

12. *Udoychand v. Guzdar*, (1925) 52 I.A. 207.

13. *Appala v. Rangappa*, A. 1918 Mad. 632.

14. *Rukmani v. Ramkishan*, A. 1950 All. 242.

15. *Lakshman v. Rupkumar*, A. 1953 Ajmer 15.

16. *Shepantibai v. Janardhan*, A. 1944 P.C. 65.

17. *Vankataswami v. Manikyam*, A. 1951 Mad. 723.

repaid by the time fixed by the decree, the mortgaged property will be sold, does not raise any question 'affecting the security'.<sup>18</sup>

(iii) A claim for reinstatement in service is not a claim respecting property even though there might be a claim for compensation exceeding Rs. 20,000/- if the claim for re-instatement was decided in favour of the appellants.<sup>19</sup> An appeal from an order refusing to quash an order of dismissal cannot be brought under this clause also on the ground that even though Government might reinstate him, it did not follow that he would be entitled to recover his pay and allowances.<sup>20</sup>

### 'Property'.

1. There was a conflict of views as to whether the word 'property' in cl. (b) relates to property other than that which is the subject-matter of the suit or it also includes the property in dispute in the suit.

(A) The Andhra,<sup>21</sup> Bombay,<sup>22</sup> Calcutta,<sup>23</sup> Nagpur,<sup>24</sup> Orissa,<sup>25</sup> High Courts were of the view that 'property' in this clause refers to some claim or decision respecting property additional to or other than the actual subject-matter in dispute. It refers to the *effect* of the judgment appealed against which may be detrimental to a property of the appellant which may not be comprised in the cause of action in the suit.<sup>26</sup> It is the value of such detriment, irrespective of the value of the property in suit, which governs the valuation in this case.<sup>26</sup>

(B) The Allahabad<sup>27</sup> and the Orissa<sup>28</sup> and Patna<sup>29</sup> High Courts in some earlier cases have taken the view that while in sub-cl. (a) it is the 'value of the subject-matter' which is the criterion, sub-cl. (b) relates to a case where the value of the claim is different from the property to which it relates. In such cases, it is the value of the property which governs the right to appeal. The controversy appears to be settled by the Supreme Court,<sup>3</sup> in favour of the former view, in these words—

"Under cl. (a) what is decisive is the amount or value of the subject-matter in the court of first instance and "still in dispute" in appeal to the Supreme Court: under cl. (b), it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The expression 'property' is not defined in the Code but having regard to the use of the expression 'amount' it would apparently include more. But the property respecting which the claim or question arises must be property in addition to or other than the subject-matter of the dispute. If in a proposed appeal there is no claim or question raised respecting property other than the subject-matter, cl. (a) will apply if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject-matter of the dispute cl. (b) will apply."

Thus,

(1) In a suit for ejectment from land by removal of buildings standing thereon, appeal lies under sub-cl. (b) if the value of the buildings exceeds

18. *Gobindbhai v. Davabhai*, A. 1938 Bom. 326; *Kesavan v. Philip*, A. 1964 S.C. 164.

19. *State of Bihar v. Ganguly*, A. 1958 Pat. 26.

20. *Ghouse v. State of A. P.*, A. 1960 A.P. 194 (195).

21. *Gobindbhai v. Davabhai*, A. 1227 Bom. 326.

22. *Kishore v. Chorani*, A. 1960 A.P. 286 (290) F.B.

23. *Ram Baran v. Ram Mohit*, A. 1961 Cal. 537.

24. *Seth v. Lachman*, A. 1929 Nag. 75.

25. *Vysvazaju v. Provas*, A. 1962 Orissa 154.

1. *Chittamal v. Umrao*, A. 1965 S.C. 1440 (1442).



the specified amount,<sup>2-8</sup> even though the value of the lands forming the tenancy be less.<sup>4</sup>

(ii) In a suit for rent, the amount decreed may be small, but where the defendant's plea that the tenancy had been transferred by him was negatived by the decree, the value of the recurring liability of the defendant may be above the appealable value.<sup>5</sup>

(iii) In a suit to enforce an annuity, it is the amount of annuity sought to be recovered and not the value of the property upon which it is charged, which governs the valuation for appeal.<sup>6</sup>

On the other hand,—

If, in a suit for recovery of money retained by an agent, the specified sum is less than Rs. 20,000/-, it cannot be urged that appeal would lie under sub-cl. (b) because there is a claim for taking accounts so that the sum ascertained by such accounting may exceed Rs. 20,000/-, for the claim for accounting is not in addition to the property in dispute.

2. 'Property' is wide enough to include money.

### Scope of Sub-cl. (c).

(i) Where the decree appealed from is one of affirmance, no appeal will lie to the Supreme Court unless the High Court certifies on two points — (a) that the case is a fit one for appeal to the High Court; (b) that the appeal involves some substantial question of law.

(ii) Where the decree is *not* one of affirmance, the certificate required is one of 'fitness'. But the mere presence of a substantial question of law is not enough for such certificate: it would be granted only if the subject matter of dispute, though of great public or private importance is not capable of money valuation.<sup>10</sup>

### Judgment or Decree of Affirmance.

1. Under sub cls. (a) and (b), if the decree of the High Court is one of affirmance, there is no appeal to the Supreme Court unless the High Court also certifies that the appeal involves a substantial question of law.

2. 'Decree', in this context, means the decree of the appellate Court in its entirety and not merely that part of the decree which is sought to be challenged in the appeal before the Supreme Court. In determining the character of the decree 'appealed from', it is necessary to take the appellate decree as a whole and enquire whether it is a decree of affirmance or not,<sup>11</sup> comparing it with the decree of the trial Court as a whole.<sup>12</sup>

3. A decision is said to be 'affirmed' within the meaning of this clause when simply the *decree* (i.e., the *result* of the suit of the Court below) is affirmed, it is not necessary that the *reasons* or *grounds* of decision or the

2. *Maneklal v Hormusji*, A. 1945 Bom. 113.

3. *Derasikamoney v Pallaniappa*, (1911) 30 Mad. 335.

4. *Central Talkies v. Dwarka Prasad*, A. 1956 All. 348.

5. *Surapati v. Ram*, A. 1923 P.C. 88.

6. *Abid Hussain v. Amad Hussain*, A. 1923 P.C. 102.

7. *Nadir Hussain v. Municipal Bd.*, A. 1937 All. 169; *Md. Ashkar v. Abida*, A. 1933 All. 177.

8. *Haramani v. Balaram*, A. 1957 Orissa 109.

9. *Isvari Prasad v. Kameshwar*, A. 1941 Pat. 288.

10. *Brijendra v. Debendra*, (1967) S.C. [C.A. 22/65, 21-11-67].

11. *Moolji v. Khandesh Spinning Mills*, A. 1960 P.C. 63; *Amin Bros v. Dominion of India*, A. 1950 F.C. 77.

12. *Rajaram v. Radhakrishnayya*, A. 1961 S.C. 1795 (1798; 1800).

finding must all be affirmed.<sup>13-14</sup> In other words, the *manner* in which the affirmance is made or the person at whose instance it is brought about is immaterial in the present context.<sup>15</sup> Thus, where the decree of the High Court is in favour of several other persons besides the original plaintiff of the suit, the decree cannot be said to be one of affirmance.<sup>16</sup>

4. A judgment is affirmed when the decree is neither reversed nor modified.<sup>17</sup>

5. But if the decree is *varied*, though only as to amount, it is not an affirmance thereof,<sup>18</sup> whether such variation takes place on appeal or on cross-objection.<sup>19</sup> Thus, if a plaintiff's money claim is decreed in part by the trial Court and the appellate Court decreed it as to a larger part but still not fully, the appellate Court's decree is not one of affirmance, even though the appellate Court's decree was still in the plaintiff's favour.

6. If the appellate decision does not affirm the decree of the trial Court in its entirety, it is a case of 'variation' for the purposes of this Article; it is immaterial whether the variation is made in favour of the appellant or the respondent,<sup>20</sup> or whether the variation made is minor or major,<sup>21</sup>—to a small extent or otherwise, e.g., variation as to interest.<sup>22</sup>

7. But costs are treated as extraneous to the subject-matter of the suit and a variation in the matter of costs does not make the decree of the appellate Court a decree of variance.<sup>23</sup>

### Variation in part.

Until the Supreme Court decision in *Rajaram v. Radhakrishnayya*,<sup>24</sup> there was a wide divergence of opinion in the different High Courts as to what would happen if the decision of the lower Court is *partly* affirmed and *partly* reversed by the High Court. The different views may be stated as follows:

I. If there has been a variation of a *portion* of the decree, but the variation is in favour of the appellant,—

A. One view was that the appellant is entitled as of right (*i.e.*, even though there is no substantial question of law involved), to appeal to the Supreme Court against the order *portion* of the decree in respect of which the decree of the lower Court has been *approved* by the High Court.

B. The other view was that in such a case, there is no appeal as of right, *i.e.*, unless some substantial question of law is involved, against the *affirmed* portion.<sup>25</sup>

13. *Tasudug v. Kashiram*, (1903) 30 I.A. 35, 25 All. 109 (P.C.).

14. *Kanak Sunder v. Ram Lakhan*, A. 1956 Pat. 325.

15. *Mahadev v. Secretary of State*, (1932) 54 All. 390.

16. *Kashi Bai v. Brojendra*, A. 1953 Pat. 380.

17. *Union of India v. Kanahaya*, A. 1957 Punj. 117 (119).

18. *Annapurnabai v. Rupao*, (1924) 51 I.A. 319, A. 1925 P.C. 60.

19. *Abdur Samad v. Ayasha*, A. 1948 Oudh 76 (F.B.).

20. *Rajaram v. Radhakrishnayya*, A. 1961 S.C. 1795.

21. *Dy. Comm., Hurdoi v. Ramkrishna*, A. 1963 S.C. 521.

22. *Kanak Sunder v. Ram Lakhan*, A. 1956 Pat. 325, *Union of India v. Kanahaya*, A. 1957 Punj. 117; *Purnendu v. Radhakanta*, (1950) 54 C.W.N. 538.

23. *Fateh Kunwar v. Durbijai*, A. 1952 All. 943 (F.B.); *Govind v. Vishnu*, A. 1949 Bom. 164; *Subba Rao v. Chalamayya*, A. 1952 Mad. 771 (F.B.); *Probodh v. Harahari*, A. 1954 Cal. 618; *Ramchandra v. Ganpati*, A. 1953 Nag. 249; *Lakshminarayana v. Sitarama*, A. 1959 A.P. 20; *Bardoloi v. Collector of Kamrup*, A. 1952 Assam 134; *Kanakarathnammal v. Lagnatha*, A. 1959 Mys. 112.

II. If the decree of the lower Court has been varied in part to the *prejudice* of the appellant,—

A. One view<sup>24</sup> was that the appellant is entitled as of right, to appeal to the Supreme Court, both on the varied and the affirmed portions.<sup>25,1</sup>

B. The other view was that in such a case, the appellant is entitled to appeal as of right only in respect of the varied portion, but not in respect of the affirmed portion.<sup>25</sup>

In *Rajaram v. Radhakrishnayya*,<sup>25</sup> the Supreme Court has *settled* the above controversy, by preferring the view in (A) as above under both heads. The following propositions have been laid down by the Supreme Court in this context—

(i) If the decision of the appellate Court, *taken as a whole*, has made any variation in the decree of the trial Court *taken as a whole*, except as to post-decree matters such as costs or post-decree interest, it is not a decree of affirmance

(ii) It is immaterial whether the variation is in favour of the appellant or against him

It would follow, according to the Supreme Court decision,<sup>25</sup> that where there has been a variation in part, it is immaterial whether the variation is in favour of the appellant or against him; in either case, he is entitled to a certificate to appeal and attack the affirmed portion which is adverse to him, without showing, further, that his proposed appeal involves some substantial question of law.

### 'Affirms'.

1. The expression 'affirms the decision of the Court below' implies that the High Court has dealt *judicially* with the decision of the Court below and upheld it.<sup>2</sup>

2. Thus, the following are not an affirmance of the decision of the Court below, within the meaning of Art 133(1):

An order rejecting the admission of an appeal, holding that the High Court has no *jurisdiction* to entertain the appeal,<sup>3</sup> or that it is barred by limitation.<sup>4</sup>

3. On the other hand, it has been held that there is a decree of affirmance—

(a) Where the appeal is dismissed for failure to furnish security for costs.<sup>5</sup>

(b) An order dismissing an appeal for default.<sup>6</sup>

### Whether the variation must be on a substantial question.

(A) If the decree of the Court below is varied on any ground other than *costs*,<sup>7</sup> there is a decree of variance and not of affirmance, e.g.,

Where the High Court has disallowed<sup>8</sup> or reduced<sup>9</sup> the claim for pre-

24. *Gangadhar v. Subramania*, A. 1946 Mad. 539 (F.B.); *Abdur Samad v. Aisha*, A. 1948 Oudh 76 (F.B.).

25. *Rajaram v. Radhakrishnayya* A 1961 S.C. 1795.

1. *Jaggo v. Harihar*, A. 1941 All. 66 (F.B.).

2. *Abdul Majid v. Dattoo*, A. 1946 Nag. 307.

3. *Godabchand v. Kudilal*, A. 1952 M.B. 149.

4. *Purnendu v. Kanai*, (1948) 2 Cal. 202.

5. *Mahadeo v. Secy. of State*, A. 1932 All. 312.

6. *Ganesk v. Makhna*, A. 1948 All. 375.

7. *Rajaram v. Radhakrishnayya*, A 1961 S.C. 1795 (1804).

8. *Hilendra v. Sukhdeb*, A. 1929 Pat. 561.

decree interest<sup>7</sup> or varied the quantum of damages<sup>10</sup> or substituted a mortgage decree by a money decree,<sup>11</sup> or passed the decree in favour of several persons other than the original plaintiffs of the suit.<sup>12</sup>

(B) On the other hand, it has been held<sup>13-14</sup> that there is a decree of variance only where there is a variation in the *substantive* relief in respect of the whole or part of a party's claim. Thus, there is no variance where the decree of the Court below is affirmed with—

(i) Variation as to costs.<sup>7</sup>

(ii) Variation by consent of both parties or withdrawal by appellant.<sup>7</sup>

(iii) Variation in the *period of grace* for the payment of the mortgage amount.<sup>14</sup>

(iv) *Incidental* or *consequential* variation of the decree, in order to clarify what was implicit in the judgment of the Court below, e.g., insertion of a clause fixing the time within which the structures were to be removed by the defendant, as directed by the judgment,<sup>15</sup> removing clerical error in the decree,<sup>13</sup> to bring it in accordance with the judgment.<sup>16</sup>

(v) Variation of the manner of *working out* the details in accordance with the terms of a preliminary decree for partition without making any change in the rights of the parties as declared by that decree.<sup>17</sup>

### 'Decision'.

Decision in this context means the decision of the suit and not the judgment or the reasons given therefor.<sup>18</sup>

### 'Court immediately below'.

1. It is now settled<sup>19</sup> that a Single Judge, whether exercising powers under the Original or the Appellate Side, is a 'Court immediately below' the Division Bench, hearing appeal from it,<sup>19-20</sup> for, the expression 'Court immediately below' does not mean 'a Court subordinate to'.<sup>19, 21</sup>

While a 'court subordinate to' the High Court means a court subject to the superintendence of the High Court, a 'Court immediately below' is the court from which the appeal has been filed.<sup>21</sup>

### What is a question of law.

1. 'Law' in this context means the *general* law and not merely statute law.<sup>22-24</sup> A question of law is to be distinguished from a question of 'fact'. But questions of law and of fact are sometimes difficult to disentangle,<sup>25</sup> and we may properly appreciate what is a question of law for the present purpose, only with reference to illustrations.

9. *Jaggo v. Harihar*, A. 1941 All 66 (F.B.)

10. *Viraraghava v. Narasimha*, A. 1950 Mad 124.

11. *Homeswar v. Kameswar*, A. 1933 Pat. 262.

12. *Kashi Bui v. Brajendra*, A. 1953 Pat. 380.

13. *Mool Chand v. Brimani*, A. 1956 All. 680.

14. *Basiram v. Kam Ratan*, A. 1927 P.C. 117.

15. *Gokul v. Nooran*, A. 1957 Pat. 7.

16. *Prabirendra v. Berkampore Bank*, (1953) 57 C.W.N. 933 (941).

17. *Girdharilal v. Fatchchand*, A. 1956 M.B. 145 (150).

18. *Kanak Sundar v. Ram Lakhan*, A. 1957 Pat. 325 (328).

19. *Ladli Prasad v. Karmal Distillery*, A. 1963 S.C. 1279 (1286-7).

20. *Durga Prasad v. Banaras Bank*, A. 1963 S.C. 1322.

21. *Nataraja v. Govindaraja*, (1967) S.C. [C.A. 574/65, d. 15 12 67].

22-25. *Ramgopal v. Shamskaton*, (1893) 19 I.A. 528.

1. *Nagar v. Shukun*, (1918) 45 I.A. 183.

2. Thus, the following questions have been held to be questions of law:

(a) The proper *legal effect* of a proved fact<sup>1</sup> e.g., the applicability of s. 18 of the Limitation Act upon proved or admitted facts;<sup>2</sup> or whether a property is secular or debottar;<sup>3</sup> or whether the defendant had accepted a mortgage deed, to which he was not a party, as a binding obligation upon himself;<sup>4</sup> or whether the tenancy was permanent;<sup>5</sup> whether there had been a dedication to the public or a presumption of lost grant could be raised.<sup>6</sup>

But not *factual inferences* from other facts.<sup>6-a</sup>

(b) Whether any evidence has been offered on the one side or the other.<sup>6</sup>

(c) Misdirection on a point of law in dealing with the evidence, e.g., as to onus of proof.<sup>8</sup>

(d) The nature of the plaintiff's title.<sup>9</sup>

(e) The *construction* of a document<sup>10</sup> of title, but not of historical documents which are not instruments of title or direct foundation of rights.<sup>11</sup>

(f) The legal inference from a document,<sup>12</sup> e.g. whether from an entry in a Wajib-ul arz an inference of a sovereign right by the Government can be drawn.<sup>13</sup>

(g) The *admissibility* of any piece of evidence,<sup>1</sup> provided it is such as to materially affect the finding.<sup>14</sup>

(h) Whether there is or is not evidence to support a finding.<sup>16</sup>

(i) A question of law arises where a Court arrives at a decision on a question of fact by considering material which is, wholly or in part, irrelevant to the inquiry or bases its decision partly on conjectures, surmises or suspicion.<sup>16</sup>

(f) Whether a document was validly presented for registration<sup>17</sup>

(k) The interpretation of statutory provisions and the scope and effect thereof even though in coming to the conclusion certain preliminary facts must be found.<sup>18</sup>

### Instances of questions of fact.

The following have been held to be questions of fact and *not of law*:

(i) Whether a fact has been proved when evidence for and against has been properly received.<sup>19</sup>

(ii) Whether a statutory presumption has been rebutted.<sup>20</sup>

(iii) The effect to be given to a document is a question of fact, where

2. *Deshmukh v. Kothari*, (1961) 6 D.L.R. (S.C.) 73 (77).
3. *Midnapur Zemindary v. Umacharan*, A. 1923 P.C. 187.
4. *Dhanna Mal v. Motisagar*, (1927) 54 I.A. 178.
5. *Lakshmidhar v. Rangulal*, (1949) 76 I.A. 271.
6. *Meenakshi Mills v. Commr. of I. T.*, A. 1957 S.C. 49 (58).
7. *Surat v. Khagendranath*, A. 1962 S.C. 331.
8. *Jogesh v. Emdad*, A. 1932 P.C. 28.
9. *Secretary of State v. Krishna*, A. 1945 P.C. 165.
10. *Fateh Chand v. Kishan*, (1912) 39 I.A. 247.
11. *Durga Singh v. Tholu*, A. 1964 S.C. 361; (1963) 2 S.C.R. 701; *Chunilal v. Century Spinning Co.*, A. 1962 S.C. 1314.
12. *Choudhuri v. Kishore*, (1919) 46 I.A. 197.
13. *Rajendra v. Sukhi*, A. 1957 S.C. 287 (293).
14. *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (107) (P.C.).
15. *Harendra v. Haridas*, (1914) 41 I.A. 110.
16. *Dhiralal v. Commr. of I. T.*, A. 1955 S.C. 271 (273).
17. *Jambu v. Nawab*, 37 All. 49 P.C.
18. *Associated Cement Co. v. Workmen*, A. 1960 S.C. 56 (62).
19. *Wali Mohammad v. Mohammad*, A. 1930 P.C. 91.

there is no question as to the construction thereof.<sup>20</sup> Here, a distinction has been made as between documents of title and other documentary evidence. If the deed is the very foundation of the suit, a mistake as to its meaning has been held to involve a question of law,<sup>21</sup> but not so if it is a mere piece of evidence.<sup>22</sup>

It follows that a mistaken inference from a document is a finding of fact, if there is no misconstruction of the document.<sup>23</sup>

(iv) Whether an endowment is private or public,<sup>24</sup> there being no question of misconstruction of a document involved.<sup>25</sup>

(v) Whether the properties in dispute are joint family properties or whether there has been a partition thereof,<sup>26</sup> or whether they were left undivided at the partition.<sup>26</sup>

(vi) Whether there was a sufficient nucleus of joint family property, for acquiring new properties by the manager of a joint Hindu family.<sup>1</sup>

(vii) A controversy relating to ordinary items in the taking of accounts between a principal and an agent. But questions of principle relating to accounts would be entertained as questions of law.<sup>2</sup>

(viii) A finding as to whether a transaction was *benami*.<sup>3</sup> a finding whether a deity was a family deity or dedicated to the public and whether properties given to the deity constituted a religious endowment of a public nature.<sup>4</sup>

(ix) Whether consideration mentioned in a deed was actually paid.<sup>5</sup>

(x) Whether a transaction is vitiated by undue influence or fraud.<sup>6</sup>

(xi) Whether there was good faith.<sup>7</sup>

(xii) Whether, in a particular case, a reasonable opportunity of showing cause within the meaning of Art. 311 (2) has been given is, ordinarily, a question of fact.<sup>8</sup> But cases are conceivable where the question of fact would be inextricably mixed up with the nature and content of the constitutional guarantee.<sup>9</sup>

### Instances of mixed questions of fact and law.

There are certain questions where the issue raises a question of law to be determined from certain facts being proved. These are mixed questions of fact and law. In such cases, the Supreme Court may interfere with the conclusion arrived at by the Court or tribunal below but not the finding of fact on which the conclusion is based.<sup>1</sup> Instances of such questions are -

(a) Whether a custom has been established

20. *Shahabuddin v. Jaiwant* (1933) 60 I.A. 231

21. *Amiruddin v. Makhani*, A. 1930 P.C. 85.

22. *Midnapur Zemindari v. Umacharan*, A. 1923 P.C. 187; *Secy. of State v. Rameswaram*, (1934) 61 I.A. 163.

23. *Narayan v. Gopal*, A. 1960 S.C. 100.

24. *Ramchandra v. Gunpati*, A. 1953 Nag. 249.

25. *Devadas v. Shrishailappa*, A. 1961 S.C. 1277 (1280).

1. *Girimalappa v. Yellappa*, A. 1959 S.C. 906 (907).

2. *Kampur v. Muralidhar*, A. 1944 P.C. 87.

3. *Raghunatha v. Nagappa*, A. 1949 P.C. 25.

4. *Meenakshi Mills v. Commr. of I. T.*, (1956) S.C.A. 1139 (1156).

5. *Misra v. Surji*, A. 1950 P.C. 28.

6. *Girimalappa v. Yellappa*, A. 1959 S.C. 906 (907).

7. *Ladli Prasad v. Karnal Distillery*, A. 1963 S.C. 1279 (1288).

8. *Dave v. Lodge Victoria*, A. 1963 S.C. 1146; (1964) 1 S.C.R. 1.

9. *State of Mysore v. Chabiani*, A. 1958 S.C. 325 (328).

10. *Meenakshi Mills v. Commr. of I. T.*, (1956) S.C.R. 691 (720); A. 1957 S.C. 49.

The existence or prevalence of a custom is a question of fact (i.e., the finding as to the things that are actually done in pursuance of the alleged custom); but the finding whether the facts proved satisfy the requirements of law in order to establish a valid custom, is a question of law.<sup>11</sup> In other words, it is a question of law whether a custom is to be recognised or not; but the facts upon which the question is to be decided cannot be a matter of appeal beyond the first appellate Court.<sup>12</sup>

(b) Whether, in an industrial employment, the payment of 'Puja bonus' every year may be inferred as an implied term of the employment.<sup>13</sup>

(c) Whether a transaction is an adventure in the nature of a 'trade,'<sup>14</sup> within the meaning of s. 2 (4) of the Income-Tax Act, 1922.

(d) Whether there has been a change-over of sovereignty.<sup>15</sup>

(e) Whether on the facts found a transaction is a mortgage by deposit of title-deeds.<sup>16</sup>

### A 'substantial question of law'.

1. It is not a mere question of law but a substantial question of law that is required for the purpose of the certificate in case of a decree of affirmance. In order to be 'substantial' it must be such that there may be some doubt or difference of opinion,<sup>16a</sup> or there is room for difference of opinion.<sup>16a</sup> Thus, if the law is well-settled by a Court of Appeal or by an overwhelming consensus of judicial opinion, the mere application of it to a particular set of facts does not constitute a substantial question of law.<sup>16a</sup>

2. The word 'substantial' does not, however, imply that the question of law must be of interest to the public in general or to any person other than the parties to the litigation.<sup>17</sup> It means a substantial question of law between the parties to the litigation.<sup>18</sup>

3. A question of law is substantial if the decision turns one way or the other on the particular view taken of the law, e.g., whether a judgment would operate as *res judicata* in a case,—though the decision may be unimportant to others.<sup>18, 19</sup>

4. Where there is divergence of opinion amongst the High Courts, the fact that the rulings of the High Court from which appeal to Supreme Court is sought, are uniform or that there is no direct decision of that High Court, does not prevent the question from being a substantial question of law, within the meaning of Art. 133.<sup>20, 21</sup> On the other hand, if there is no divergence of opinion amongst the High Courts on a point of law, the mere fact that there is no decision of the local High Court on the point would not make it a substantial question of law.<sup>22</sup>

11. *Palaniappa v. Devasikamony*, (1917) 44 I.A. 147.

12. *Lakshmidhar v. Rangalal*, A. 1950 P.C. 56 (59).

13. *Ispahani v. Ispahani Employees' Union*, A. 1959 S.C. 1147.

14. *Venkataswami v. Commr. of I. T.*, A. 1959 S.C. 359 (304); *Saroj v. Commr. of I. T.*, A. 1959 S.C. 1252 (1256).

15. *State of Saurashtra v. Abdulla*, A. 1960 S.C. 445.

16. *K. J. Nathan v. Maruthi*, A. 1965 S.C. 430 (436).

16a. *Chunilal v. Century Spinning Co.*, A. 1962 S.C. 1314 (1318).

17. *State of J. & K. v. Ganga Singh*, A. 1960 S.C. 356.

18. *Raghunath v. Deputy Commissioner*, A. 1927 P.C. 101.

19. *Dinkar v. Ratansey*, A. 1949 Nag. 300.

20. *Subba Rao v. Veeraju*, A. 1951 Mad. 960.

21. *Kanji & Co. v. Jatashankar*, A. 1956 Pat. 526.

22. *S. N. Chakravarty v. Bijawat*, A. 1963 Ajmer 16; *Nallathambi v. Raghunath*, A. 1943 Mad. 581.

5. Nor can it be argued that there is no substantial question of law since the decision is 'obviously right'.<sup>23</sup> A question which comes before the courts frequently, may be said to be 'substantial'.<sup>24</sup>

6. On the other hand,—where the question involved is one of principle and the High Court has decided it for the first time, it is not a sufficient reason for refusing the certificate that the High Court is satisfied that their decision is correct.<sup>25</sup>

7. And for the same reason, if the question does not arise on the findings of either Court, no certificate on the present ground can be granted<sup>1</sup> merely because the question raised affects a large number of people.<sup>2</sup>

8. The following have been held *not* to involve 'substantial' questions of law—

(i) The question of construction of a decree.<sup>3</sup>

(ii) Dismissal of appeal for failure to furnish costs.<sup>4</sup>

(iii) The construction of a document would not ordinarily involve a substantial question of law<sup>5</sup> but it has been held to involve such a question where the scope for difference of opinion is serious and relates to the legal effect of the document.<sup>5</sup>

(iv) Incorrect application of the principles of law,<sup>6</sup> where the principles are well-settled.

(v) The propriety of the appointment of a Receiver.<sup>7</sup>

9. On the other hand, the following have been held to involve substantial questions of law—

(i) Whether a testamentary disposition by a Hindu in favour of a female heir conferred on her only a limited estate in the absence of evidence that he intended to confer on her an absolute interest in the property.<sup>8</sup>

(ii) The interpretation of a statutory rule imposing a tax liability.<sup>9</sup>

(iii) Whether a particular income is an 'agricultural income,' for the purposes of income-tax.<sup>10</sup>

10. On the other hand,—where the question involved is one of principle and the High Court has decided it for the first time, it is not a sufficient reason for refusing the certificate that the High Court is satisfied that their decision is correct.<sup>25</sup>

### Certificate as to fitness.

1. While the certificate under sub-cl. (a) and (b) of Art. 133 (1) may be obtained as of right, if the conditions specified therein are satisfied, the certificate under cl. (c) lies solely at the discretion of the High Court. The question of 'fitness' under cl. (c) has no connection with the question of a substantial question of law being involved. This jurisdiction is very wide and it is neither possible nor desirable to crystallise the rules relating to the High Court's discretion in the matter.<sup>11</sup>

23. *Raghunath v. Deputy Commissioner*, A. 1927 P.C. 101.

24. *Chhail Bhatti v. Municipal Board*, A. 1948 All. 189.

25. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66.

1. *Sudhir v. The King*, (1948) 3 D.L.R. (F.C.) 4.

2. *Hulas Narain v. Deen Mohammad*, A. 1944 F.C. 24.

3. *Kaikashree v. C. P. Syndicate*, A. 1949 Bom. 131.

4. *Muhammad v. Secy. of State*, (1914) 36 All. 325.

5. *Jhandu v. Wahiduddin*, 38 All. 570 P.C.

6. *Sastry v. Palankar*, A. 1955 Mys. 35.

7. *Madan Gopal v. State of Orissa*, A. 1955 Orissa 71.

8. *Nathoo Lal v. Durga Prasad*, (1955) 1 S.C.R. 51.

9. *Thangavelu Chettiar v. Govt. of Madras*, A. 1955 Mad. 230.

10. *Mustafa v. Commr. of I. T.*, (1946) I.T.R. 245.

11. *Cy. Jagannath v. United Provinces*, A. 1944 (F.C.) 23 (24).



2. When a certificate under this sub-cl. is granted to one party under Art. 133, it is usual<sup>12, 13</sup> to grant a certificate also to the opposite party, under the present clause, though the opposite party is not entitled as of right to appeal under cl. (a) or (b) or Art. 133 (1).<sup>14</sup> But it cannot be laid down as a general proposition.<sup>15</sup>

3. The pecuniary value of the subject-matter is no consideration for the certificate under the present clause. This clause is intended to meet special cases, where the point in dispute *cannot be measured in money*, but is still one of great *public or private importance*.<sup>16</sup> Thus, the fact that the decision in the case would affect the interests of a large number of people and the controversy must arise again, makes the case a fit one for appeal to the Supreme Court.<sup>17, 18</sup> A question which does not affect a large number of persons cannot be said to be one of great public importance.<sup>20</sup>

4. Even the existence of a divergence of opinion amongst the High Courts is not, by itself, a sufficient ground for a certificate under sub cl. (c) where the question involved is not one of general public or private importance.<sup>21, 23</sup> But if the decision of the question is likely to affect numerous cases, that may be a reason for holding that the question is a matter of great public importance.<sup>21</sup>

5. A question of public importance may be one of fact.<sup>24</sup>

6. Once the certificate has been granted by the High Court, the conditions of the sub-cl. (c) having been satisfied, it cannot be contended that the decree is non-appellable, having been passed on consent.<sup>24a</sup>

7. The following are instances where certificates of fitness have been granted on the ground of 'public importance' of the question involved:

- (i) Dispute regarding religious rites and ceremonies,<sup>25</sup> caste and family rights<sup>26</sup>
- (ii) A matter relating to some ceremony of wide public importance<sup>1</sup>
- (iii) The right of a community to take out a religious procession along the highway.
- (iv) Such matters as the reduction of the capital of companies<sup>1</sup>
- (v) The true nature of an order or decree based on an agreement between parties and whether contempt of Court is committed by violation of such consent order or decree.- there being difference of judicial opinion on the point<sup>2</sup>
- (vi) Order of disciplinary action against a legal practitioner.<sup>4</sup>

12. *Subbayamma v. Venkayya*, A. 1956 Mad. 876

13. *Gwalior Sugar Co. v. State*, A. 1955 M.B. 210.

14. *Subbayamma v. Venkayya*, A. 1954 Mad. 876.

15. *Eramma v. Veerpanna*, A. 1957 Mys. 24 (26).

16. *Banarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

17. *Cf. Jagannath v. United Provinces*, A. 1944 (F.C.) 23 (24).

18. *Abdur Rahaman v. Raghbir*, A. 1951 Punj. 313.

19. *Kailash v. Union of India*, A. 1959 All. 685 (686).

20. *Batala Engineering Co. v. Custodian*, A. 1951 Punj. 412.

21. *Gulab v. Manphool*, A. 1953 Raj. 42 (F.B.).

22. *Barada v. Surendra*, A. 1953 Assam 21.

23. *Lachman v. Bihar Govt.*, A. 1952 Pat. 386.

24. *R. S. N. Co. v. S. S. Tea Co.*, A. 1956 Assam 1; *Gotan Lime Syndicate v. I. T. Commr.*, A. 1964 Raj. 277.

24a. *Bansi Lal v. Rajkumar*, (1967) S.C. [C.A. 1014/64, d. 6-2-67].

25. *Banarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

1. *Radhakrishna v. Swaminath*, (1921) 44 Mad. 293 (P.C.).

2. *Manohar v. Zaman*, A. 1925 P.C. 36.

3. *B. B. Light Ry. v. Dt. Patna*, A. 1952 Pat. 23 (25).

4. *A. Prasad v. High Court of Allahabad*, A. 1937 All. 167.

(vii) Dismissal of an application under Art. 226 challenging an order under the Minimum Wages Act, involving interpretation of that Act;<sup>5</sup> or raising the question of validity of an Act.<sup>6</sup>

(viii) Whether the omission by a candidate himself to keep accounts as required by s. 77 of the Representation of the People Act constitutes a 'corrupt practice'.<sup>7</sup>

8. Though sub-cl. (c) primarily concerns cases where the claim or dispute cannot be valued in money, it does not follow that this sub-cl. cannot be applied to cases where the subject-matter may be so valued but the value falls below that specified in sub-cl. (a)-(b). The High Court has a discretion in the matter of granting the certificate in such cases as in other cases,<sup>8-10</sup> having regard to the general importance of the question involved. Thus,--

(i) A certificate has been granted in respect of decrees in suits relating to immovable property (of a value lower than the specified amount)--

(a) Where the decision involved the nature of the rights of holders of *darmilla* or post settlement *inams* of portions of a village under the Madras Estates (Abolition of Conversion into Ryotwari) Act, 1948;<sup>11</sup> or the customary rights of succession of daughters in the Punjab.<sup>12</sup>

(b) Where the decision involved a question as to the rule of succession to the Mohuntship, of certain religious endowments.<sup>13</sup>

(ii) Similarly, certificate has been granted from orders in execution proceedings--

Where a question of interpretation of O. 21, r. 16, C. P. Code<sup>14</sup> was involved.

9. But where a small amount is involved it is to be considered whether the further appeal would be oppressively expensive to the opposite party.<sup>15</sup> But this consideration has lost much of its importance since the shifting of the venue of appeal from London to New Delhi.<sup>6</sup>

10. The question to be determined under sub-cl. (c) is not the propriety of the order against which the leave is sought, but the importance of the question raised.<sup>1</sup> Thus --

Though the certificate may be granted against an order of suspension of an Advocate from practice under the Legal Practitioners Act,<sup>16</sup> it would not be granted where the leave is sought by the lawyer, in whose favour the order had been made, merely for the purpose of getting certain remarks expunged from the judgment.<sup>18</sup>

11. The following have been held not to be fit cases for certificate under this clause:

(i) The question whether a deed constitutes a mortgage by conditional sale or an out and out sale is not one of general public importance since the question has to be determined upon the facts and circumstances of each particular case.<sup>19</sup>

5. *Allison v. B. L. Sen*, A. 1957 S.C. 227 (279) (1957) S.C.R. 359.

6. *Inda Devi v. Board of Revenue*, A. 1957 All. 116.

7. *Keshav v. Ghavur*, A. 1959 All. 607 (611).

8. *Udoychand v. Guddar*, (1925) 52 L.A. 207.

9. *R. S. N. Co. v. S. S. Tea Co.*, A. 1956 Assam 1.

10. *Phoolchand v. Bodripasad*, A. 1963 Raj. 51 (F.B.).

11. *State of Madras v. Ayyangar*, A. 1956 S.C. 91.

12. *Salig Ram v. Maya Devi*, A. 1955 S.C. 266.

13. *Pirthinath v. Binkhanath*, A. 1956 S.C. 192.

14. *Jugalkishore v. Raw Cotton Co.*, A. 1955 S.C. 376 (381).

15. *Shankari v. Kulkha*, A. 1947 Lah. 307 (F.B.).

16. *Harkishan v. Mohan*, A. 1960 Punj. 192.

17. *Kutoor v. Kutoor*, A. 1950 Mad. 215.

18. *A Pleader v. High Court of Allahabad*, A. 1937 All. 167.

19. *Barada v. Surendra*, A. 1953 Assam 21.

(ii) Whether the pleading amounted to an admission or not.<sup>20</sup>

(iii) Where the question involved is purely one of fact, e.g., whether the Petitioner was given reasonable opportunity to show cause at the stages in a proceeding for disciplinary action, as required by Art. 311 (2).<sup>21</sup>

12. 'Private importance' means importance to both parties to the litigation and not merely to one of them.<sup>22, 23</sup>

A. The following are instances of certificate having been granted on the ground of private importance, to appeal against—

(a) A decree in a suit for declaration of title of the plaintiffs (superior landlords of Nandaun Jagir) to some trees standing on the land of the defendants (inferior landlords) because it affected the rights of the superior and inferior landlords in Nadaun Jagir.<sup>24</sup>

(b) A decree in a similar suit which involved the question whether the disputed lands had lost their *watan character*.<sup>25</sup>

(c) A decree in a suit for assessment of rent which raised the question whether the presumption of lost grant could be applied in the circumstances of the case.<sup>1</sup>

(d) A decree setting aside an award being without jurisdiction on the ground that the contract in dispute was void owing to contravention of s 6 of the Bombay Securities Contract Act, 1925.<sup>2</sup>

B. On the other hand,—

Any observation made in an order directing a retrial, without deciding any issue, cannot be regarded as a question of law of public or private importance.<sup>3</sup>

13. The initial words 'judgment' decree or final order' also govern sub-cl. (c). Hence, it cannot be said that leave can be granted under sub-cl. (c), even though the order is not a 'final' one.<sup>4</sup> Under Art. 136, however, the Supreme Court itself may grant special leave to appeal even where the order is not final.

14. The High Court has no jurisdiction to grant certificate under this clause to interveners. The latter should move the Supreme Court, if they want to appeal.<sup>4</sup>

### Separate application required for leave to appeal.

1. A separate application is required for a certificate for appeal. The prayer cannot be made in the alternative in an application for review of judgment.<sup>5, 6</sup>

2. The Allahabad<sup>7</sup> High Court has ruled that an application under Art 133, for leave to appeal, will fail unless it specifies the particular sub-clause of cl. (1) under which the certificate is asked for.

### Whether application to appeal in forma pauperis maintainable.

The Allahabad High Court has held that an application under O. 44, r. 1, C. P. Code is not maintainable in a application filed under Art. 133 of the Constitution, inasmuch as a Court hearing an application under Art. 133 cannot be said to be an Appellate Court.<sup>10</sup>

20. *Dibakar v Bimal*, A. 1951 Cal. 409.

21. *Ramgopal v. Gopikrishna*, A. 1957 M.P. 226 [see also *State of Mysore v. Chablani*, A. 1958 S.C. 325 (328)].

22. *Muthvala v Appajiiah*, I.L.R. (1951) Mys 423

23. *J. T. & G. Ins Co v. Raj Mal*, A. 1956 Punj 228.

24. *Cj. Rajinder v. Sukhi*, A. 1957 S.C. 287 (288).

25. *Barkharam v. Vishwanath*, A. 1957 S.C. 34.

1. *Manohar v. Charuchandra*, A. 1955 S.C. 228.

2. *Jugal Kishore v. Hommusji*, (1956) S.C.A. 499.

3. *Jethanand & Sons v. State of U. P.*, A. 1961 S.C. 794 (797).

4. *Swin v. Mahapatra*, (1969) S.C. [C.A. 2064/68, d. 11-4-69].

5-8. *Bajinath v. Jangi Lal*, A. 1952 V.P. 1.

9. *Dt. Bood v. Tahir*, A. 1959 All. 572 (F.B.).

10. *Om. Prakash v. State of U. P.*, A. 1953 All. 115.

**Limitation.**

1. Limitation for an application for a certificate under any of the clauses of Art. 133 is 60 days from the date of the decree appealed from. under Art. 132 of the Limitation Act, 1963.<sup>11</sup>

2. S. 12 is applicable to the computation of the foregoing period of limitation.<sup>12</sup>

**Form of certificate.**—See under Art. 134 (1) (c), *post*.

**Certificate not conclusive as to right to appeal.**

1. When a certificate has been granted by the High Court under Article 133, the Supreme Court would not be precluded from entertaining a preliminary objection that appeal does not lie under that Article.<sup>13</sup> In other words, it is open to the Supreme Court to see whether the case fulfils the requirements of the Article, and to refuse to entertain the appeal if it does not lie under the Article in spite of the certificate,<sup>14</sup> e.g., if it finds that (i) the order appealed from is not a judgment, decree or final order,<sup>15</sup> or (ii) the suit out of which the appeal arises has abated.<sup>3</sup>

2. Of course, under Art. 136 (*see post*), the Supreme Court may entertain an appeal by special leave even when the certificate granted by the High Court is defective, but exceptional grounds must exist for the granting of such special leave.<sup>16</sup>

3. On the other hand, it is open to an appellant to support a certificate on grounds other than those on which it has actually been given and the Supreme Court would entertain the appeal if the appellant succeeds in establishing such alternative grounds.<sup>17</sup>

**Appeal from order under Art. 226.**

It is obvious that a certificate under Art. 133 (1) (c) would be available for appeal against an order under Art. 226—

When a question of public importance is involved, e.g., a question of interpretation of validity of an Act.<sup>18,19</sup>

**CL (2): Constitutional ground.**

Though the right to appeal under Art. 133 (1) is not founded on the existence of any question of constitutional interpretation,<sup>20</sup> nevertheless, once the appeal has been entertained by the Supreme Court, the appellant would be at liberty to attack the judgment also on the ground that some constitutional question has been wrongly decided.<sup>21</sup>

**Scope of appeal under Art. 133.**

1. Though a certificate issued by the High Court is a pre-condition to an appeal under Art. 133, once the certificate is held to be good, the conditions, if any, with which the certificate may be hedged in, do not circumscribe the Supreme Court in considering the correctness of the

11. *Chunilal v. Gopi*, A. 1965 Cal. 630.

12. *Raghavamma v. Chenchamma*, A. 1961 S.C. 136 (112).

13. *Manohar v. Charuchandia*, A. 1935 S.C. 228.

14. *Venkataramana v. State of Mysore*, A. 1958 S.C. 253.

15. *Moolji v. Khandesh Spinning Mills*, A. 1950 F.C. 83, *Amin Bros v. Dominion of India*, A. 1960 F.C. 77.

16. *Dy. Comm. Hardoi v. Ramakrishna*, (1961) S.C.R. 506 (509).

17-18. *A. M. Allison v. B. L. Sen*, A. 1967 S.C. 227 (229), (1957) S.C.R. 359;

*Cf. Associated Cement Co. v. Vyas*, A. 1960 S.C. 665.

19. *Jagannath v. Harihar*, A. 1958 S.C. 239, (1958) S.C.R. 1067.

20. *Athmanathan v. Gopalan*, A. 1965 S.C. 338 (340).

decision appealed against, from every standpoint, whether on questions of law or of fact.<sup>21-24</sup>

2. In the exercise of this jurisdiction, the Supreme Court would not interfere with findings of fact, unless it is shown to be wholly unsupported by evidence;<sup>25</sup> or it is based partly on a mis-reading of the evidence and partly on the non-advertence to important material evidence bearing on the question and the probabilities of the case.<sup>4</sup>

3. The Supreme Court would not, ordinarily,<sup>2, 3</sup> interfere with the concurrent findings of fact of the two Courts below, the reason being that when facts have been fairly tried by two Courts and the same conclusion has been reached by both, it is not in the public interest that the fact should be again examined by the ultimate Court of Appeal.<sup>4-5</sup>

4. On the other hand,—

(i) The above rule of non-interference would not extend to mixed questions of fact and law, e.g., whether a transaction, on the facts found, constitutes a mortgage by deposit of title-deeds;<sup>6</sup> the construction of a lease and inference drawn from the fact that the permanent nature of the tenancy had remained unquestioned for a very long period.<sup>7</sup>

(ii) The practice of non-interference in a case of concurrent findings of fact "is not a cast-iron rule and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice".<sup>7a</sup>

Thus, if there has been a miscarriage of justice or the violation of some principles of law or procedure, the Board might interfere with concurrent findings of fact.<sup>7b</sup>

5. 'Miscarriage of justice' in this context means—

(a) Such a departure from the rules which permeate all judicial procedure as to make that which happened not a proper use of the words 'judicial procedure' at all,<sup>8-9</sup> or, a violation of the principles of natural justice.<sup>9</sup>

(b) Where there has been a substantial failure of justice, i.e., where the finding is not supported by any evidence on the record.<sup>10</sup>

(c) Where the finding is so perverse that it shocks the conscience.<sup>9</sup>

(d) Where the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected, the finding of fact disappears. In short, the rule would not apply if underlying the findings of fact there are questions of law, on which the findings proceeded and on which the Courts misdirected themselves,<sup>8</sup> such as the admissibility of material evidence or the construction of a document.<sup>11</sup>

21-24. *Raghavamma v. Chenchamma*, A. 1964 S.C. 136 (142).

25. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (269).

1. *Catholicos v. Paulo Avara*, A. 1959 S.C. 31 (49).

2. *Narayan v. Gopal*, A. 1960 S.C. 100; *Bhinka v. Charan Singh*, A. 1959 S.C. 960 (964); *Daver v. Lodge Victoria*, A. 1963 S.C. 1144.

3. *Raghavamma v. Chenchamma*, A. 1964 S.C. 136 (142).

4. *Trojan & Co. v. Nagappa*, A. 1953 S.C. 298.

5. *Dwarka v. Lalchand*, A. 1965 S.C. 1549 (1551).

6. *Nathan v. Maruthi*, A. 1965 S.C. 430 (431).

7. *Iswar Gopal v. Pratapmal*, A. 1951 S.C. 214.

7a. *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (147) (P.C.); *Srinivas v. Mahabir*, (1951) S.C.J. 261.

7b. *Rani v. Khagendra*, (1904) 31 Cal. 871 (P.C.).

8. *Tilakdhari v. Keshoprasad*, A. 1925 P.C. 122.

9. *Raghavamma v. Chenchamma*, A. 1964 S.C. 136 (143).

10. *Trojan & Co. v. Nagappa*, A. 1953 S.C. 298.

11. *Venkateswara v. Shekari*, (1881) 3 Mad. P.C.; *Tilakdhari v. Keshoprasad*, A. 1925 P.C. 122.

On the other hand, miscarriage of justice does not include—

(a) Objections as to weight of evidence,<sup>12-13</sup> or the appreciation of any piece of evidence,<sup>12, 13</sup> having no question as to *admissibility* of evidence.

(b) Again, concurrent findings of fact would not be disturbed on the ground that inadmissible evidence was received, if the findings cannot on any reasonable view be said to be based upon the inadmissible evidence.<sup>14</sup>

(c) Nor does it detract from the weight of concurrent findings of fact that the Courts have come to the same conclusion upon *different* considerations.<sup>15</sup>

6. In case of *divergent* findings on a question of fact, on the other hand, the Court of second or final appeal would ordinarily attach great weight to the finding of the Judge of first instance who sees and hears the witness and is in a position to assess their credibility from his own observation.<sup>16</sup> It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunal he may go wrong on questions of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal Court should not lightly interfere with that judgment.<sup>17</sup> If, however, the finding of the Court of first instance is not based on the impression made by the witness in the witness-box, but on inferences and assumptions founded on a variety of facts and circumstances, the right of the Appellate Court to review that inferential process cannot be denied.<sup>18</sup>

7. In case of divergent views on the evidence, the Supreme Court may allow the appellant to place the entire evidence in support of his contentions.<sup>19</sup>

### Interference with discretionary orders.

The Supreme Court will not, in an appeal under this Article, interfere with the exercise of discretion by the High Court, where it cannot be held that the discretion was improperly exercised.<sup>19</sup>

### Appeal from decision under Art. 226.

1. The reluctance of the Supreme Court to interfere with a finding of fact arrived at by a Tribunal increases when it comes before the Supreme Court through a proceeding under Art. 226<sup>20</sup> or 227.<sup>21</sup>

But in exceptional cases, the Supreme Court may examine the finding of fact, e.g.---

Where the finding of bias affects the status of a person holding a high public office in the discharge of his duties.<sup>22</sup>

2. The Court would, however, quash the decision of the High Court where it errs in law, e.g. :-

In holding that a person was a 'working journalist' under the Working Journalists Industrial Disputes Act, 1955<sup>23</sup>

12-13. *Thakur Harihar v. Thakur Uman*, (1886) 14 I.A. 7.

14. *Keolupati v. Amarkrishna*, (1939) 41 C.W.N. 66 (P.C.).

15. *Nilmani v. Kirti*, (1893) 20 Cal. 817 P.C.

16. *Bank of India v. Chinoy*, A. 1950 P.C. 90 (94).

17. *Madholal v. Official Assignee*, A. 1950 F.C. 21 (30).

18. *Asiatic S. N. Co. v. Arabinda*, A. 1959 S.C. 597 (601).

19. *Union of India v. Shree Ram*, A. 1965 S.C. 1531 (1535).

20. *Jagannath v. Harihar*, A. 1958 S.C. 239, (1958) S.C.R. 1067.

21. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (269).

22. *APSRTC v. Satyanarayana Transports*, A. 1965 S.C. 1302 (1307).

23. *Management of Express Newspapers v. Somayajula*, (1963) S.C. [C.A. 202/63].

### Practice and Procedure.

In such appeal, the Court will not permit a party to raise a point which was not raised before the High Court.<sup>24</sup>

2. The Supreme Court being a Court of final resort, questions which require investigation are not allowed to be raised for the first time before it, e.g., questions of that<sup>25</sup> which are required to be proved by evidence; or mixed questions of fact and law.<sup>1</sup>

3. Nor will the Supreme Court allow the appellant to charge his case,<sup>2</sup> or to make a new case.<sup>3</sup>

4. But where, though the pleading was somewhat vague, the point was fully argued before the High Court and all the materials were before the Supreme Court, the point was allowed to be taken.<sup>4</sup>

### CL (3): Single Judge decision.

No appeal lies to the Supreme Court under Art. 133 from the decision of a Single Judge, even though he is competent to grant a certificate for appeal to the Supreme Court under Art. 132(1), where a constitutional question is involved.<sup>5</sup>

### 134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

Appellate jurisdiction of Supreme Court in regard to criminal matters.

- (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
- \* (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
- (c) certifies that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

**Art. 134: Criminal Appeals.** - Apart from appeal by special leave under Art. 136, appeal will lie under the present Article to the Supreme Court from any judgment, final order or sentence in any criminal proceedings of a High Court, in the following cases:—

- (i) If the High Court, on appeal, reverses the decision of acquittal of

24. *Shri Bhagwan v. Ram Chand*, A. 1965 S.C. 1763 (1766).

25. *Athamathaswami v. Gopalaswami*, A. 1965 S.C. 338; *Amalgamated Electricity Co v. Aymer Municipality*, A. 1969 S.C. 227 (235).

1. *Indore Malwa Mills v. State of M. P.*, A. 1965 S.C. 1272 (1274).

2. *Narayan v. Gopal*, A. 1960 S.C. 100.

3. *Devji v. Maganlal*, A. 1965 S.C. 139.

4. *Union of India v. Karanpura Colliery*, A. 1969 S.C. 125 (127).

5. *Hindustan Commercial Bank v. Bhagwan Das*, A. 1965 S.C. 1142 (1143).

the accused person and sentences him to *death*. This will be a case of second appeal.

(ii) If the High Court has withdrawn for trial (s. 526 of the Criminal Procedure Code) to itself any case from a subordinate Court and, after trial, sentenced him to death.

(iii) Besides the above cases of sentence of death by the High Court, the High Court shall have the power, subject to rules to be framed by the Supreme Court, to certify *any* criminal case as fit for appeal to the Supreme Court.

### Art. 134 and s. 476B of the Cr. P. C.

In view of Art. 372 of the Constitution, the right of appeal, if any, under s. 476B of the Criminal Procedure Code, must yield to the restricted right of appeal under Art. 134.<sup>6</sup>

### CL (1): 'Judgment'.

It means any decision which terminates a criminal proceeding pending before the High Court, and excludes an interlocutory order.<sup>7</sup>

### 'Final order'.

1. An order cannot be a 'final order' unless it, of its own force, binds or affects the rights of the parties.<sup>8</sup>

2. In a criminal proceeding, the following are *not* final order—

(a) An order on a bail petition.<sup>9</sup>

(b) An order of remand, for hearing on the merits after disposing of a question of law.<sup>10</sup>

(c) An order for retrial, after setting aside the order of acquittal.<sup>11</sup>

(d) An order allowing the application of the accused for the production of a document by the Government, rejecting the claim of 'privilege' of the Government.<sup>12</sup>

3. On the other hand, the following have been held to be 'final orders',—

Order directing the filing of a complaint, deciding that there is a *prima facie* case for inquiry into an offence.<sup>13</sup>

4. The principle is that a judgment or order may be final for one purpose and interlocutory for another. It may also be final as to one part and interlocutory as to another part. It may be final although it directs inquiries or is made on an interlocutory application or reserves leave to apply.<sup>14</sup>

### Criminal proceeding.

1. A criminal proceeding includes all proceedings which are capable of being instituted under the ordinary criminal law of the land,<sup>15, 20</sup> as distinguished from military law.<sup>16, 17</sup> But it is not confined to proceedings under the Cr. P. C.<sup>18</sup> It is a proceeding which, if carried to its conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as death, imprisonment, fine,<sup>19</sup> or forfeiture of property

6. *Sheriff v. Gvindan*, A. 1951 Mad. 1060.

7. *Cf. Hari Ram v. Emp.*, A. 1939 FC. 43.

8. *State of U. P. v. Sujan Singh*, A. 1964 SC 1897 (1901).

9. *Sawal Ram v. State*, A. 1961 Cal. 169 (*Nizam, in re.* (1959) 2 M.L.J. 541).

10. *Durga Prasad v. State of U. P.*, A. 1960 All. 730.

11. *Dilip v. State*, A. 1962 Cal. 417 [contrary view in *Abinas v. Bimal*, A. 1962 Cal. 113, not preferable].

12. *Mohan Lal v. State of Gujarat*, A. 1967 S.C. 733.

13-20. *Meads v. K. E.*, (1944) 49 C.W.N. (F.R.) 23.

21. *S. K. Gupta v. Sen*, A. 1959 Cal. 106 (109).



and also proceedings such as those contained in the Cr. P. C., for prevention of breach of peace and the like.<sup>22</sup>

2. Though the Supreme Court has entertained an appeal from a conviction for contempt, on a certificate under Art. 134 (1) (c),<sup>23,24</sup> in *Narayan v. Ishwar*,<sup>25</sup> it has been observed that "proceedings for contempt of Court, and for exercise of disciplinary jurisdiction against lawyers or other professionals, such as Chartered Accountants, may not fall within the classification of proceedings,—civil or criminal".<sup>26</sup> It would follow from this that no certificate can be granted under Art. 134 (1) (c) from an order by the High Court in such a proceeding.

3. Of course, a proceeding for 'civil contempt' is a civil proceeding.<sup>21,25</sup>

### CL (1)(a): 'Acquittal'.

This word does not mean that the trial must have ended in a *complete* acquittal. The sub-clause would also apply where the trial Court acquitted the accused of the offence charged (say, s. 302, I. P. C.) but convicted him of a minor offence (say, s. 304 I. P. C.) other than that for which the accused was tried; and the High Court, on appeal, reverses the acquittal and convicts the accused of the major offence (i.e., s. 302).<sup>1</sup>

### CL (1)(b).

This clause provides for appeal against an order of conviction sentencing the accused to death, which has been passed by a High Court after withdrawing a case from a subordinate Court.

Besides the cases dealt with in sub-clauses (a) and (b) of cl. (1) of Art. 134, appeal does not lie as of right against any order of conviction made by the High Court.<sup>2</sup> In other cases, appeal will lie only if a certificate is granted under sub-cl. (c).

### CL (1)(c): Conditions for exercise of power under Art. 134 (1)(c).

1. The conditions 'pre-requisite' for the exercise of the discretionary power to grant a certificate under art. 134 (1) (c) cannot be precisely formulated but it should be exercised sparingly and not to convert the Supreme Court into an ordinary court of criminal appeal.<sup>3</sup> The certificate must show on the face of it that the discretion conferred was invoked and exercised.<sup>4</sup>

2. The reasons for the order must be apparent on the face of the order itself so that the Supreme Court may be in a position to know that the High Court has applied its mind to the matter and also to know exactly what the High Court's difficulty is and what questions of law of outstanding difficulty or importance the High Court feels the Supreme Court ought to settle.<sup>5,6</sup>

In other words, while giving leave, the High Court must first determine the issue of law which in its opinion is needed to be settled by the Supreme Court and such question must be clearly set out in its order.<sup>6</sup>

3. If the case as decided by the High Court does not involve any such question, the High Court cannot, as a matter of course, certify that

22. *Narayan v. Ishwar*, A. 1965 S.C. 1818 (1821).

23-24. Cf. *Brajnandan v. Jyoti Narain*, A. 1956 S.C. 66 (67).

25. *B. B. Light Ry. v. Dt. Board*, A. 1952 Pat. 23 (25).

1. *Tarachand v. State of Maharashtra*, A. 1962 130 (132).

2. *Maheeb v. State of Maharashtra*, (1965) S.C. [Ct. A. 120/64, d. 19-3-65]; *Babu v. State of U. P.*, A. 1965 S.S. 1467.

3. *Nar Singh v. State of U. P.*, (1955) S.C.R. 238.

4. *Baladin v. State of U. P.*, A. 1956 S.C. 181; *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411 (413); *Siddemur v. State of W. B.*, A. 1958 S.C. 143 (146).

5. *Thakara v. State of Maharashtra*, (1969) S.C. [C. A. 187/68, d. 25-4-69].

the case is fit for appeal to the Supreme Court.<sup>6</sup> If a case does not involve any such question of law or principle,<sup>6</sup> then however difficult the question of fact<sup>6</sup> may be, that would not justify the grant of a certificate, because if the High Court had any doubt about the facts, the benefit of doubt must go to the accused.<sup>4, 6</sup>

In order to grant a certificate, the appeal must involve something more than a question of appreciation of evidence.<sup>6</sup>

4. It is a condition for the exercise of the discretion under Art. 133(1) (c) that the case must involve a question of general public importance. This test need not be applied to a criminal case under Art. 134(1) (c). But no certificate under Art. 134(1) (c) can be issued unless there is some error of a fundamental character and where the only question involved is one of fact.<sup>6</sup> In exercise of this discretion, the High Court should not also overlook the fact that there is a further remedy by way of special leave from the Supreme Court under art. 136 where the certificate is refused by the High Court.<sup>6</sup>

#### (A) When the certificate of fitness should not be granted.

1. A certificate under Art. 134(1) (c) cannot be granted under such circumstances as would convert the Supreme Court into ordinary Court of appeal.<sup>7</sup> Thus,

(a) A certificate under this clause should never be granted where the only or main<sup>8</sup> question involved is one of fact, however strong the feelings of the High Court may be that the findings of fact require a reconsideration.

If there is any doubt in the minds of the Judges about the facts, their duty is to acquit. They cannot convict and then issue a certificate because they cannot make up their minds about the facts.<sup>9, 11</sup>

Hence, a certificate cannot be granted in the following cases—

(i) Where the question is merely one of sufficiency or credibility of witnesses or reliability of the evidence specially when there are concurrent findings of fact<sup>12</sup> or where there has been an error in procedure in the admission of improper evidence without which the same conclusion might properly have been arrived at.<sup>11</sup>

(ii) On the mere ground that there was delay in delivering the judgment of the Court and that it might have led to the result that some of the points urged by counsel were lost sight of in delivering judgments.<sup>13</sup>

(iii) Where the High Court directs the filing of a complaint, deciding that there is a *prima facie* case for inquiry into an offence.<sup>14</sup>

2. The grant of a certificate under Art. 134(1) (c) is not a matter of course but the power has to be exercised after considering what difficult questions of law or principle<sup>15</sup> were involved in the case which should require further consideration of the Supreme Court. Therefore, ordinarily, in a case which does not involve a substantial question of law or principle in the *affirmata* judgment the High Court would not be justified in granting a certificate under this Clause.<sup>12</sup>

6. *Babu v. State of U. P.*, A 1965 SC 1467 (1471) (1965) II SCA 296.

7. *Kalawati v. State of H. P.* (1952) 51 2 CC 286 (287); (1953) SCR. 543.

8. *Haripada v. State of W. B.* (1956) SCR 639.

9. *Sunder Singh v. State of U. P.*, A 1966 SC 411.

10. *Khushal v. State of Bombay*, A 1958 SC 22 (1958) SCR 552.

11. *Baladin v. State of U. P.*, A 1956 SC 181.

12. *Parshotam v. State*, A 1952 Kutch 54, *Habib v. Hyderabad State*, A 1951 Hyd. 73; *Kalu Prasad v. State*, (1951) A.L.J. 473.

13. *Jai Singh v. State*, (1952) A.L.J. 566; A 1952 All. 991.

14. *Achut v. State of W. B.*, (1963) 2 SCR 1.

15. *Mohan Lal v. State of Gujarat*, A 1967 SC 733 (739).

16. *Babu v. State of U. P.*, (1965) II SCA 296.

The following have been held *not* to involve such questions of law or principle—

(i) Where the High Court decided that in proceedings under s. 145, Cr. P. C., the preliminary order should be passed immediately on receipt of the application and that if there is any delay on the part of the Magistrate in making such an order, such delay on the part of the Court should not affect the rights of third parties.<sup>18</sup>

(ii) Where there has been a mere irregularity in the procedure which may be cured under s. 537, Cr. P. C.<sup>14</sup>

(iii) Where the only point at issue is the propriety of the grant or refusal of adjournment.<sup>17</sup>

(iv) Where a Magistrate took cognizance of a case on a police report of a likelihood of a breach of the peace.<sup>18</sup>

(v) Where a judgment of acquittal has been confirmed by the High Court.<sup>19</sup>

(vi) "If in any particular State there is only the Judicial Commissioner as the appellate authority, and if the confirmation of sentence of death has to be made by him, the procedure laid down must be followed. The fact that there is not a Bench of two Judges as in the High Courts to deal with death sentences is not an adequate ground for converting the Supreme Court into an ordinary court of appeal and confirmation in such matter".<sup>20</sup>

(vii) Where a third Judge has agreed with the decision of one of the two differing Judges, but has omitted to give his view on any particular point of difference.<sup>16</sup>

When a criminal appeal is brought before the High Court, the High Court has to be satisfied that it raises an arguable or substantial question; if it is so satisfied, the appeal should be admitted, if, on the other hand, the High Court is satisfied that there is no substance in the appeal and that the view taken by the trial Court is substantially correct, it can summarily dismiss the appeal. It is necessary to emphasise that the summary dismissal of the appeal does not mean that before summarily dismissing the appeal, the High Court has not applied its mind to all the points raised by the appellant. Therefore, the High Court is not right in granting certificate to the appellant under Art. 134 (1) (c) of the Constitution of India on the ground that his appeal should not have been summarily dismissed by another Division Bench of the said High Court.<sup>21</sup>

### (B) Where the certificate may be granted.

1. The certificate should be granted only where there has been an infringement of the essential principles of justice<sup>21</sup> or there is a matter of great public or private importance; in short, the certificate would not be granted unless there are *exceptional and special circumstances*.<sup>22</sup> The reason is that Art. 134 intends that except in cases coming under cls. (a)-(b) the High Courts in the respective States should ordinarily be the final courts of appeal in criminal matters.<sup>22</sup> Thus, the following questions of law, *inter alia*, have been held to be fit for a certificate under Art. 134 (1) (c), in view of their importance—

(i) Whether an Appellate Court, at the time of hearing an appeal under s. 411A, Cr. P. C., is entitled to go into the validity or otherwise of the order granting leave to appeal by the trial Judge.<sup>23</sup>

17. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 67.

18. *Raghubans v. Laxman*, A. 1951 Pat. 437.

19. *State of Orissa v. Minckelan*, A. 1953 Orissa 160 (S.B.).

20. *Kalamati v. State of H. P.*, (1952-4) 2 C.C. 286; (1963) S.C.R. 543.

21. *Chittoranjay v. State of W. B.*, A. 1953 S.C. 1696.

22. *Siddharan v. State of W. B.*, A. 1958 S.C. 143 (145); *Nar Singh v. State of*

23. *In re Sahib Vohra*, A. 1951 Mad. 212.

(ii) The point that the Magistrate decided under s. 145, Cr. P. C. the question of possession with reference to title, if such question was not raised before the High Court in revision.<sup>24</sup>

(iii) Examination of the accused in disregard of provisions of s. 342 of the Cr. P. Code, to the utter prejudice of the defence.<sup>25</sup>

(iv) Whether the High Court has a power to review or alter its judgment in a criminal appeal, after the judgment has been recorded and a writ in terms thereof has been issued.<sup>21</sup>

(v) Interpretation of the word 'officer' in the Prevention of Corruption Act.<sup>2</sup>

(vi) Whether a person accused of an offence committed in a district which thereafter became Pakistan, could be tried of that offence in India after his migration to this country.<sup>3</sup>

2. The following has been held to involve a question of great *private* importance:

Suspension of Advocates from practice or like disciplinary action against them, because there are cases of great *private* importance concerning the future career of the Advocates.<sup>4</sup>

3. In the absence of a matter of outstanding importance or of grave injustice, the mere existence of substantial questions of law is not sufficient to warrant a certificate under Art. 134 (1) (c).

The question may assume such general importance if, owing to a conflict of judicial opinion, it requires an authoritative decision from the highest Court in the land, e.g.,

(a) What were the ingredients of an offence under s. 396 I. P. C.<sup>5</sup>

(b) The proper connotation of the word 'officer' in the Indian Penal Code.<sup>2</sup>

(c) Whether a conviction was void on the ground of the Magistrate being disqualified under s. 539, Cr. P. C.<sup>6</sup>

4. On the other hand, in the absence of a substantial question of law or principle involved in an affirming judgment, the High Court would not be justified in granting a certificate, for, if the High Court had no doubt about the guilt of the accused and confirmed the order of conviction, there was nothing for a further appeal to the Supreme Court.<sup>7</sup>

5. In exercise of the power under Art. 134 (1) (c), the High Court has to consider the case of each of the accused individually and should not grant the certificate in respect of all the accused where only the case of some of them warrants the issue of a certificate.<sup>10</sup>

### Appeal from order of acquittal.

When, on appeal, the High Court sets aside an order of conviction and acquits the accused, the State is entitled to apply for a certificate under

24. *Jagdhatri v. Ambika*, A. 1951 Pat. 305.

25. *Arjun v. Indian Union*, 10 Cutl. T. 115, *Ranpha v. State*, A. 1952 HP 5.

1. *State of Bombay v. Geoffrey*, A. 1951 Bom. 49.

2. *Montero v. State of Ajmer*, A. 1957 S.C. 13.

3. *Central Bank of India v. Ramnarain*, A. 1955 S.C. 36.

4. *Kali Prasad v. State*, A. 1952 All. 630 (632).

5. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66 (69), *D. J. Anways v. Union of India*, A. 1956 Punj. 1 (4), *Ramakanta v. State*, A. 1957 Orissa 10 (12).

6. *Rama v. State*, A. 1956 M.B. 20.

7. *Shyam Behari v. State of U. P.*, A. 1957 S.C. 320.

8. *Rameswar v. State of Assam*, A. 1951 Assam 14.

9. *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411.

10. *Nar Singh v. State of U. P.*, A. 1954 S.C. 457.

Art. 134 (1) (c). Such an application cannot be rejected as incompetent but must be decided on the merits.<sup>11</sup>

#### When to apply.

Under the Rules of the Allahabad High Court,<sup>12</sup> an application for a certificate of fitness under Art. 134 (1) (c) must be made either before or at the time of delivery of the judgment.

In the absence of any such rule,— though there is no limitation prescribed for an application for certificate under Art. 133 (1) (c) or art. 134 (1) (c),— an application would not be entertained after an inordinate delay which is unexplained.<sup>13</sup>

#### Scope of hearing for certificate.

1 In an application for certificate under this clause, the High Court is solely concerned with the question whether, on the judgment of the High Court, any question of law or principle arises. It cannot reassess the evidence, come to its own conclusion different from that of the first Court, and then grant leave to appeal on the ground that the findings were not justified by the evidence on record. A certificate cannot be granted merely because the Court which hears the application takes a different view of the facts from the Court which heard the original appeal. It must be shown that there was a failure of justice by reason of the misapplication or omission to consider any established rule of law or natural justice.<sup>14</sup>

2 Where one Division Bench has dismissed an appeal another Division Bench, dealing with an application under Art. 134 (1) (c), cannot examine the grounds of appeal as it sitting in appeal over the decision of the other Division Bench.<sup>15</sup> The certificate can be granted only if there are complexities of law which require an authoritative interpretation by the Supreme Court and not on mere questions of fact.

#### Procedure relating to certificate.

1 Points which are not raised during the hearing of the appeal before the High Court cannot be raised in an application for certificate for leave to appeal to the Supreme Court— particularly when it relates to facts.<sup>16</sup>

2 After the High Court grants a certificate for appeal to the Supreme Court, the High Court becomes *functus officio* and cannot, thereafter, grant a stay of further proceedings. The only remedy of the appellant in such cases is to file the appeal in the Supreme Court as early as possible and obtain a stay order from that Court.<sup>17</sup>

#### Disposal of an application under Art. 134 (1) (c).

An application for certificate for appeal under this provision should be disposed of with the greatest despatch.<sup>18</sup>

11 *State of Punjab v Shashi Lal*, A. 1960 SC 379, *State of U. P. v Agrawal*, A. 1966 SC 1135 (1136), (*State of M. P. v Ramakrishna*, A. 1954 SC. 20, not good law if it says anything to the contrary)

12 *Bassi v Hari* A. 1056 All. 297 (301)

13 *State v. Jaiswal*, A. 1954 L.P. 9

14 *Ramakrishna v State*, A. 1957 Orissa 10.

15 *Sidharwar v State of B. B.*, A. 1958 SC 143 (145)

16 *Juram v State*, A. 1954 Bom. 206

17 *Roy v. State*, A. 1953 Orissa 266

18 *Harshankar v. State of M. P.*, (1952) 8 D.L.R. 130 (Nag.).

19 *Bisnu v. State of U. P.*, A. 1954 S.C. 714.

### Form of order in application for certificate.

1. The proper order allowing an application under Art. 134 (1) (c) is not that 'leave to appeal is granted';<sup>20</sup> but that

"a certificate do issue that the case is a fit one for appeal to the Supreme Court"<sup>21</sup>

2. In view of the above observation of the Supreme Court, Desai J. of the Allahabad High Court<sup>22</sup> seems to be justified in saying that it is not correct to describe an application for a certificate under Art. 132 (3), 133 (1) (c) or 134 (1) (c) as an application for 'leave to appeal'. On such an application, the High Court is merely called upon to certify, whether the conditions referred to in the Articles exist or not. It is for the Supreme Court to decide whether appeal lies or not, even though the High Court has granted a certificate.

### Certificate not conclusive.

1. A certificate granted under Art. 134 (1) (c) does not preclude the Supreme Court from determining whether the certificate was rightly granted. In other words, the Supreme Court is not necessarily bound to hear an appeal on the merits merely because a certificate has been granted by the High Court.

2. If on the face of it the Supreme Court is satisfied that the High Court has not properly exercised its jurisdiction under Art. 134 (1) (c), the Supreme Court may either remit the case for exercise of the discretion itself,<sup>23</sup> and treat the appeal as one under Art. 136. The Court may also dismiss the appeal *in limine* if it finds no sufficient reason to interfere under Art. 136 or vary the certificate issued on an application for a writ or a declaratory order. The Supreme Court may also set aside a certificate where no reasons are given by the High Court.

### Refusal of application under 134 (1) (c).

Notwithstanding the refusal of the High Court to grant an application under Art. 134 (1) (c), the aggrieved party may apply to the Supreme Court for special leave to appeal under Art. 136.

### Scope of appeal filed under Art. 134 (1) (a)-(b).

1. The case of appeal under sub-section (a) has to be distinguished from that under sub-section (b) in the following respects:

(i) Under sub-section (a) the appeal lies as of right only on questions of fact and of law, while under sub-section (b) it is available only if the High Court certifies that the case is a fit one for appeal.

(ii) Further, the appeal under sub-section (a) comes from a judgment or a finding on reversal of a conviction, the decision on a question of law or a concurrent finding.

2. As a result, though the Supreme Court may not appraise the evidence under sub-section (a) it would come to its own conclusion as to the

<sup>20</sup> *Baladin v. State of U. P.* A 1955 SC 181, *Gorindul v. State of W. B.* (1957) SC [Cr. App. 62/55].

<sup>21</sup> *State v. Mukhtar Singh* A 1957 All 305 (615).

<sup>22</sup> *Nar Singh v. State of U. P.* A 1954 SC 417.

<sup>23</sup> *Baladin v. State of U. P.* A 1955 SC 181.

<sup>24</sup> *Haripada v. State of W. B.* (1956) SC R 639, *Sunder Singh v. State of U. P.* A 1956 SC 411.

<sup>25</sup> *Saty Narayan Tea Co. v. State of W. B.* (1968) SC [Cr. A. 101/66, d. 82-68].

1. *Thekara v. State of Maharashtra*, (1969) SC [Cr. A. 187/66, d. 25-4-69].

guilt of the accused, upon a reappraisal of the evidence, under sub-cl. (a).<sup>2</sup> Under sub-cl. (a)-(b), the Court sits as a court of appeal on facts, but not under sub-cl. (c).<sup>3</sup>

### Scope of an appeal filed under Art. 134 (1) (c).

1. (i) In an appeal under Art. 134, the Supreme Court will not reassess evidence and argument on a point of *fact* which did not prevail with the Courts below.<sup>4</sup> The Supreme Court would refuse to act as a third Court of facts, to set aside a *concurrent* finding of fact, in the absence of any *compelling reason*,<sup>5</sup> or exceptional circumstances.<sup>6</sup>

(ii) Where the order appealed against is one directing a complaint to be made for the prosecution of the Appellant, the Supreme Court, in appeal, will not ordinarily do more than examine whether the High Court has *fairly considered* a case to reach the conclusion that *prima facie* there is a reasonable prospect of conviction and that it is expedient in the interest of justice to order a prosecution.<sup>7</sup>

2. On the other hand,--

(i) Though the Supreme Court would not, usually, depart from the practice of declining to reassess the evidence, it would raise a benefit of doubt in favour of the accused, *e.g.*, where the defence of the accused, which is a reasonable one, is supported by two *prosecution* witnesses.<sup>8</sup>

(ii) Where the Courts below found the accused guilty, relying on an admission of the accused which did not, in fact, exist, the proper order the Supreme Court would make is an order directing a rehearing, after excluding the consideration of the alleged admission.<sup>9</sup>

(iii) The Supreme Court would certainly interfere where there is a defect in the judgment of the High Court which goes to the root of the matter, *e.g.*, where one of the Judges who signed the judgment dies before it was delivered, for, 'pronouncement' or 'delivery' of the judgment in open Court is an essential requirement of a judgment under the Criminal Procedure Code.<sup>10</sup>

(iv) Where there is such an irregularity in the proceeding as cannot be cured under s. 537, C. P. C.<sup>11</sup>

(v) Where the finding of fact is not concurrent, the Supreme Court may review the evidence and see whether the High Court's assessment was correct.<sup>12</sup> But it would not interfere with the High Court's finding where it finds that the High Court did not err in disagreeing with the trial Court's finding.<sup>13</sup>

(vi) Where there has been a violation of the principles of natural justice, resulting in grave injustice.<sup>14</sup>

2. *Shambhoo v. State of U. P.*, (1962) S.C. [Cr. A. 108/61].

3. *Aher Raja v. State of Saurashtra*, (1955) 2 S.C.R. 1285 (1301).

4. *Lachman Singh v. The State*, A. 1952 S.C. 167 (169).

5. *Damodaran v. State of T. C.*, A. 1953 S.C. 462 (466).

6. *Barsay v. State of Bombay*, A. 1961 S.C. 1762 (1779).

7. *Hari Das v. State of W. B.*, A. 1964 S.C. 1773 (1776).

8. *Hate Singh v. State of M. B.*, A. 1953 S.C. 468 (471).

9. *Darshan Singh v. State of Punjab*, (1953) S.C.R. 319 (333).

10. *Surendra v. State of U. P.*, (1954) S.C.R. 330.

11. *Magga v. State of Rajasthan*, A. 1956 S.C. 174.

12. *Prem Nath v. State of Delhi*, A. 1956 S.C. 4 (8).

13. *Dastagir v. State of Madras*, A. 1960 S.C. 756 (761).

14. *Narayandas v. State of W. B.*, A. 1959 S.C. 1118 (1121).

15. *Tej Narain v. State of U. P.*, (1964) S.C. [CR. Cr. A. 81/64, d. 23-10-64].

(vii) Where the conclusions drawn by the High Court do not follow in law or where they are so unreasonable as to amount to miscarriage of justice.<sup>16</sup>

### Question of law.

A. The following have been held to be questions of law, *not* of fact, in relation to criminal proceedings:

(a) The nature of the offence deducible from proved facts,<sup>16a</sup> but not the respective degrees of guilt of the various accused.<sup>16b</sup>

(b) What is or is not evidence<sup>16b</sup> or whether a particular evidence is admissible.<sup>17</sup>

(c) Whether a charge is valid under the law.<sup>18</sup>

(d) Alleged severity of a sentence [Expl to s 418, Cr P C.].

B. On the other hand the following are instances of questions of fact—

Whether a confession was voluntary or not.<sup>18a</sup>

### Interference with sentence.

The Supreme Court would not ordinarily interfere with sentence unless there is any illegality in it or it involves any question of principle,<sup>21</sup> or there are some unusual feature.<sup>21</sup>

### Practice and Procedure.

The Supreme Court would not allow a question to be raised for the first time, in an appeal under the present Article, when it is a question before the Bench which granted the certificate.<sup>21</sup> Thus, —

Save in exceptional cases, such as subsequent legislation, or questions of fundamental and general importance, the Supreme Court would not permit the appellant to urge points not raised before the High Court nor grant a petition for the purpose,<sup>24</sup> e.g., a plea as to invalidity of sanction under s 197, Cr P. C.<sup>25</sup>

**Abatement of appeal, by reason of death of accused.**—See under Art 136, *post*

### 135. Until Parliament by law otherwise provides, the Supreme

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court

immediately before the commencement of this Constitution under any existing law.

16. *State of Madras v Khadar*, (1960) S.C. 101, A. 150/59, d 8-11-60]

16a. *Dharman v. State of Punjab*, A. 1957 S.C. 321 (326)

16b. *Rebati v. Emp* 32 C.W.N. 945.

17. *Amiruddin v. Emp.*, 45 Cal. 557.

18. *Ramjanam v Emp.*, A. 1935 Pat. 357.

18a. *Sarwan Singh v. State of Punjab*, A. 1957 S.C. 637.

19. *Bhagwati Saran v. State of U. P.*, A. 1961 S.C. 928 (930).

20. *Chari v. State of U. P.*, A. 1962 S.C. 1573 (1580)

21. *State of Maharashtra v. George*, A. 1965 S.C. 722 (741).

22. *Ramashwar v. State of Assam*, (1953) S.C.R. 126.

23. *Narayandas v. State of W. B.*, A. 1959 S.C. 1118 (1121).

24. *Bhagwati Saran v State of U. P.*, A. 1961 S.C. 928 (930).

25. *Chari v. State of U. P.*, A. 1962 S.C. 1573 (1580).



**Scope of Art. 135.**

1. Arts. 133 and 134, being prospective in their operation, affect only suits and proceedings instituted after the commencement of the Constitution. Suits and proceedings instituted before the Constitution are governed by Art. 135 and the pre-Constitution law determines the right of appeal from decrees or orders passed therein, even though such decrees or orders themselves were made after the commencement of the Constitution. The right of appeal which vested in the parties at the institution of those suits or proceedings is not retrospectively affected by anything in the Constitution.<sup>1</sup>

2. In the result, an appeal shall, as of right, lie to the Supreme Court from the judgment passed (even after 26-1-50) in a suit instituted before the Constitution, even though the value of the subject-matter is less than Rs. 20,000, (but above Rs. 10,000), by virtue of the provisions of Civil Procedure Code (ss. 109-110), as they stood before amendment by the Adaption of Laws Order, 1950, read with the Government of India Act, 1935, and the Federal Court (Enlargement of Jurisdiction) Act, 1947.<sup>2</sup>

**'Matter'.**

This is a word of wide import and includes vested rights of appeal.<sup>3</sup>

**'Matter to which the provisions of Art. 133 or Art. 134 do not apply'.**

Such matters, e.g., are—

- (i) Petition under s. 10 of the Bombay Hereditary Offices Act, 1874.<sup>4</sup>
- (ii) Appeals on income-tax matters under s. 66A (2), Income-tax Act.<sup>5</sup>

**136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.**

Special leave to appeal by the Supreme Court.

**(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.**

**Art. 136: Appeal by special leave.**

1. Notwithstanding provision for regular appeals from proceedings before the High Courts, in arts. 132-4, there may still remain some cases, where justice might require the interference of the Supreme Court, with decisions not only of the High Courts outside the purview of the foregoing articles, but also of any other Court or tribunal of the land. The power of the Supreme Court to grant special leave to appeal from the decision of any Court or tribunal save military tribunals, is not subject to any constitutional limitation, and is left entirely to the discretion of the Supreme Court.<sup>6-8</sup>

2. Under this Article the Supreme Court shall have the power to grant special leave to appeal—

- (a) from any judgment, decree, determination, sentence or order.
- (b) in any cases or matter.
- (c) passed or made by any Court or tribunal, in the territory of India.

1. *Garikapati v. Subbiah*, A. 1957 S.C. 540.

2. *Yellappa Gouda v. Basangouda*, A. 1960 S.C. 808.

3. *Jamnadas v. Commr. of I. T.*, A. 1952 Bom. 479; *Commr. of Excess Profits v. Ruby General Ins.*, A. 1954 Cal. 477.

4. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188 (193).

5. *Durgathanagar v. Raghuraj*, A. 1954 S.C. 520 (523); *Raj Krushna v. Bined*, (1954) S.C.R. 913.

3. Arts. 133-4 relate to civil and criminal proceedings, respectively. If a proceeding is neither civil nor criminal and does not involve any question of constitutional interpretation (Art. 132), the only way in which a party may appeal from an order made in such a proceeding is by obtaining special leave of the Supreme Court itself, under the present Article.

4. Art. 136 does not confer a right of appeal upon the party<sup>6</sup> but merely vests a discretion in the Supreme Court to interfere in exceptional cases.<sup>7</sup>

#### **Jurisdiction under Art. 136 cannot be barred by statute.**

The extraordinary power conferred by Art. 136 cannot be taken away by any legislation short of constitutional amendment.<sup>8</sup> Conclusiveness or finality given by a statute to any decision of a court or tribunal cannot deter the Supreme Court from exercising this jurisdiction.<sup>9</sup>

#### **General principles relating to the granting of special leave under Art. 136.**

1. Though the discretionary power vested in the Supreme Court under Art. 136 is not subject to any limitation, the Court has imposed certain limitations upon its own powers.<sup>10</sup> Thus, it has laid down that this power is to be exercised sparingly and in exceptional cases only. By virtue of this Article, the Supreme Court can grant special leave to appeal in 'any cause or other matter' civil, criminal or otherwise, and from any court or tribunal in India. The only uniform standard that can be laid down regarding these variety of cases is that the power shall be exercised only where special circumstances are shown to exist.<sup>11</sup>

2. Ordinarily, the Supreme Court would refuse to entertain appeal under Art. 136 from the order of an inferior tribunal where the litigant has not availed himself of the ordinary remedies available to him at law,<sup>12</sup> e.g., a statutory right of appeal<sup>13</sup> or revision<sup>14</sup> or has not appealed from the final order of an appellate tribunal on appeal from the decision of the inferior tribunal.<sup>15</sup>

This may be allowed only in exceptional cases, such as, a breach of the principles of natural justice by the order appealed against,<sup>16,17</sup> or where the appeal to the Supreme Court is on a point which could not have been decided in the appeal under the ordinary law.<sup>18</sup>

3. It is implicit in the reserve power that it cannot be exhaustively defined, but decided cases do not permit interference unless by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.<sup>19,20</sup>

6. *B. C. P. W. v. Employees*, A. 1959 S.C. 633 (635).

7. *State of Bombay v. Ruyv. A.* 1960 S.C. 391 (395).

8. *Dhakeswari Mills v. Commr. of I. T.* (1955) 1 S.C.R. 941 (919); *Rajkrushna v. Binod*, A. 1954 S.C. 202 (201); *Rutcah Jute Mills v. Eastern Ry.*, A. 1958 S.C. 525 (528); *Harinakar Sugar Mills v. Shyam Sunder*, A. 1961 S.C. 1669 (1678); *I. G. N. & R v. Workmen*, A. 1960 S.C. 219.

9. *Ram Saran v. Commercial Tax Officer*, A. 1962 S.C. 1326 (1328).

10. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188 (189).

11. *Pritam Singh v. State*, (1950) S.C.R. 453; *Dhakeswari Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941 (949).

12. *B. I. S. N. Co. v. Jasjit*, (1965) 1 S.C.A. 425 (428).

13. *Chandi Prasad v. State of Bihar*, A. 1962 S.C. 1708.

14. *Mahadaya v. C. T. O.*, A. 1958 S.C. 667; *D. C. Mills v. Amarnath*, (1955) 1 S.C.R. 941.

15. *Cy. Kanhaiyalal v. I. T. O.*, A. 1962 S.C. 1323 (1325).

16. *Sarwat Singh v. State of Rajasthan*, A. 1961 S.C. 715 (722).

4. It is, however, plain that when the Supreme Court reaches the conclusion that a person has been dealt with *arbitrarily* or that a Court or tribunal has not given a fair deal to a litigant, then no *technical* hurdles of any kind like the finality of finding of facts, or otherwise can stand in the way of the exercise of this power.<sup>17</sup>

On the other hand,—

(a) In the exercise of this extraordinary power, the Supreme Court will not assume a jurisdiction which is not warranted by the provisions of the Constitution nor offer to provide a relief which has been omitted in the Constitution, for, that will be tantamount to making legislation which is never the functions of the Court.<sup>18</sup>

(b) The same principle should be applied at the stage of granting special leave as at the stage when the appeal is finally disposed of.<sup>19</sup> In other words, the Court would not grant special leave on grounds which would not sustain the appeal itself.<sup>20</sup>

(c) Special leave to appeal would not, as a rule, be granted where the appeal had become academic, for instance, where the relief sought in the proceeding had become nugatory owing to subsequent events.<sup>21</sup> It may, however, be granted—

Where though the relief sought had become nugatory, there are pronouncements in the judgment or order appealed against which would affect the appellant substantially.<sup>21</sup>

#### **Delay in filing application.**

1. An application for special leave must be filed within the time limited by the Rules of the Supreme Court. The fact that the Petitioners had to collect money from a large number of persons who were interested in the case, is not sufficient for condoning delay in filing an application.<sup>22</sup>

2. An intending appellant who has not applied for or obtained the leave of the High Court and who does not say a word by way of explanation as to why he did not apply to the High Court and as to why there has been great delay in applying to the Supreme Court should not get special leave from the Supreme Court for the mere asking.<sup>23</sup>

3. At any rate, an application for condonation of delay would not be granted without hearing the respondent.<sup>24</sup>

#### **Where relief would be nugatory.**

1. Special leave to appeal would not, as a rule, be granted where the appeal had become academic, for instance, where the relief sought in the proceeding had become nugatory owing to subsequent events.<sup>25</sup>

2. It may, however, be granted

Where though the relief sought had become nugatory, there are pronouncements in the judgment or order appealed against which would affect the appellant substantially.<sup>25</sup>

17. *Dhakeshwari Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941 (949).

18. *Janardhan Reddy v. The State*, (1950) S.C.R. 940.

19. *Baldota Bros. v. Libra Mining Works*, A. 1961 S.C. 100 (103).

20. *Pritam Singh v. State*, (1950) S.C.R. 453.

21. *Chief Commr. v. Radhey Shyam*, A. 1957 S.C. 304 (306).

22. *Banarsidas v. State of U. P.*, A. 1956 S.C. 520 (522).

23. *Aswini v. Arabinda*, A. 1952 S.C. 369 (386), *Das J.*

24. *Ram Lal v. Ram Nath*, (1962) S.C. [476/61].

25. *Chief Commr. v. Radhey Shyam*, A. 1957 S.C. 304 (306).

**Existence of alternative remedy.**

The existence of an alternative remedy, such as a Letters Patent appeal from the decision of a Single Judge of the High Court, is no ground for taking away the jurisdiction of the Supreme Court under Art. 136. But if this fact is brought to the notice of the Supreme Court in *proper time*, it may refuse to grant special leave or may even revoke a leave already granted.<sup>1</sup>

**Practice and Procedure.**

1. Untrue or misleading statements should not be made in applications for special leave.<sup>2</sup>

2. In the exercise of its discretion, the Court may refuse leave on the ground of misrepresentation or suppression of material facts.<sup>3</sup>

**Whether leave may be revoked.**

1. It cannot be stated as a general proposition<sup>4</sup> that leave once granted cannot be revoked.<sup>5</sup>

2. Where special leave to appeal under this Article has been granted after notice to the Respondent and giving him a hearing, the Supreme Court will not permit the Respondent to urge any argument regarding the correctness of the order granting leave and the Court would not revoke the leave, except in extraordinary circumstances,<sup>6</sup> e.g.,

(i) Where the ground urged for revocation arose subsequent to the grant of the special leave;<sup>7</sup> or

(ii) Where it could not be ascertained by the Respondent at the date of the grant of leave, notwithstanding the exercise of due care.<sup>8</sup>

3. Leave would not be revoked on the ground —

That the appellant before the Supreme Court preferred no appeal against the order of the High Court by which his Petition under Art. 226, challenging the impugned order of the Industrial Tribunal, was summarily dismissed.<sup>9</sup> The reason is that scope of a proceeding under Art. 226 and an appeal under Art. 136 are different and an order summarily dismissing a petition under Art. 226 would not constitute *res judicata* to bar appeal under Art. 136.<sup>10</sup>

4. But, where the special leave was granted after *ex parte* hearing, it would be open to the Respondent to urge at the final hearing that (a) the judgment or order appealed against was not pronounced by a Court or a Tribunal within the meaning of Art. 136 (1) and that, accordingly, the leave should be revoked;<sup>11</sup> or

(b) The leave was obtained by a misrepresentation or suppression of material facts,<sup>12-10</sup> e.g., where the appellant deliberately inflated the valuation of the property;<sup>11</sup> or

1. *Union of India v. Kishorelal*, A. 1959 S.C. 1362 (1365).

2. *Har Narain v. Badri Das*, A. 1963 S.C. 1558.

3. *Rajbhai v. Vasudeb*, A. 1964 S.C. 345 (347).

4. *Cf. Renuka v. Achul Singh*, A. 1961 S.C. 1097.

5. *Balakrishna v. Ramaswami*, A. 1965 S.C. 195 (198).

6. *Thungabhadra Industries v. Govt. of A. P.*, A. 1964 S.C. 1372.

7. *P. D. Sharma v. State Bank of India*, A. 1968 S.C. 985 (987).

8. *Indo-China Navigation Co. v. Jasjit*, A. 1964 S.C. 1140 (1145).

9. *Rajbhai v. Vasudeb*, A. 1964 S.C. 345 (347).

10. *Har Narain v. Badri Das*, A. 1963 S.C. 1558 (1560).

11. *Shetty v. Phirozeshah*, (1963) S.C. [C.A. 155/63].

(c) There was no proper case for granting leave,<sup>12</sup> or the appellant had not complied with a Rule of the Court.<sup>13</sup>

### Scope of appeal under Art. 136.

In granting special leave to appeal, the Court may impose special limitations upon the subject-matter of appeal; or the materials to be used at the hearing. But in the absence of any such limitation, it is open to the appellant to rely on any ground which would have been open to him in a case of regular appeal subject, of course, to the general limitations of an appeal under Art. 136, that is to say, an argument cannot be heard, nor an appeal allowed, on a ground which would not have sufficed for granting the special leave to appeal.<sup>14</sup>

On the other hand,--

1. The circumstance that an appeal has been admitted by special leave does not entitle the applicant to open out the whole case and contest all the findings of fact and raise every point which could be raised in the High Court. Even at the final hearing, only those points can be urged which are fit to be urged when special leave to appeal is asked for. It would be illogical to apply two different standards at two different stages of the same case.<sup>15-16</sup>

2. This does not mean that once special leave has been granted (on *ex parte* motion) restrictions cannot be imposed by the Court at the time of hearing the appeal.<sup>16</sup>

3. In the appellate jurisdiction, the Supreme Court will not decide hypothetical questions.<sup>17</sup>

**'Judgment', 'decree'.—**See under Art. 133 (1), p. 270, *ante*.

### 'Order'.

It is to be noted that while the words 'final order' occur in Arts. 132 3, the word 'order' is used in Art. 136. Hence, if the other conditions are satisfied, the Supreme Court can interfere even with interlocutory orders, under Art. 136, e.g.,—

An order of appointment of a Receiver made by the High Court, under s. 115, C. P. Code, in a case where no *prima facie* case for the exercise of its powers under s. 115 had been made out.<sup>18</sup>

### 'Determination'.

1. This word, which does not occur in Arts. 132 3, has been inserted in Art. 136 to cover decisions which do not come within the ambit of a formal judgment, decree or order, e.g., the decision of a High Court under s. 19 (1) (f) of the Defence of India Act, 1939.<sup>19</sup> Since these cases stand outside Art. 133, special leave may be sought under Art. 136, without asking for a certificate from the High Court under Art. 133.<sup>2</sup>

12. *Baidota Bros. v. Libra Mining Works*, A. 1961 S.C. 623 (635).

13. *Hindusthan Commercial Bank v. Bhagwan Das*, A. 1965 S.C. 1142 (1143).

14. *Sivayogeswara v. Panchakshurappa*, A. 1962 S.C. 413; *Balwan Singh v. Lakshmi Narain*, (1960) S.C. 770 (775).

15. *Harko & Co. v. Bedariya*, (1969) S.C. [C.A. 595/66, d. 10-4-69].

16. *B. C. P. W. v. Employees*, A. 1959 S.C. 632 (635); *Bulwan v. Lakshmi*, A. 1960 S.C. 770 (775).

17. *Central Bank of India v. Workmen*, A. 1960 S.C. 12 (28).

18. *Viradaraja v. Subramonia*, (1968) S.C. [Cr. A. 1651/67, d. 18-12-61].

19. *Collector v. Gauri Sankar*, A. 1968 S.C. 384 (386).

2. But no appeal would lie from mere observations<sup>20</sup> made by a High Court.

**'Any cause or matter'.**

This expression is of a very wide import<sup>21</sup>. It covers proceedings other than civil or criminal, *e.g.*,—

(i) Decision of a High Court in a reference under s. 57, Stamp Act;<sup>22</sup> or ss. 162, 153C, the Companies Act;<sup>23</sup> or s. 432, C. P. C.,<sup>24</sup> or s. 66 (1), Income-tax Act;<sup>25</sup> or s. 21 of the Bihar Sales Tax Act;<sup>26</sup> or similar provisions in the Excess Profits Tax Act,<sup>27</sup> Business Profits Tax Act, 1947.

(ii) Order of the High Court under ss. 13-14 of the Legal Practitioners Act;<sup>28</sup> or s. 12, Bar Councils Act.<sup>29</sup>

**A. Appeal by Special Leave in civil cases.**

1. The Supreme Court has entertained appeal by Special Leave from judgments in civil cases where substantial questions of law have been involved, even though the monetary test laid down in Art. 133 (1) was not satisfied, *e.g.*,

(i) Where the decree of the High Court in a suit for declaration that a deed of gift executed by a limited owner in favour of her daughter was not binding on the reversioner was challenged on the ground of a wrong interpretation of the principles of the Mitakshara law and of s. 123, Transfer of Property Act.<sup>30</sup>

(ii) Where the High Court came to a wrong conclusion from the evidence as to non-access between the parents of the plaintiff, thus making an erroneous decision on a substantial question of law, the question of legitimacy being one of law in view of the presumption of law contained in s. 112 of the Evidence Act.<sup>31</sup>

(iii) Where the High Court erred on the question of law whether a property bequeathed by a father to his sons and intended to be the absolute property of the legatees is ancestral property in which the heirs of the legatees were to have interests.<sup>32</sup>

(iv) Where the High Court had allowed an amendment at the appellate stage after the period of limitation for the suit had already expired.<sup>33</sup>

(v) Where the High Court had dismissed an appeal against an order refusing an objection under s. 47 of the C. P. Code, involving substantial questions of law<sup>34</sup> or decreed a suit rejecting the objection that it was barred under s. 47, C. P. Code.<sup>35</sup>

(vi) Where the decree in a suit for declaration of title and partition involved a substantial question of law viz. of adverse possession between co-heirs.<sup>36</sup>

(vii) Where a suit for declaration of the plaintiff's status as adopted son raised the question as to whether a widow's power to adopt terminates by reason of subsequent changes in the family.<sup>37</sup>

20. *Jagatjit Distilling Ltd v State of Punjab*, (1969) S.C. (A 510 66 d 29 4-69).

21. *Pratap Singh v State*, (1950) S.C.R. 153.

22. *Cf. Board of Revenue v Benihal A*, 1956 S.C. 35.

23. *Cf. R. E. S. Corpn. v Nagaswara A*, 1956 S.C. 217.

24. *A. S. Krishna v State of Madras A*, 1957 S.C. 297 (300).

25. *Cf. India United Mills v Commr. of E. P. I.*, A 1955 S.C. 79.

1. *Oriental Investment Co v Commr. of I. T.*, (1958) S.C.R. 40.

2-10. *Raghunath v State of Bihar*, (1958) S.C.R. 37.

11. *J. K. Trust v. Commr. of I. T.*, (1958) S.C.R. 65.

12. *Cf. Lalit Mohan v. Advocate General A*, 1957 S.C. 250 (251).

13. *Nageshwara v Judges, A*, 1955 S.C. 223.

14. *Kamlu v. Bachulal, A*, 1957 S.C. 311 (1957) S.C.R. 152.

15. *Chilukuri v Chilukuri*, (1964) S.C.R.

16. *Arjunachala v. Muruganatha*, (1961) S.C.R. 243.

17. *P. H. Patil v Patil A*, 1957 S.C. 363.

18. *Rajes v. Shanti, A*, 1957 S.C. 253 (257) (1957) S.C.R. 77.

19. *Ramanna v Nallapareddy, A*, 1956 S.C. 87.

20. *Lakshmi Reddy v. Lakshmi Reddy, A*, 1957 S.C. 314; (1957) S.C.R. 195.

21. *Gurunath v. Kamalabai, A*, 1955 S.C. 706.

(viii) Where the decision in a mortgage suit rested upon the question of limitation;<sup>22</sup> or contribution between co mortgagors;<sup>23</sup> or the extinction of the right of redemption.<sup>24</sup>

(ix) Where, in an appeal against an order of appointment of a Receiver in an execution proceeding, the point involved was whether execution at all lay against a compulsory deposit in a Provident Fund due to the judgment debtor.<sup>25</sup>

(x) Where, in a suit upon a contract, the question involved was the applicability of the doctrine of frustration of contract as embodied in ss. 32 and 56 of Contract Act;<sup>1</sup> or the scope, at law, of the authority of an agent to conclude a contract on behalf of his principle.<sup>2</sup>

(xi) Where a memorandum of appeal had been rejected for non-payment of court-fee directed to be paid, the question of application of the proper provision of the Court-fees Act being in dispute.<sup>3</sup>

(xii) Where, in an appeal against a revisional order of the High Court, the point involved was whether the High Court had a revisional jurisdiction in the matter under the law.<sup>4</sup>

(xiii) Where the jurisdiction of the Civil Court to try the suit was in question.<sup>5</sup>

2. If such substantial questions are involved, the Court may grant special leave to appeal under Art. 136 where the High Court had rejected an application for certificate under Art. 133 (1) (c), e.g.,—

(a) Where the High Court had dismissed a petition under Art. 226 *in limine*, without inquiring into the allegation of *mala fides* against the Government.<sup>6</sup>

(b) Where the decision of the High Court in revision against the order of the Rent Controller involved a substantial question of law, viz., whether the W. B. Premises Rent Control Act applies to the premises in question.<sup>7</sup>

### Interference with second appellate decision.

1. Normally, special leave against a second appellate decision will not be granted unless the remedy of a Letters Patent Appeal has been availed. But it cannot be laid down as "an inflexible rule that leave must be refused if the appellant has not moved for leave under the Letters Patent."<sup>8</sup>

2. In any case, special leave would be granted from a second appellate decision only where the judgment raises issues of law of general importance.<sup>9</sup>

### Interference with orders in revision.

Matters which could not be raised before the High Court in revision cannot be raised before the Supreme Court in appeal by special leave from the order passed by the High Court in revision.<sup>10</sup> In short, the limitations placed upon the powers of the High Court under s. 115 of the C. P. Code also circumscribe the powers of the Supreme Court to interfere, under Art. 136, in regard to the same matter.<sup>11a</sup>

### Interference with discretionary orders.

1. Where the granting of relief was at the *discretion* of the High

22. *Sant Lal v. Kamala*, (1952) S.C.R. 116.

23. *Kidar Lal v. Hari Lal*, (1952) S.C.R. 179.

24. *Lilachand v. Mallappa*, A. 1960 S.C. 85.

45. *Union of India v. Hira Devi*, (1952) S.C.R. 765.

1. *Ganga Saran v. Ram Charan*, (1952) S.C.R. 36.

2. *Abdulla v. Annemndra*, (1951) S.C.R. 30.

3. *Nemi Chand v. Edward Mills*, (1953) S.C.R. 197.

4. *Moti Ram v. Suraj Bhan*, A. 1960 S.C. 635.

5. *Foods Ltd. v. Munshi Lal*, (1952) S.C. [C.A. 629/60].

6. *C. J. B. I. Corp. v. Industrial*, A. 1957 S.C. 354.

7. *Karnani Properties v. Augustine*, A. 1957 S.C. 309; (1957) S.C.R. 20.

8. *Balakrishna v. Ramaswami*, A. 1965 S.C. 195.

9. *Misrilal v. Sadasiviah*, A. 1965 S.C. 553 (554).

9a. *Ratilal v. Ranchhodhbhai*, A. 1966 S.C. 439 (441).

Court, the Supreme Court would not interfere unless the discretion was exercised by the High Court *improperly* or arbitrarily<sup>10</sup> even though the Supreme Court might have exercised the discretion in a different way if the application for writ had been presented to the Supreme Court, in the first instance.<sup>11</sup>

2. Though no hard and fast rules can be laid down in matters relating to the exercise of a discretion, the Supreme Court will interfere where the discretion is exercised arbitrarily, or is based on a misunderstanding of the principles that govern its exercise,<sup>12</sup> e.g., in the matter of adding an unnecessary party under O. 1, r. 10, C. P. Code;<sup>13</sup> or improperly demanding security as a condition of defence under O. 37, r. 3<sup>14</sup> or granting or refusing injunction.<sup>15</sup>

3. But the Supreme Court would not interfere with a discretionary order merely on the ground that if the Supreme Court were required to exercise the discretion, it would have made a different order.<sup>16</sup>

4. Where the High Court has interfered with a wrong exercise of discretion by a subordinate authority, the Supreme Court would not under Art. 136, interfere with the order of the High Court which was clearly in the interest of justice.<sup>17</sup>

### Interference with findings of fact.

The Court could not go behind the findings of fact unless there is a sufficient ground for doing so.<sup>18, 19</sup>

I. It has been held that there was no such sufficient reason —

(a) Where the High Court, lost for a confusion between two of the alleged gifts which were in question, came to a correct conclusion upon a consideration of the oral evidence.<sup>20</sup>

(b) Where the High Court has accepted the view taken by the Trial Court in preference to that taken by the Appellate Court on a question within its competence.<sup>21</sup>

II. But the Supreme Court would interfere —

1. Where on the evidence on the record no Court could, as a matter of legitimate inference, arrive at the conclusion that the lower Court has.<sup>22</sup>

2. Where the two lower Courts of appeal were under a misapprehension as to the finding of the trial Court of a material fact, the Supreme Court will examine the evidence on the point itself.<sup>23</sup>

III. Where there are exceptional circumstances, the Supreme Court may go into the entire evidence to see whether the High Court was right in its finding of fact, e.g.,

Where suspicious circumstances regarding execution and attestation of a Will were noted by the High Court and there were differences in the approach of the two Judges composing the Bench.<sup>24</sup>

10. *Khorai Municipality v. Kamal Kumar*, A. 1955 SC 1321 (1321).

11. *Venkateswarun v. Wadhvani*, A. 1961 SC 1506.

12. *Santosh v. Mool Singh*, (1959) SCR 32 (38).

13. *Razia Begum v. Amir*, A. 1958 SC 846 (845).

14. *Baldota Bros. v. Libra Mining Works*, A. 1961 SC. 100 (103).

15. *Chellammal v. Masanan*, A. 1965 SC. 498 (502).

16. *Kamala v. Bachulal*, A. 1957 SC. 434 (438); (1957) SCR 452.

17. *Chattanatha v. Ramachandra*, (1955) 2 SCR. 477 (480).

18. *Kasibai v. Mahadu*, A. 1965 SC. 703 (706).

19. *White v. White*, A. 1958 SC 441 (442).

20. *Kaushal Kishore v. Ram Dev*, A. 1958 SC. 999 (1001).

21. *Purnima v. Khagendra*, A. 1962 SC. 567; (1962) 3 S.C.R. 195.



### Interference with concurrent findings of fact.

Where the finding is concurrent, the Supreme Court will not interfere<sup>22</sup> with it unless there are any special reasons, e.g., a manifest error of law in arriving at the finding;<sup>23</sup> or a disregard of the judicial process or of principles of fair hearing.<sup>23-24</sup>

### Practice and Procedure.

1. The Supreme Court will not allow a party to set up a case not made in his pleading and which was not allowed to be argued by the High Court;<sup>25</sup> e.g., as to the invalidity of a statute.<sup>1</sup>

2. The Court will not allow the scope of an appeal to be enlarged beyond that of the appeal before the High Court even at the instance of a Respondent who is entitled to support a decree in his favour even upon a ground found against him by the High Court.<sup>2</sup> But the Court may make an exception to this rule where the question raised is one of considerable importance and may be raised in other similar pending suits.<sup>2</sup>

2. Ordinarily, a question of law is allowed to be raised before the Supreme Court, even though not taken in the High Court, such as the interpretation of a statute;<sup>3</sup> but not where it would result in grave miscarriage of justice.<sup>4</sup>

3. A question of fact is not allowed to be raised for the first time before the Supreme Court.<sup>5</sup>

4. The High Court is a Court of Record and unless an omission is admitted or demonstrably proved the Supreme Court will not consider an allegation that a point was raised before the High Court but was not dealt with by the Court. Ordinarily, the details of the arguments as given in the judgment will be taken as correct.<sup>6</sup>

5. The Supreme Court may, in the exercise of its discretion, refuse to grant special leave from the decision of a single Judge when the appellant did not avail of the right to appeal under the Letters Patent.<sup>7</sup>

6. Ordinarily, the Supreme Court will not exercise its jurisdiction under Art. 136, unless the appellant has exhausted all other remedies open to him.<sup>8</sup>

5. Since normally a party in whose favour a judgment has been given cannot appeal from it, where a special leave to appeal has been granted, the Court may, in appropriate cases, permit the respondent to support the judgment in his favour even upon grounds on which the findings were against him.<sup>9-25</sup>

### Applicability of O. 45, r. 8, C. P. Code to appeals under Art. 136.

The applicability of O. 45, r. 8 C. P. Code to appeals under Art. 136 is restricted. Ordinarily, when a High Court grants a certificate for appeal

22. *Thenappa v. Karuppan*, A. 1968 S.C. 915 (419).

23. *Gondumogula v. Jagapathiraju*, A. 1967 S.C. 647 (619).

24. *Gondumogula v. Penumatcha*, (1962) Supp. (3) S.C.R. 324.

25. *Lilachand v. Mallappa*, A. 1960 S.C. 85; *Ghouse v. State of Andhra*, A. 1967 S.C. 246 (249).

1. *Lakshmi Narayan v. State of A. P.*, A. 1965 S.C. 580 (585).

2. *Bharat Kala Bhandar v. Dhamanraon Municipality*, A. 1966 S.C. 249 (259).

3. *Gondumogula v. Jagapathiraju*, A. 1967 S.C. 647 (649).

4. *Ragh Prasad v. Sri Krishna*, A. 1969 S.C. 316 (319).

5. *Lakshmana v. State of Madras*, A. 1969 S.C. 1489 (1494).

6. *Bashiruddin v. Majlis-Awaaz*, A. 1966 S.C. 1206 (1208).

7. *Ranuja v. Achal Singh*, A. 1961 S.C. 1097.

8. *State of Bombay v. Ratilal*, A. 1961 S.C. 1106.

9-25. *Ramanbhai v. Dabhi*, A. 1965 S.C. 669 (676), overruling *Vashist Narain v. Dev Chandra*, A. 1964 S.C. 513 (516).

to the Supreme Court, it is the High Court which retains full control and jurisdiction over the subsequent proceedings till the appeal is admitted. The jurisdiction of the Supreme Court begins after the appeal is finally admitted.

When, however, the appeal comes to the Supreme Court on the strength of a special leave granted by it, the position is different. In such cases, the order of the Supreme Court itself operates as an admission of the appeal as soon as the conditions in the order relating to security or deposit are complied with. In such a case, it is not necessary for the appellant to move the High Court again for a formal admission of the appeal. As soon as the directions laid down in the order granting special leave are complied with, it would be the duty of the Registrar of the Supreme Court to issue a notice of admission of the appeal for service upon the respondent. In default of issue of such notice, the appellant cannot be held responsible for laches in the prosecution of his appeal.<sup>11</sup>

### **B. Principles relating to interference with orders of High Court under Art. 226.**

1. The Supreme Court would interfere with an order of the High Court under Art. 226

(1) Where the High Court has refused to interfere with the proceedings before a statutory tribunal which are patently *ultra vires*<sup>12</sup> or unconstitutional, since they infringe a fundamental right<sup>13</sup> or violates a mandatory provision of the Constitution<sup>14</sup>

(2) Where the appellant under Art. 226 complains of the violation of Art. 311 (2) the Supreme Court will not usually interfere with the decision of the High Court if it has acted reasonably where the disciplinary proceedings have violated the principle of natural justice.

#### **2. On the other hand**

Where a Court of appeal has reversed the order of a single Judge dismissing a petition under Art. 226, the Supreme Court would not interfere if the petition raises questions of importance.<sup>15</sup>

#### **Interference with discretion.**

Where the High Court has granted relief under Art. 226 notwithstanding the existence of an alternative remedy, the Supreme Court would not interfere unless the High Court has acted arbitrarily or unreasonably in exercising its discretion.<sup>16</sup>

### **Interference with interlocutory orders passed in proceedings under Art. 226.**

Ordinarily, the Supreme Court will not interfere with interlocutory orders passed by a High Court in proceedings under Art. 226 while it is still pending before the High Court.<sup>17</sup> It will interfere with an

11. *Shree Jule Budhu v. H.N. Das & Co.* (1955) 2 S.C.R. 243 (249).

12. *Carl Stoll v. State of Texas*, A. 1961 S.C. 1035; *Kabundia and v. Tax Recovery Officer*, A. 1963 S.C. 182 (168).

13. *Himmat Lal v. State of M.P.* (1951) S.C.R. 1122.

14. *State of Bombay v. United Motors* (1953) S.C.R. 1069.

15. *State of M.P. v. Chintaman*, A. 1961 S.C. 1033.

16. *Himansu v. Jyoti Prakash*, A. 1964 S.C. 1636 (1641).

17. *Kharai Municipality v. Kamal Kumar*, A. 1965 S.C. 1321 (1324); *Zila Parishad v. K.S. Mills*, A. 1964 S.C. 98 (100); *I.T.O. v. Short Bros.*, A. 1967 S.C. 81 (82); *Barium Chemicals v. Company Lau Brand*, A. 1967 S.C. 295 (cross-examination of deponent).

11. *Nagendra v. Commr.*, A. 1958 S.C. 398 (413).

12. *Himansu v. Jyoti Prakash*, A. 1964 S.C. 1633 (1640).

interlocutory order in a case pending before the High Court where there are exceptional and unusual features justifying such interference, e.g.,—

The High Court in an application under Art. 226 brought by the respondents made an interim order on 10-6-57 that "*status quo ante* be maintained." By a misapprehension of this order, the Excise Commissioner directed that possession should be recovered from the appellant and given to the respondents. The appellant moved the High Court for quashing this order of the Excise Commissioner which was palpably wrong. The High Court issued a rule but *refused to grant an interim stay* of the order directing possession to be given. The petitioner went on moving petitions for vacating the order of possession but the High Court could not hear these petitions until after the Long Vacation in September, 1957, because no Division Bench could be constituted for want of a Judge.

The Supreme Court found that the order directing the appellant to be dispossessed was without any authority of law and also found that there was no merit in the case made by the respondent in the application under Art. 226 itself where the interlocutory order of the High Court was made. Hence, the interlocutory order was quashed.<sup>13</sup>

### Interference with finding of fact.

1 Ordinarily the Supreme Court will not interfere with the appreciation of the affidavit evidence by the High Court, but in exceptional cases, the Supreme Court may examine the finding of the High Court, e.g., where it affects the status of a person holding the office of a quasi-judicial tribunal on the ground of bias.<sup>13</sup>

2 The jurisdiction of the Supreme Court under Art. 136 is wider than that of the High Court under Art. 226, because it can go into questions of fact as well, while the High Court, in a proceeding for *certiorari*, cannot.<sup>13a</sup>

### Appeal from dismissal in limine.

1 In an appeal from an order of the High Court dismissing a petition under Art. 226 *in limine*, the scope of the appeal before the Supreme Court is confined to the ambit of the writ petition in the High Court,<sup>14</sup> viz., whether the grounds set forth in the Petition can be established in the averments therein.

2 Where the Petition raises a *prima facie* case or an arguable issue, but requires further investigation, the Court would reverse the order of the High Court and send the case back, e.g., where the question raised is of considerable importance<sup>12</sup> or there is an allegation of *mala fides*.<sup>15</sup>

### Practice and Procedure.

1 A point of law which can be decided on the material on record can be allowed to be raised for the first time before the Supreme Court in special appeal.<sup>16</sup>

But—

The Supreme Court would not entertain a plea, which was not made before the High Court and was introduced for the first time in the application for special leave, such as the following—

(i) *Mala fides*.<sup>17</sup>

(ii) That the impugned acquisition was not for a public purpose.<sup>18</sup>

13 *APSRTC v. Satyanarayan Transports*, A. 1965 SC 1303 (1307).

13a *Sharma v. State of Bank of India*, (1968) 3 S.C.R. 91 (94).

14 *Gurbux Singh v. State of Punjab*, A. 1967 S.C. 502 (503).

15 *B. I. Corbin v. Industrial Tribunal*, A. 1957 S.C. 354 (356).

16 *State of Rajasthan v. Karamchand*, A. 1965 S.C. 913 (917).

17 *Makhan Singh v. State of Punjab*, A. 1964 S.C. 1120 (1126).

18 *State of Mysore v. Achiah*, A. 1969 S.C. 677 (483).

(iii) The constitutional validity of a statutory provision.<sup>19</sup>

2. Unless there are specific allegations against the inferior tribunal whose order is sought to be set aside by *certiorari*, such tribunal need not appear by a lawyer either before the High Court or in appeal before the Supreme Court and, if it does, it must bear its own costs.<sup>20</sup>

3. In a fit case, the Supreme Court may, in an appeal from an order under Art. 226, remit the case to the inferior statutory tribunal to deal with the case according to law.<sup>21</sup>

4. When a concession has been made by a party before the High Court on a question of fact or mixed question of fact and law the Supreme Court will not allow that to be withdrawn.<sup>22</sup>

### C. Principles relating to orders of High Court under Art. 227.

1. The Supreme Court would interfere with an order under Art. 227

(a) Where the High Court refused jurisdiction upon a misconception of law, e.g., as to the nature of the tenancy in respect of which the landlord had applied for possession before the Rent Controller.<sup>23</sup>

(b) Where the High Court, under Art. 227, sought to correct a mere error of law of a Tribunal, not being an error 'apparent on the face of the record'.<sup>24</sup>

2. But the Supreme Court will not interfere where the High Court has, in a proper case, set aside the decision of an inferior Court merely on the ground that it was erroneous.

### D. Principles relating to interference with orders of High Court in cases of professional misconduct.

The Supreme Court is most reluctant to interfere with the orders of the High Court in this sphere in view of the delicate and responsible task of the High Court in maintaining a high standard of professional rectitude, save in exceptional cases where any question of principle is involved or where the Supreme Court is persuaded that any violation of the principles of natural justice or miscarriage of justice has taken place.<sup>25</sup>

The findings of the High Court on points of fact are not open before the Supreme Court and the latter would only consider whether on the facts found, the charge of professional misconduct is established.

### E. Appeal by special Leave in Criminal Cases.

#### I. Principles relating to grant of special leave in criminal cases.

1. In a criminal case, the Supreme Court will grant special leave to appeal only in those cases where it is shown that exceptional and special circumstances exist or that substantial and grave injustice has been done or that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.<sup>26</sup> It would not grant special leave to appeal on grounds which would not sustain the appeal itself,<sup>27</sup> that is, unless it is manifest that, by a disregard of the forms of legal process

19. *Krishan Kumar v. State of J & K*, A 1967 SC 1368 (1370).

20. *Yakub v. Radhakrishnan*, A 1964 SC 477 (483).

21. *Municipal Bd v. S T A*, A 1965 SC 458 (467).

22. *State of Bombay v. Venkat Rao*, A 1966 SC 991 (993).

23. *Nagendra v. Commr.*, A 1958 SC 398 (413).

24. *Kishan Lal v. Ganpat*, A 1961 SC 1554.

25. *Surendra v. Stephen Court*, A 1966 SC 1361 (1363).

1. *Ratnam v. Kanikaram*, A 1964 SC 244 (247).

2. *Priyam Singh v. The State*, (1950) SCR 453.

3. *Hem Raj v. State of Ajmer*, (1956) SCR 113.

4. *Sadhu Singh v. State of Pepsu*, A 1964 SC. 271.

or by violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.<sup>5</sup>

2. The Supreme Court has granted special leave to appeal from the judgment of the High Court in a criminal case:

(a) Where the High Court reversed a judgment of acquittal and sentenced the accused to transportation for life [so that Art. 134(1)(a) was not applicable], and there was a passage in the judgment of the High Court which suggested that the Court had ignored the presumption of innocence in favour of the accused.<sup>6</sup>

(b) Where there is a serious question of law affecting the foundation of the conviction, e.g.,—

Whether the conviction of an accused under s. 120B, I.P.C., is maintainable where other alleged conspirators have been acquitted.

(c) Special leave was granted to the State—

Where the order of discharge passed by a Magistrate at the instance of the Public Prosecutor, under s. 491, Cr. P. C., was set aside by the High Court on the ground that the Court should not have granted the consent to the withdrawal of the Public Prosecutor and it was contended on behalf of the State that the view taken by the High Court was erroneous and was likely to have repercussions in the State beyond what was involved in the particular case.<sup>7</sup>

3. The Supreme Court does not generally interfere with interlocutory orders, e.g., order of remand.<sup>8</sup>

### Practice and Procedure.

The Supreme Court would not entertain an application for special leave where the appellant did not move the High Court for a certificate under Art. 134 (1) (c).<sup>9</sup>

## II. Principles governing disposal of criminal appeal on special leave.

(1) The Court will not interfere with judgments or orders of Criminal Courts, on special leave—

(i) To assume a jurisdiction which is not warranted by the other provisions of the Constitution.<sup>10, 12</sup>

(ii) Where the plea of mis-joinder of charges is without substance.<sup>1</sup>

(iii) Merely to question a finding of fact which is in favour of the accused.<sup>13</sup>

(iv) To examine the reasons for coming to certain conclusions of fact.<sup>14</sup>

(v) On ground of mistakes of a technical nature which have not occasioned any failure of justice.<sup>15</sup> Thus,

(a) Whether action should be taken under s. 195 of the Cr. P. C. is a matter primarily for the Court which hears the application, and is not a matter for interference by the Supreme Court in exercise of its extraordinary powers under Art. 136.<sup>11</sup>

5 *Mohinder Singh v State*, A. 1953 SC 415.

6 *Nisar v State of U. P.*, A. 1957 SC 366 (1957) SCR. 657.

7 *Topandas v State of Bombay*, (1955) 2 SCR 881.

8 *State of Bihar v. Ram Narish*, A. 1957 SC 380 (392), (1957) S.C.R. 279.

9 *Madanraj v. Jalanchand*, A. 1960 SC 744.

10 *State of U. P. v. Boota Singh*, (1966) SC (Cr. A. 41/66, d. 18-8-66).

11 12. *Janardhan v The State*, (1950-51) CC 269 (1950) SCR 940.

13 *Bhagat Singh v. The State*, (1952) S.C.R. 371.

14 *Suami v. State*, A. 1960 SC 7.

15 *Zabar Singh v. State of U. P.*, A. 1957 SC 465.

16 *Habeeb v. State of Hyderabad*, (1954) SC 475.

17 *Vinodur Kumar v. State of U. P.*, A. 1956 SC 153 (158).

(b) Every error or omission not in compliance with s. 342 of the Criminal Procedure Code does not necessarily vitiate the trial. Errors of this type fall within the category of curable irregularities, and the question whether the trial is vitiated depends upon the degree of error and upon whether prejudice<sup>18</sup> has been or is likely to have been caused to the accused.<sup>19</sup>

The Court would set aside the conviction where omission to examine the accused under s. 342 was not a mere technical error.<sup>20</sup>

It is not a sufficient compliance with the section to generally ask the accused that having heard the prosecution evidence what he has to say about it. He must be questioned *separately* about each material circumstance which is intended to be used against him. The questions must be fair and be couched in a form which any ignorant or illiterate person will be able to appreciate and understand. Where there is a violation of these principles, the Supreme Court will interfere by special leave.<sup>20, 21</sup>

(c) Where the High Court has refused to exercise its inherent jurisdiction under s. 561-A, Cr. P. C., unless the decision is erroneous in law, even though the Supreme Court may not agree with the conclusion arrived at by the High Court.<sup>22</sup>

2. On appeal by the State, the Supreme Court will not interfere to resuscitate a state matter, where public interest does not so require.<sup>23</sup>

3. The only function of the Supreme Court being to find whether the judgment appealed from is legally correct or not, the Court cannot take into account the result of a later case against the accused.<sup>24</sup>

(H) 1. On the order hand, the Court will interfere in case of substantial injustice, e.g., -

(i) Where the High Court accepted as correct all the essential facts constituting the offence with which the accused was charged but passed an order of *acquittal* on a misconception as to the effect of a decision of the Supreme Court.<sup>25</sup>

(ii) Where the Court below had committed an error of law which constituted the very foundation of the offence, viz. upon the question whether *mens rea* was an essential ingredient for conviction for contravention of cl. 22 and 27 of the Motor Spirit Rationing Order, 1941, promulgated under s. 81-22 of the Defence of India Rules, 1939, or failed to consider the plea of private defence in the light of the ingredients laid down by the law.<sup>1</sup>

(iii) Where of the many items set out in the charge under s. 147 of the Indian Penal Code as constituting the common object of the alleged unlawful assembly, dispossession of the complainant is the most important one, it is incumbent on the Appellate Court to record a clear finding as to possession and its failure to record it on the vital issue in the case, without deciding which the question as to who was the aggressor could not properly and satisfactorily be determined, is apt to lead to injustice of such a serious substantial character as to warrant interference of the Supreme Court on special leave.<sup>2</sup>

(iv) Where the inferior Court adopted a procedure unknown to law, e.g., holding a preliminary inquiry under s. 188, Cr. P. C., and the circumstances of the case were strong enough to show that he had made an unjudicial approach to the case.<sup>3</sup>

18. *Ajmer Singh v. The State*, A. 1953 S.C. 76.

19. *Machander v. State of Hyderabad*, (1955) 2 S.C.R. 524 (540).

20. *Tara Singh v. State*, (1950) S.C.R. 729.

21. *Karula Hanjrasada v. The State*, (1951) S.C.R. 322.

22. *Kapur v. State of Punjab*, A. 1960 S.C. 866 (871).

23. *State of Bihar v. Hiralal*, A. 1960 S.C. 48 (51).

24. *Mohinder Singh v. State of Punjab*, A. 1965 S.C. 79 (83).

25. *State of Bihar v. Hasawan Singh*, A. 1958 S.C. 500 (507).

1. *Amjad v. The State*, (1952) S.C.R. 757.

2. *Kapiladeo v. The King*, A. 1950 F.C. 80.

3. *Nand Lal v. Kanhaiya Lal*, A. 1960 S.C. 882 (886).

### Interference with findings of fact.

1. In a criminal appeal on special leave the Supreme Court will not constitute itself into a third Court of fact and re-weigh the evidence which has impressed the Courts below.<sup>4-6</sup> Hence,

(a) It will not interfere with the judgment of the Courts below only on ground of credibility of witnesses, when the prosecution story is not *prima facie* incredible or improbable<sup>7a</sup> or the alleged error of the Court has not resulted in a failure of justice.<sup>8</sup>

(b) Where the High Court has considered all the evidence, the Supreme Court will not examine the *reasons* of the High Court for coming to the conclusion from them.<sup>9</sup>

2. On the other hand, though the Supreme Court will not, ordinarily, look beyond the *findings of fact* arrived at by the Court below, the Court will interfere in exceptional cases,<sup>10a</sup> e.g. —

I. Where there has been in substance no fair and proper trial or the findings of the fact are such as are shocking to the judicial conscience of the Court,<sup>11-13</sup> that is, where the evidence is such that no tribunal could legitimately infer from it that the accused is guilty of the offence,<sup>14a</sup> e.g. —

(a) Where the Courts below have arrived at a decision on the plea of *alibi* in disregard of the principle that the standard of proof which is required in regard to that plea must be the same as the standard which is applied to the prosecution evidence and that in both cases it should be a reasonable standard;<sup>15</sup> or where the circumstances relied upon by the Courts were not inconsistent with the innocence of the accused,<sup>12</sup> or,

(b) Where the Court below relied upon the *confession* of a co-accused or the testimony of an accomplice without sufficient independent evidence in corroboration;<sup>13</sup> or where the Courts below, in coming to the conclusion that the confession was voluntary, failed to note that the prosecution offered no explanation why the C.I.D. Inspector kept the accused in *prolonged* custody preceding the making of the confession.<sup>14</sup>

(c) Where a finding of fact has been arrived at on the testimony of a witness who is not a person on whom any reliance could be placed and who was himself a party to the preparation of a forged document in the suit and the Courts below have departed from the rule of prudence that such testimony should not be accepted unless it is corroborated by some other evidence on the record, a finding of that character may be reviewed even on special leave if the other circumstances of the case require it, and substantial grave injustice has resulted.<sup>14b</sup>

(d) Where the appellant has been convicted notwithstanding the fact that the evidence was wanting on a most material part of the prosecution case.<sup>16</sup>

(e) Where it appears that the High Court has not at all applied its mind to the appreciation of the evidence and grave injustice has resulted therefrom.<sup>17</sup>

4. *Pritam Singh v. State*, (1950) S.C.R. 453.

5. *Mulk Raj v. State of U. P.*, A. 1959 S.C. 902.

6. *Dalbir Singh v. State of Punjab*, A. 1962 S.C. 1106.

6a. *Tara Singh v. State*, (1961) S.C.R. 729.

7. *Brij Bhukhan v. State of U. P.*, A. 1957 S.C. 474.

8. *Sarwant Singh v. State of Rajasthan*, A. 1951 S.C. 715 (722).

8a. *Mohinder Singh v. State of Punjab*, A. 1965 S.C. 79 (81).

9. *Swami v. State*, A. 1960 S.C. 6 (10).

10. *Haripada v. State of W. B.*, A. 1956 S.C. 757 (759).

11. *Hanumant v. State of Madhya Pradesh*, A. 1952 S.C. 343.

12. *Kashmira Singh v. State of Madhya Pradesh*, (1952) S.C.R. 526.

13. *Nathu v. State of U. P.*, A. 1956 S.C. 56 (59).

14. *Bhagwan v. State of Rajasthan*, A. 1957 S.C. 589; (1967) S.C.R. 854;

*Kunhakhammad v. State of Madras*, A. 1960 S.C. 661.

15. *Hanumant v. State of M. P.*, (1952) S.C.R. 1091.

16. *Mohinder Singh v. State*, (1950) S.C.R. 821.

17. *Surjan v. State of Rajasthan*, A. 1956 S.C. 425 (431).

(f) Where the accused has been convicted of murder, without apprehending the true effect of a material change in the versions given by the witnesses immediately after the occurrence and at the trial with respect to the nature and character of the offence.<sup>18</sup>

(g) Where the accused has been convicted of murder on the opinion of a third Judge (in view of difference as to guilt between two Judges) who, again, has differed on the question of sentence.<sup>19</sup>

(h) Where the finding of fact leads to a conclusion which is not tenable at law, e.g., where the accused was convicted for having entered into a conspiracy to murder, though the persons with whom he was said to have conspired, were acquitted.<sup>20</sup>

If any of the foregoing conditions are present, the Supreme Court will make no distinction between a judgment of conviction or acquittal by the High Court.<sup>21</sup>

It. Where the High Court has reversed a finding of acquittal of the subordinate Court, in disregard of the principles laid down by the Supreme Court in this behalf,<sup>22</sup> but not otherwise.

### Interference with concurrent findings of fact.

The Supreme Court will not reassess the evidence at large and come to a fresh opinion as to the innocence or guilt of the accused,<sup>23</sup> so as to interfere with a concurrent finding of fact by the Courts below.<sup>24, 25</sup>

But even in cases of concurrent findings, the Court may interfere—

(i) Where there has been in the trial a violation of the principles of natural justice;<sup>26, 25</sup>

(ii) Where the conclusions reached by the Courts below are so patently opposed to the well established principles of judicial approach<sup>1</sup> as to amount to a miscarriage of justice;<sup>2</sup>

(iii) Where the Courts have committed an error of law or of the forms of legal process or procedure by which justice itself has failed;<sup>28</sup>

(iv) Where there has been an improper reception or rejection of evidence which, if discarded or received, would leave the conviction unsupported;<sup>29</sup>

(v) Where there has been a misreading of vital evidence<sup>23</sup> or the Court omits to notice very important points in the accused's favour which would swing the balance the other way.<sup>3</sup>

### Consideration of evidence by Supreme Court.

1. Where the finding of fact by the High Court is perverse, inadequate<sup>3</sup> and has resulted in a miscarriage of justice, the Supreme Court may itself hear the appeal on the evidence instead of remanding the case to the High Court for a reconsideration of the evidence, where the latter course

18. *Sadhu Singh v. State of Punjab*, A. 1951 S.C. 271.

19. *Pandurang v. State of Hyderabad* (1955) 1 S.C.R. 1083.

20. *Zahar Singh v. State of U. P.*, A. 1957 S.C. 465 (466).

21. *State of Madras v. Vaidyanatha*, (1958) S.C. 580.

22. *Nihal Singh v. State of Punjab*, A. 1965 S.C. 26 (29).

23. *Saravanabhan v. State of Madras*, A. 1966 S.C. 1273 (1276).

24. *Karnesh v. State of U. P.*, A. 1966 S.C. 1102 (1407); *Ashiq v. State of M. P.*, A. 1969 S.C. 4 (5).

25. *Kirpal Singh v. State of U. P.*, A. 1965 S.C. 712 (714).

1. *Sarwan Singh v. State of Punjab*, A. 1957 S.C. 637 (640).

2. *Ratan v. State of Bihar*, A. 1959 S.C. 18 (21).

3. *Kashmira Singh v. State of M. P.*, A. 1952 S.C. 159.



would lead to unnecessary delay or hardship, *e.g.*, where the appellants are under a sentence of death<sup>4</sup>

2. But where, in making a reference under s. 307, Cr. P. C., the High Court failed to consider the entire evidence as required by sub-sec. (3) of that section, the Supreme Court remanded the matter to the High Court for compliance with s. 307 (3), instead of examining the evidence itself.<sup>5</sup>

### . Interference with sentence.

1. It is not the practice of the Supreme Court to interfere by special leave in the matter of *punishment* imposed for crimes committed<sup>6-7</sup> except in exceptional cases<sup>8</sup> where the sentences are *unduly harsh* and do not really advance the ends of justice. Thus, the Court has reduced the sentence in the following cases—

(i) Though the offence of black marketing calls for a certain amount of severity, yet, when a substantial sentence of imprisonment with fine (*e.g.* a fine of Rs. 42,300/- in addition to a year's imprisonment for black-marketing in 115 barrels of kerosene oil) has been awarded especially to a commission agent the imposition of unduly heavy fines, which may be justified to some extent in the case of principals, is not called for in the case of commission agents the Supreme Court accordingly reduced the fine to Rs. 4,000/- in all<sup>9</sup>

(ii) Upon a consideration of the age or sex<sup>7</sup> of the accused

(iii) Where the murder was committed without premeditation and in sudden heat of anger without being cruel or brutal to the victim<sup>9</sup>

2. But the severity of the fine imposed would not, *per se*, be a consideration for reducing it where the social evil which is sought to be checked by the punishment is such that only a deterrent fine would be effective, *e.g.*, in the case of illegal importation of gold.<sup>10</sup>

### Appeal against acquittal, under s. 417, Cr. P. C.

1. Though in appeal against acquittal under s. 417 of the Cr. P. C., the High Court has full power to review the evidence upon which the order of acquittal was founded the judgment of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed by the High Court only in extraordinary cases<sup>11</sup> and for substantial and compelling reasons<sup>12</sup>

2. The Supreme Court will interfere with an order of acquittal where it is perverse<sup>13</sup> or where the facts are such that no tribunal could legitimately arrive at the conclusion that the guilt of the accused had not been proved beyond any reasonable doubt<sup>14</sup>

Since the Supreme Court's jurisdiction under Art. 136 is limited only by its own discretion, the Court has undoubtedly jurisdiction to interfere

4. *Jumman v. State of Punjab*, A. 1957 SC 469 (472), *Cf. Pandurang v. State of Hyderabad* (1955) 1 SCR 1083; *Machander v. State of Hyderabad*, (1955) 2 SCR 524 (530).

5. *Ramayed v. State of Bihar*, A. 1957 SC 373 (375).

6. *Adamji v. The State of Bombay*, (1952) S.C.R. 172.

7. *Mathri v. State of Punjab*, A. 1964 SC 986 (992).

8. *State of Maharashtra v. George*, A. 1965 S.C. 722 (744).

9. *Bhupendra v. State of Punjab*, A. 1968 S.C. 1438 (1444).

10. *Indo-China Navigation Co. v. Jasjit*, A. 1964 1140 (1153).

11. *Shantiranjn v. Abhayananda*, (1964) SC [Cr. A. 21/60, d. 14-9-64].

12. *Suraipal v. The State* (1952) S.C.R. 193 (201).

13. *Agarwal v. State of Maharashtra*, A. 1963 S.C. 201.

14. *State of Maharashtra v. Panchapokosh*, (1968) [Cr. A. 194/65, d. 12-12-68]; *State of Rajasthan v. Mukh Ram*, (1969) S.C. [Cr. A. 75/68, d. 18-4-69].

even with findings of fact arrived at by the High Court in appeal setting aside those of the subordinate court acquitting the accused.<sup>15</sup>

3. In the following cases the Supreme Court allowed the appeal and restored the judgment of acquittal—

(a) Where the Sessions Judge had taken a reasonable view of the case in acquitting the accused in accordance with the unanimous opinion of the assessors but the High Court reversed the order of acquittal relying upon some witnesses overlooking the weighty comments of the Sessions Judge upon their evidence.<sup>16</sup>

(b) Where the accused, charged of murder, repudiated his confession at the earliest opportunity as having been made under Police threats administered to him at night while in jail custody and there was evidence to show that the Police had access to him there, and there was nothing to displace his statement that he was threatened, the finding of the Sessions Judge that the confession was not voluntary in character was fair and reasonable but the High Court had set aside the order of acquittal, without any compelling reason.<sup>17</sup>

4. On the other hand, the Court would not exercise this power to reopen a stale matter *e.g.*, to quash an order of discharge in respect of a statutory offence which is alleged to have been committed several years ago.<sup>18</sup>

### Practice and Procedure.

1. The Supreme Court would not allow a new point (which was not taken before the High Court) to be raised before it,<sup>19-25</sup> unless it is a question of pure law,<sup>1-12</sup> *e.g.*,

(i) Whether in a case triable by a Court of Session the Public Prosecutor can apply for withdrawal at the committal stage,<sup>14</sup> or

(ii) Question of interpretation of a statute.<sup>15</sup>

(iii) Question of jurisdiction,<sup>16</sup> except where had the question been raised before the High Court it could have resulted to an alternative jurisdiction.<sup>16</sup>

2. Questions which if admitted, would necessitate a retrial, *e.g.*, that the examination of the accused under s. 342 was inadequate or misjoinder of charges,<sup>17</sup> cannot be raised for the first time before the Supreme Court in an appeal on special leave.

Nor would the Court admit a new plea if it would require further evidence,<sup>18-19</sup> *e.g.*, that no sanction of the Government had been obtained for lodging complaint under s. 198B of the Cr. P. C.<sup>20</sup>

3. But—

(a) If a point of fact which plainly arises on the record, or a point of

15. *Nihal Singh v. State of Punjab*, A. 1965 S.C. 26.

16. *Amar Singh v. State of Punjab* (1953) S.C.R. 418 (423); *Sanuat v. State of Rajasthan*, A. 1961 S.C. 715.

17. *Aher Raja v. State of Saurashtra* (1955) 2 S.C.R. 1285.

18. *State of Bihar v. Hiralal*, A. 1960 S.C. 47.

19-25. *State of M. P. v. Azad Bharat Finance Co.*, A. 1967 S.C. 276 (278); *Madan Lal v. State of Punjab*, A. 1967 S.C. 1590 (1593); *Ratilal v. Asstt. Collector*, A. 1967 S.C. 1639 (1642).

1-13. *State of Bihar v. Ram Narash*, A. 1957 S.C. 389 (394); (1957) S.C.R. 279.

14. *Moseh v. State of W. B.*, A. 1956 S.C. 536 (541).

15. *Alembic Chemical v. Workmen*, A. 1961 S.C. 646.

16. *Cantonment Board v. Pyare Lal*, A. 1966 S.C. 108 (110).

17. *Mangal Singh v. State of M. B.*, A. 1957 S.C. 199.

18-19. *Gopal v. Bhardwaj*, A. 1963 S.C. 337 (340); *Waverly Jute Mills v. Raymon & Co.*, A. 1963 S.C. 90 (96).

20. *Sahib Singh v. State of U. P.*, A. 1965 S.C. 1451 (1452).

law which is relevant and material and can be argued without any further evidence being taken, was urged before the trial Court and after it was rejected by it was not repeated before the High Court, it may, in a proper case, be permissible to the appellants to ask this Court to consider that point in an appeal under Article 136 of the Constitution; after all in criminal proceedings of this character where sentences of death are imposed on the appellants, it may not be appropriate to refuse to consider relevant and material pleas of fact and law only on the ground that they were not urged before the High Court.

(b) If it is shown that the pleas were actually urged before the High Court and had not been considered by it, then, of course, the party is entitled as a matter of right to obtain a decision on those pleas from this Court.<sup>21</sup>

(c) But even otherwise, no hard and fast rule can be laid down prohibiting such pleas being raised in appeals under Art. 136.<sup>21</sup>

4. In an appeal under Art. 136, the respondent cannot, without filing a cross-objection, attempt to support the judgment on grounds which have been found against him.<sup>22</sup>

### Abatement.

Though a criminal appeal would ordinarily abate on the death of the accused, it may be permitted to be continued by the legal representative of the accused where the sentence appealed against affects the *property* of the deceased, as where the sentence is one of fine.<sup>1</sup>

### E. Principles relating to appeal by special leave from decisions of tribunals.

(A) 1. The general principle to be remembered in this context is that the Supreme Court would not disturb the decisions of specially constituted authorities or tribunals, as if it were an appeal Court, and would not review findings of fact except where they are perverse or shocking to the judicial conscience or the like.<sup>24</sup>

Thus, a liberal exercise of the power under Art. 136 to interfere with decisions of Industrial Tribunals may materially affect the fundamental basis of such decisions, namely, a quick solution to such disputes to achieve industrial peace.<sup>25</sup>

2. The Supreme Court will *not* allow an appeal from the decision of a quasi-judicial tribunal in the exercise of its extraordinary powers under Art. 136, on any of the following grounds:

(i) Where the determination of the tribunal has not been affected materially by an alleged wrong interpretation of any award.<sup>1</sup> Similarly, an award which is within the jurisdiction of the tribunal and based on relevant facts cannot be challenged on abstract questions of law,<sup>2a</sup> as in the case of an arbitration tribunal dealing with commercial matters.<sup>1b</sup>

(ii) That the tribunal has come to an alleged wrong decision, having the jurisdiction to come to that decision.<sup>1</sup>

21. *Masalti v. State of U. P.*, A. 1965 S.C. 202 (209).

22. *Baru Ram v. Prasanni A.* 1959 S.C. 93.

23. *Bondada v. State of A. P.*, A. 1964 S.C. 1645 (1647).

24. *Kishanchand v. S. T. A. A.*, A. 1968 S.C. 1461 (1464).

25. *B. C. P. W. v. Workmen*, A. 1959 S.C. 633 (635); *Hindusthan Antibiotics v. Workmen*, A. 1967 S.C. 948 (953).

1. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459: (1950-51) C.C. 255.

1a. *Kays Construction Co. v. Workmen*, (1958) S.C. [C.A. 382/58].

1b. *Niemla Textile Co. v. Punjab Industrial Tribunal*, (1957) S.C.R. 355.

(iii) That the award of the tribunal is based on no evidence, when this ground was not urged in the application for special leave. At any rate, when the evidence that was shut out relates to an isolated point which in the opinion of the Tribunal had no bearing on the issue before them, there is no sufficient ground for interference by the Supreme Court.<sup>24</sup>

(iv) That the award has been signed by only two members of the Tribunal though it originally consisted of three persons and the entire hearing had taken place before the three persons, when the statute provided that it was not obligatory upon the Government to fill the vacancy when one of the members 'ceases to be available' at any time during the proceedings.<sup>25</sup>

(v) Where in a proceeding under the Bar Councils Act, the High Court agreed with the Bar Council that the appellant was guilty of professional misconduct, the Supreme Court would not re-examine on the merits this concurrent finding of fact.<sup>26</sup>

(vi) Where the question or jurisdiction is not a pure question of law, but is mingled with a question of facts, a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of a Labour Appellate Tribunal.<sup>27</sup>

(vii) Where the question involved has to be determined on *empirical considerations* as distinguished from objective data.<sup>28</sup>

(viii) Where the matter has become stale.<sup>29</sup>

(B) On the other hand, the Supreme Court has granted special leave to appeal from decisions of tribunals, on the following grounds—

(i) Where the decision of the Tribunal was without jurisdiction, or in excess of its jurisdiction, *e.g.*,

(a) Where an Election Tribunal allowed a material amendment beyond the time limited in s. 81 of the Representation of the People Act, 1951, for presenting an election petition.<sup>30</sup>

(b) Where the Railway Rates Tribunal entered into the *reasonableness* of terminal charges levied according to the provisions of the Railways Act.<sup>31</sup>

(c) Where an award was passed beyond the time originally fixed by the Government and the *ex post facto* extension of time by Government was *ultra vires*.<sup>32</sup>

(ii) Where it ostensibly failed to exercise a patent jurisdiction,<sup>33</sup> or did not perform its duty under the law,<sup>34</sup> or declined to exercise its jurisdiction upon an erroneous view of the law.<sup>35</sup>

(iii) Where the Tribunal misdirected itself upon a material question and proceeded upon a speculative view of things.<sup>36</sup> *e.g.*—

(i) Where a Tribunal acted in violation of the principles of natural justice.<sup>37</sup> *e.g.*,—

(a) Where an Income-tax Tribunal, in making an assessment, (a)

2. *Manak Lal v. Prem Chand*, A. 1955 S.C. 425 (135) (1957) S.C.R. 57.

3. *United Commercial Bank Ltd. v. U. P. Bank Employees*, A. 1953 S.C. 437.

4. *Indian Bank v. Employees' Union*, A. 1960 S.C. 653.

5. *State of Bihar v. Kripa Shankar*, A. 1961 S.C. 304 (307).

6. *Harish Chandra v. Tilok*, A. 1957 S.C. 444 (455).

7. *S. S. Light Ry. v. U. D. Sugar Mills*, A. 1960 S.C. 695.

8. *Strawboard Manufacturing Co. v. G. Mill Workers*, A. 1963 S.C. 95.

9. *Clerks of C. T. Co. v. C. T. Co.*, A. 1957 S.C. 78 (81).

10. *Rajkrishna v. Binod*, (1954) S.C.R. 913.

11. *D. C. Works v. Dharamadhar Municipality*, A. 1959 S.C. 1271 (1276).

12. *Vashist v. Deo Chandra*, (1955) S.C.A. 41.

13. *B. C. P. W. v. Workmen*, (1959) Supp. 2 S.C.R. 136 (140).

14-25. *Bishambhar v. State of U. P.*, A. 1966 S.C. 573 (580).

acted not on any material but on pure guess and suspicion, (b) did not disclose to the assessee what information had been supplied to it by the Department, (c) did not give to the assessee any opportunity to rebut the material furnished to the Tribunal by the Department, (d) declined to take all the material that the assessee wanted to produce in support of his case.<sup>1</sup>

(b) Where a Sales Tax Officer, disbelieving the returns filed by the assessee, makes an assessment on any figures of gross turnover without giving any basis to justify the adoption of that figure.<sup>2</sup>

(v) Where the order of the Tribunal was vitiated by an apparent error of law.<sup>3</sup>

### Exhaustion of alternative remedies, how far a ground of refusal.

1. The Supreme Court generally does not entertain appeals against orders passed by a Tribunal unless the alternative remedies provided by the relevant statute by way of appeal or revision have been pursued by the aggrieved party.<sup>4,5</sup>

2. This, however, is not a rule of exclusion of jurisdiction<sup>6</sup> and where questions of law of importance have been raised, and those questions have otherwise been brought before it, the Court may hear the appeal on such questions, even though the statutory remedies have not been exhausted.<sup>16</sup>

3. But the Supreme Court would not entertain an appeal under Art. 136 direct from the decision of a Tribunal, where the effect thereof would be to bypass the High Court from whose decision the appellant has preferred not to appeal, *e.g.*,<sup>7</sup>—

(a) Where the High Court has refused to direct the Tribunal to state a case and the person aggrieved goes to the Supreme Court against the order of the Tribunal without appealing against the order of refusal by the High Court.<sup>8</sup>

(b) The position would be the same where the High Court gives its decision on a case stated by the Tribunal or on revision and the assessee does not appeal against that decision of the High Court.<sup>9</sup>

But this may be allowed where special circumstances<sup>10</sup> exist, which cannot be corrected by the procedure of a case stated on a question of law, *e.g.*,

(a) A breach of the principles of natural justice by the tribunal.<sup>11</sup>

(b) Other remedies have been barred, for no fault of the appellant.<sup>12</sup>

(c) Where the statutory revisional or appellate authority would have felt bound by a decision of the High Court.<sup>10</sup>

### Interference with a finding of fact.

1. When hearing appeals under Art. 136, the Supreme Court does not sit as a Court of further appeal on facts, and does not interfere with

1. *D. C. Mills v. Commr. of I. T.*, (1952-54) 2 C.C. 497.
2. *Cf. Raghubar v. State of Bihar*, (1958) S.C.A. 852.
3. *Clerks of C. T. Co. v. C. T. Co.*, A. 1957 S.C. 78 (81).
4. *British India Navigation Co. v. Jasjit*, A. 1964 S.C. 145 (1453).
5. *Ramcharan v. C. T. O.*, A. 1962 S.C. 1326.
6. *Master Construction Co. v. State of Orissa*, A. 1966 S.C. 1047 (1049).
7. *Ballabhdas v. State of Bihar*, A. 1966 S.C. 814 (816); *Chimmonlall v. C. I. T.*, A. 1960 S.C. 280; *Chandi Prasad v. State of Bihar*, A. 1961 S.C. 1708.
8. *C. I. T. v. Lakhiram*, A. 1967 S.C. 338; *C. I. T. v. K. W. Trust*, A. 1967 S.C. 844 (846).
9. *Kanhaiyalal v. I. T. O.*, A. 1962 S.C. 1323; *Indian Aluminium Co. v. C. I. T.*, A. 1962 S.C. 1619 (1620).
10. *L. E. Works v. Asstt. Commr., Sales Tax*, A. 1968 S.C. 488 (494) (entertaining appeal from assessing authority for sales tax).
11. *D. C. Mills v. Commr. of I. T.*, A. 1955 S.C. 65.
12. *Baldev Singh v. Commr. of I. T.*, A. 1961 S.C. 736.
13. *Bharat Bank v. Employees of Bharat Bank*, (1960) S.C.R. 459 (489).

findings given by Tribunals on the ground that they are erroneous or based on a misappreciation of evidence,<sup>14, 25</sup> unless -

(a) They are pre-empted or based on surmises and conjectures, not supported by any evidence on record<sup>2, 3</sup>

(b) They are based partly upon admissible and partly upon inadmissible evidence<sup>1</sup>

(c) They are based upon a view of the facts which cannot be reasonably entertained or, in other words, the conclusions are such that no tribunal of reasonable and unbiased men<sup>1</sup> and properly instructed as to the relevant law could have reached -

(d) Where the finding is arbitrary or is arrived at in violation of the principles of natural justice

(e) Where the Tribunal has spoken in two voices and given inconsistent and conflicting findings<sup>2</sup>

(f) Where the finding is not based on any legal evidence and is wholly inconsistent with the material on the record<sup>1</sup> or is based on conjectures.<sup>10</sup>

(g) Where the finding of fact is based on a consideration of material which is irrelevant to the issue<sup>1</sup> or partly on relevant and partly on irrelevant material and it is impossible to say to what extent the mind of the Court was affected by the irrelevant material<sup>1</sup>

(h) Where the approach of the tribunal to the question is erroneous.<sup>11</sup>

(i) Where in spite of error and the Tribunal has failed to make a definite finding on the point referred to

Beyond this, the Supreme Court will not enter into the soundness of the findings made by such a Tribunal<sup>1, 2, 3</sup>, as to the reasonableness or fairness of the Standing Orders certified by the Certifying Officer under the Industrial Employment (Standing Orders) Act 1946,<sup>11</sup> whether particular staff are employees of a company for the purpose of clamping bonus.<sup>15</sup>

2. The Court thus referred to review the decision of the Election Tribunal on the following questions

(a) When the candidature commenced in a particular case<sup>10</sup>

(b) Whether the improper rejection of a nomination paper materially affected the result of the election<sup>1</sup>

- 14 25 *Tata Iron & Steel Co v Madak* A 1960 SC 390 (385)
- 1 *Imperial Tobacco Co v Workmen* A 1967 SC 1348 (1370) *N E Industries v Hanuman* A 1968 SC 33 (31)
- 2 *Talchand v Commr of I T* A 1959 SC 1295 (1298)
- 3 *C. Raghubar v State of Bihar* (1958) SC R 37
- 4 *Dharangadhura Chemical Works v State of Saurashtra* (1956) SC R 152 (162)
- 5 *Dinabandhu v Jadumani* A 1954 SC 411
- 6 *Jamuna Prasad v Lachhi Ram* A 1954 SC 686
- 7 *D C Mills v Commr of I T* (1952) 2 CC 197 (1955) 1 SC R 941 A 1955 SC 65
- 8 *P S Mills v Mazdoor Union* A 1957 SC 95 (102)
- 9 *Macropollo v Macropollo* A 1958 SC 1012
- 10 *Omar Salav v Commr of I T* A 1959 SC 1278 (1216), *Dhruajal v Commr I T*, A 1955 SC 271
- 11 *Kalinda Tubes v Workmen*, A 1969 SC 90 (98)
- 12 *Airlines Hotel v Workmen* A 1962 SC 676
- 13 *Jamuna Prasad v Lachhi Ram* A 1954 SC 686
- 14 *Rhotak & Hissar E S C v State of U P* A 1965 SC 1471 (1481)
- 15 *Sita Ram Sugar Mills v Workmen* A 1966 SC 1670 (1671)
- 16 *Khader v Munuswami*, (1955) 2 SC R 469 (174)
- 17 *Surendra v. Dalip*, (1957) SC R. 179 (186).

(c) Whether a particular sum paid at the time or on the eve of election was a donation, an act of charity or an election expense.<sup>18</sup>

3. Similarly, in the case of an Industrial Tribunal, the Court has refused to interfere with findings of fact on the following points, inter alia,—

(a) Whether certain employees were 'workmen'.<sup>19</sup>

(b) Whether the workmen were guilty of go-slow tactics.<sup>20</sup>

4. On the other hand, the Court would interfere with a finding of fact arrived at by a Tribunal —

Where an Election Tribunal found that a business was a joint family business, acting on the presumption that a new business started by the father is a joint family business (while there was no such presumption in law) —<sup>21</sup>

5. In general, the Court refuses to disturb concurrent finding of fact, founded on appreciation of oral evidence.<sup>22</sup>

6. In the absence of such extraordinary circumstances as mentioned above, the Supreme Court will not, in an appeal under Art. 136, examine the evidence recorded by the Tribunal.<sup>23</sup>

7. Nor will the Supreme Court entertain additional evidence, in such appeal, to controvert findings of fact by the Tribunal.<sup>24</sup>

### Interference with discretion.

Where a Tribunal has exercised its discretionary power after a consideration of all the relevant facts, the Supreme Court would not interfere,<sup>25-27</sup> except where the Tribunal has contravened any principle of natural justice or any important principle of law,<sup>1</sup> or applied any wrong principle.<sup>2</sup>

### High Court.

This term, used in juxtaposition with the word 'Court', refers to decisional tribunals, other than the ordinary courts, which have the 'character of a Court'.<sup>3</sup> Broadly speaking, the jurisdiction of the Supreme

under Art. 136 (1) to entertain appeal by special leave from decisions cannot be said to involve any tribunal against whose decision the Court has

(a) power to issue the writs of *certiorari* and *prohibition*.<sup>4</sup>

(b)

(c) under the present Article the Supreme Court has entertained appeals from—

(i) The Central Board of Revenue and Central Government, exercising powers of appeal and revision under ss. 100 I of the sea Customs Act.<sup>5</sup>

18 *Dharangadhara Chemical Works v. State of Saurashtra*, (1959) SCR 152 (161).

19 *Workmen v. Molipur Sugar Factory*, A. 1965 SC 1803 (1809).

20 *Chattanatha v. Ramchandra*, (1955) 1 SCR 477 (481).

21 *Mohan Singh v. Bhauratlal*, A. 1964 SC 1361 (1370).

22 *Union of India v. Indian Sugar Mills Assn.*, A. 1969 SC 22 (28).

23 *C. I. T. v. Canara Bank*, A. 1967 SC 417.

24 *N. E. Industries v. Workmen*, A. 1968 SC 538 (551).

25 *Bishambhar v. State of U. P.*, A. 1966 SC 573 (575) [Custodian-General].

1. *B. C. P. W. v. Workmen*, A. 1959 SC 633 (635), *Workmen v. W. I. Match Co.*, A. 1966 SC 976 (981).

2. *C. I. S. Union v. Management*, A. 1966 SC 987 (991).

3. *A. C. Companies v. Sharma*, (1965) 1 SCR 723 (741), A. 1965 SC 1595 (1606).

4. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.J. 459; (1950-51) SC 255.

5. *Chattanatha v. Ramachandra*, (1955) 1 SCR 477 (481).

5a. *Alambic Chemicals v. Workmen*, A. 1963 SC 647; *Muir Mills v. Suti Mills*, (1955) SC 321.

6. *Indo-China Navigation Co. v. Jasjit*, A. 1964 SC 1140 (1148).

(ii) Industrial Tribunal.<sup>7</sup>

(iii) The Central Government, exercising power under s. 111 (3) of the Companies Act, 1956.<sup>8</sup>

(iv) The State of Punjab exercising appellate power under the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952.

2 But the presence of all of the trappings of a court is not an essential characteristic of a 'tribunal' in order to come under Art. 136.<sup>9</sup> The basic tests are—

(a) That the power of adjudication has been conferred on the authority in question by statute,

(b) That such adjudicating power is a part of the State's inherent power exercised in discharging its 'judicial' functions,<sup>10</sup>

(c) If there is a law and the decision of the authority is *binding and final*, such authority is a 'tribunal' e.g. an authority hearing an administrative appeal<sup>11</sup> or revision.<sup>12</sup>

3 On the other hand—

(i) The word 'tribunal' in Art. 136 excludes 'domestic tribunals' on the ground that they are not 'created' by the State nor do they derive their authority from it,<sup>13</sup> but from the agreement of the parties.<sup>14</sup> e.g., an Arbitrator appointed under s. 10A of the Industrial Disputes Act, 1947.

(ii) Again a tribunal would be outside the purview of Art. 136 if it is not invested with any part of the judicial function of the State but discharges purely *administrative or executive* functions.<sup>15</sup>

(iii) Even the requirement to proceed judicially would not make an authority a 'tribunal' if it does not possess the power to pronounce a *final and binding* decision in a dispute. e.g., the Conciliation Officer, acting under Cl. 29 of the Order in 1954 under the U.P. Industrial Disputes Act, 1947.<sup>16</sup>

### Instances where the Supreme Court has interfered with the decisions of Industrial Tribunals.

A The Supreme Court has on special leave set aside the order of Industrial Tribunal on the following grounds: *inter alia*—

1 Where the order of the Industrial Tribunal is in violation of law.

1 An Industrial Tribunal can function in respect of a domestic inquiry relating to discipline only when its jurisdiction is limited so that the award of such Tribunal is not in violation of law if it interferes in any case not warranted by any of the conditions of its jurisdiction.

Its duty in short is to ensure that the inquiry has been *fairly* conducted.<sup>17, 18</sup> It can accordingly interfere with the order of the management made after domestic inquiry only.

(a) Where it is vitiated by *mala fide*.<sup>19</sup>

7 *Munr Mills v. Sugar Mills Union* (1955) 1 SCR 962.

8 *Harinagar Sugar Mills v. Shyam Suroo*, A. 1961 SC 1669 (1679) (1962) 2 SCR 370.

9 *A C C v. Sharma*, A. 1965 SC 1595.

10 *Engineering Mazdoor Sabha v. Hind Cycles*, A. 1963 SC 871 (1963) Supp. (1) SCR 625.

11 *Indo China Steam Navigation Co. v. Jasjit*, A. 1964 SC 1140.

12 *Durgashankar v. Raghuvar* (1955) 1 SCR 267 (1952-4) 2 CC 619.

13 *Jaswant Sugar Mills v. Lakshmitchand* (1963) Supp. 1 SCR 242 (259-60). A. 1963 SC 677.

14-16 *Saran Motors v. Vishvanath*, (1964) SC [CA 755/64].

17 *Rita Theatre v. Workmen*, A. 1963 SC 295.

18 *Indian Iron & Steel Co. v. Workmen*, A. 1958 SC 130 (138).



But there is no *mala fides* merely because—

(i) The employer has refused to stay the domestic inquiry because a criminal proceeding on the same charge was pending before Court,<sup>20</sup> though, in general stay was desirable.

(ii) The conclusion of the inquiry officer is erroneous.<sup>20a</sup>

(iii) The employer proceeded with the inquiry in spite of the fact that a criminal case was pending.<sup>20b</sup>

(b) Where it constitutes an act of victimisation or unfair labour practice<sup>17, 28</sup>

(c) Where the workman has been penalised without holding any inquiry at all,<sup>17</sup> on the charges levelled against him.

(d) Where the inquiry was not conducted in accordance with the principles of natural justice,<sup>14 20</sup> e.g.,—

Where the workman was not afforded reasonable opportunity—

(i) To meet the charge,<sup>21</sup> e.g., because the proper charge has not been served upon him;<sup>21</sup> or he has not been informed in time of the date fixed for inquiry so that the workman may prepare himself for defence.<sup>22</sup>

(ii) To lead evidence.<sup>23</sup>

But, in the absence of any statutory power in this behalf, the Inquiry officer at a domestic inquiry has neither the power nor the duty to summon any witnesses. It is for the parties to bring their respective witnesses, and if, for no fault of his, the workman fails to bring his witnesses, the Inquiry Officer should offer him reasonable time and adjournments to produce the witnesses. But the workman has no right to ask for as many adjournments as he likes.<sup>23</sup>

(iii) To rebut the evidence led by the employer, e.g.,—

(a) Where the witnesses were not examined in the presence of the employee and copies of the depositions were not supplied nor read over before cross-examination of such witnesses by the employee.<sup>24</sup> At such domestic inquiry, all the witnesses relied upon by the management should, in the absence of compelling circumstances, be examined in the presence of the workman charged.<sup>25, 1</sup>

(b) Where the Inquiry Officer relied upon information received from a document or otherwise, without notice to the employee;<sup>22</sup> or relied upon the inconsistency between a statement of the employee and another document, without giving the employee a chance to explain the inconsistency,<sup>22</sup> or relied upon the evidence recorded in an inquiry held against another employee which the employee charged had no opportunity to cross-examine.<sup>22</sup>

There is no prejudice however where the Tribunal, after the close of the hearing, merely sends for an authenticated record to see whether the employee was the secretary of the Union or not.<sup>25</sup>

19. *Delhi Cloth Mills v. Kunal Bhan*, (1950) 1 I.L.J. 520 (S.C.).

20. *Tata Oil Mills v. Workmen*, A. 1965 S.C. 155

20a. *B. C. P. W. v. Employees*, 1959 S.C. 632 (635).

• 20b. *Phulbari Tea Estate v. Workmen*, A. 1959 S.C. 1111.

21. *Ritz Theatre v. Workmen*, A. 1963 S.C. 295.

22. *Associated Cement Cos. v. Workmen*, (1965) 1 S.C.A. 723.

23. *Tata Oil Mills v. Workmen*, A. 1965 S.C. 155 (158).

24. *Phulbari Tea Estate v. Workmen*, A. 1959 S.C. 1111.

25. *Khardah Co. v. Workman*, A. 1964 S.C. 719. [The corresponding rule allowing witnesses to be examined in the absence of the accused, subject to cross-examination subsequently, held inapplicable in the case of proceedings against workman outside the purview of Art. 311 (2)].

1. *Cf. Kesaram Cotton Mills v. Gangadhar*, A. 1964 S.C. 708.

## II. Where the procedure adopted was prejudicial to the workman.

The onus being upon the management to establish the guilt of the workman, the employer should take steps *first* to lead evidence against the workman charged, the workman should then be given an opportunity of cross-examining those witnesses and to offer his explanation, if any, against the evidence led against him.<sup>1</sup> The inquiry is, accordingly, vitiated where the employee is closely cross-examined even before any evidence is led against him.<sup>1</sup>

## III. Where the inquiry officer is actuated by *personal bias*.<sup>2</sup>

In the case of a domestic inquiry, special individual bias is required to vitiate the proceeding. For, in the nature of things, the inquiry by the private employer must be held by its own officer<sup>3</sup> or lawyer,<sup>4</sup> and such persons cannot be held disqualified to hold the inquiry merely because they receive remuneration from the employer, if the inquiry has been otherwise fairly conducted.<sup>5</sup>

But the inquiry would be vitiated if it is held by an officer who claims to have *personal knowledge* of the alleged misconduct of the employee.<sup>4</sup>

(c) Where the finding of the Inquiry officer is *perverse*,<sup>7-8</sup> e.g.—

(i) Where it is based on no evidence at all:<sup>6-7</sup> or

(ii) Where on the materials on the record, the finding is completely baseless.<sup>7</sup>

The Inquiry Officer must record his finding with reasons<sup>8</sup> for the same, in his report.<sup>9</sup>

(f) Where the finding of the Inquiry officer or the order of the management is *ultra vires*, e.g.—

(g) Where the employee has been found guilty on a charge which is not a 'misconduct' according to the relevant standing orders.<sup>10</sup>

## IV. Where the award of the Tribunal is *arbitrary*

The Supreme Court would interfere—

(a) Where the award (say, directing payment of bonus) is made on an arbitrary basis,<sup>11</sup> contrary to settled principles.<sup>2</sup>

(b) Where the labour was not given proper opportunity to test the correctness of the materials relied upon by the management in determining the surplus for the purposes of bonus.<sup>1</sup>

V. The Tribunal's award would also be liable to be quashed where it is *ultra vires*; e.g.—

(i) Where the Tribunal directed the payment of costs of a party in

1. *Associated Cement Co. v. Workmen* (1965) 1 S.C.A. 723 A. 1964 S.C. 911.
2. *Kishoram Cotton Mills v. Gangadhar*, A. 1964 S.C. 708.
3. *Satan Motors v. Visvanath* (1964) S.C. [755/64].
4. *Associated Cement v. Workmen* (1965) 1 S.C.A. 723.
5. *Tata Iron & Steel Co. v. Workmen* A. 1958 S.C. 130 (138).
6. *Phulhari Tea Estate v. Workmen*, A. 1959 S.C. 1111.
7. *Tata Oil Mills v. Workmen*, A. 1965 S.C. 155 (158).
8. *Khardah & Co. v. Workmen*, A. 1964 S.C. 719.
9. *Sur Enamel Works v. Workmen*, (1963) S.C. [CA 681/62].
10. *Andhra Scientific Co. v. Seshagiri*, (1961) 11 L.L.J. 117.
11. *Tata Oil Mills v. Its Workmen*, A. 1959 S.C. 1065, *Indian Hume Pipe Co. v. Their Workmen*, A. 1959 S.C. 1081, *Muir Mills v. Suti Mills Mazdoor Union*, (1955) 1 S.C.R. 991 (1003).
12. *Workmen v. Dimakuchi Tea Estate*, (1958) S.C.A. 602; *Crompton Parkinson v. Its Workmen*, A. 1960 S.C. 1080 (1094).
13. *Rhandesh Spinning Mills v. Rashtriya Kamgar Sangh*, (1960) 2 S.C.R. 841 (850).

advice by the other party, irrespective of the final result of the proceeding, such order not being warranted by s. 11 (7) of the Industrial Disputes Act.<sup>14</sup>

(ii) Where the dispute which was referred to the Tribunal was not an 'industrial dispute' within the meaning of the Industrial Disputes Act.<sup>15, 16</sup>

(iii) Where the Tribunal made an award on a matter not included in the reference.<sup>16</sup>

(iv) Where compensation was awarded under s. 25E (iii) to workmen of a 'separate establishment'.<sup>17</sup>

2. But the jurisdiction of the Industrial Tribunal is not confined to adjudicating industrial disputes strictly according to law, in the same manner as courts. It has the power to impose conditions and obligations upon the employer to secure social justice and industrial peace,<sup>18</sup> provided, of course, they are not *ultra vires* the statute which confers jurisdiction upon it.

VI. Where the order of the Tribunal is vitiated by an *error apparent on the face of the record*, e.g., as to the interpretation of the agreement between the parties.<sup>19</sup>

B. Speaking generally, an appeal by special leave against an award is not intended to be an appeal on every ground of fact and of law unless the Court considers it fit to examine the matter from any special angle.<sup>20</sup> Before a party can claim redress, it must show that the award is defective by reason of an excess of jurisdiction or of a substantial error in applying the law or some settled principle or of some gross and palpable error occasioning substantial justice.<sup>20</sup>

C. If, however, the preceding conditions are fulfilled, the Supreme Court's jurisdiction in dealing with awards of Industrial Tribunals is wider than that of the High Court under Art. 226<sup>21</sup> and can be exercised even against an interim award.<sup>22</sup>

### **Tribunal's jurisdiction to take additional evidence.**

I. 1. The whole issue as to the dismissal of a workman is at large before the Industrial Tribunal, and the Tribunal has the jurisdiction to determine the question of validity of the order of dismissal independently,<sup>23</sup> in the following cases—

(i) Where there has been no inquiry at<sup>24</sup> all;

(ii) Where the domestic inquiry has not been fairly conducted or a reasonable opportunity to meet the charges has been denied to the employee.<sup>23, 24</sup>

(iii) Where the findings of the Inquiry Officer are found by the Tribunal to be perverse or not supported by any evidence.<sup>23, 24</sup>

2. In all such cases the employer is entitled<sup>25</sup> to support the dismissal on the merits by leading additional evidence before the Tribunal and the

14. *Punjab National Bank v Industrial Tribunal*, (1959) S.C.R. 220 (231).

15. *Newspapers Ltd. v. State Industrial Tribunal*, (1957) S.C.R. 714 (769).

16. *Calcutta E S Corpn. v. C. E. S. Workers' Union*, A. 1959 S.C. 1191.

17. *Associated Cement Co. v. Workmen*, A. 1960 S.C. 56 (62).

18. *Bidi Merchants' Assn. v. State of Bombay*, A. 1962 S.C. 486.

19. *Johal Tea Co. v. Workmen*, (1961) 2 L.L.J. 70 (S.C.).

20. *Kamani Metals v. Workmen*, A. 1967 S.C. 1175 (1179).

21. *Agnani v. Badri Das*, (1963) S.C. [C.A. 861/62, d. 25-3-63].

22. *Central Bank of India v. Workmen*, (1960) 1 S.C.R. 200.

23. *Rita Theatre v. Workmen*, A. 1963 S.C. 295.

24. *Tata Oil Mills v. Workmen*, A. 1965 S.C. 155 (160).

25. *Phulhari Tea State v. Workmen*, A. 1959 S.C. 1111: (1960) 1 S.C.R. 32.

Tribunal should deal with the question after giving the employee an opportunity to meet that evidence.<sup>23</sup>

3. But if the inquiry has been fairly conducted or the employee has been afforded reasonable opportunity to lead evidence, the Tribunal cannot admit fresh evidence on behalf of the employee simply because some of his witnesses chose not to appear at the domestic inquiry.<sup>24</sup>

4. Though in the foregoing cases, the jurisdiction of the Tribunal to go into the merits or to take additional evidence depends upon its finding that a proper inquiry has not been made or the employee has not been given proper opportunity or that the finding of the Inquiry Officer is perverse, it does not mean that the Tribunal shall have no jurisdiction to receive evidence until this question is decided as a preliminary issue or that the employer would be debarred from adducing additional evidence unless he concedes that there has been no proper inquiry. Where the employer seeks to adduce additional evidence, the Tribunal should receive such evidence as on an alternative plea, and then decide the preliminary issue and the merits, successively, after such evidence has been recorded.<sup>25</sup>

II Where, on a question of fact the finding of the Tribunal is *not clear or unambiguous*.<sup>1</sup>

Though the Supreme Court would not enter into a question of fact where the determination of the industrial tribunal is clear, the Court would itself enter into the evidence to come to a finding where the Tribunal's finding is not clear or definite.<sup>2</sup>

### **Instances where the Supreme Court has refused to interfere with decisions of the Industrial Tribunal.**

(a) The Court has refused to interfere with the decision of an Industrial Tribunal on the ground that

The employee was not a workman as defined by s. 2 (s) of the Industrial Disputes Act 1947, holding this to be a question of fact.<sup>3</sup>

(b) On matters which are committed to the statute or the consideration of the Industrial Tribunal (e.g. the provision with respect to leave in an award) the Supreme Court would not interfere unless it appears that the impugned determination of the Tribunal cannot be sustained on any reasonable ground or that they mark a violent departure from the prevalent practice or trend.<sup>4</sup>

(c) An award which is within the jurisdiction of the tribunal and based on relevant facts cannot be challenged on abstract questions of law, as in the case of an arbitration tribunal dealing with commercial matters.<sup>5</sup>

(d) Where the High Court refused, under Art. 226 of the Constitution, to interfere with the proceedings before the Tribunal on the ground that it had no jurisdiction because the reference did not relate to an 'industrial dispute', and the party did not appeal from that decision of the High Court, the Supreme Court would not, in appeal under Art. 136 against the award of the Tribunal, entertain the plea that it was without jurisdiction, on the same ground.<sup>6,26</sup>

1 *Bombay Steel Rolling Mills v. Khemchand Steel Mills Labour Union*, (1964) 11 L.L.J. 120 (S.C.)

2 *New India Motors v. Morris*, A. 1960 S.C. 873

3 *Alemhic Chemical v. Workmen*, A. 1961 S.C. 617

4 *Kays Construction Co. v. Workmen*, A. 1959 S.C. 208

5 *Niemla Textile Co. v. Punjab Industrial Tribunal* (1957) S.C.R. 355.

6-25. *N. R. Co-operative Soc. v. Industrial Tribunal*, A. 1967 S.C. 1182 (1186).

### Some Instances where the Supreme Court has interfered with the decisions of the Income-Tax Appellate Tribunal.

1. The Supreme Court has interfered under Art. 136 with the decision of the Income-Tax Appellate Tribunal where—

(i) The Tribunal made an assessment against the principles of natural justice,—on pure guess and suspicion.<sup>1,2</sup>

(ii) The decision of the Tribunal is not supported by any evidence whatever, or shows that the tribunal did not apply its mind to the evidence on the record.<sup>1,2</sup>

2. On the other hand, the Supreme Court has refused to interfere, under Art. 136—

(a) Where the appellant moved the High Court under s. 66 (2) of the Income-Tax Act, and after the decision of the High Court dismissing the application had become final, appealed to the Supreme Court under Art. 136 against the order of the Income-Tax Appellate Tribunal, on the same grounds as were taken before the High Court.<sup>3</sup>

(b) Where there are no special circumstances and the question raised could have been raised under the statutory procedure.<sup>4</sup>

### Some Instances where the Supreme Court has interfered with the decisions of Election Tribunals.

(A) The Supreme Court has under Art. 136, set aside orders of an Election Tribunal on the following grounds, *inter alia*:

(a) Where the Tribunal acted without jurisdiction, e.g.,

(i) In allowing an amendment not authorised by s. 83 (3) of the Representation of the People Act, 1951<sup>5</sup> or O. VI, r. 17, C. P. Code.<sup>6</sup>

(ii) In invalidating the election of a candidate on the ground that a nomination was invalid where the statute did not make it invalid.<sup>7</sup>

(iii) In rejecting an election petition as time barred where it was not.<sup>8</sup>

(b) Where the Tribunal arrived at a finding of fact without any evidence at all, e.g., whether a person had been 'employed for payment' in connection with an election.<sup>9</sup>

(c) Where the decision of the Tribunal was vitiated by an error on the face of the record, e.g.—

Where an Election Tribunal set aside an election upon an erroneous view of the law, e.g., treating the mandatory provision of s. 33 (1) of the Representation of the People Act, 1950, as a technical requirement, or making a wrong application of s. 123 (7) of the Representation of the People Act, 1951.<sup>11</sup>

### Appeal to Supreme Court under statutory provisions.

1. Appeal lies to the Supreme Court from a judgment of the High Court delivered on a reference under s. 66 of the Income-Tax Act, 1922, on the certificate of the High Court issued under s. 66A (Z) of that Act.<sup>12</sup>

1-2. *Omar Salay v. I. T. Commr.*, A. 1959 S.C. 1233 (1251).

3. *D. C. Mills v. Commr. of I. T.*, (1955) S.C.R. 941.

4. *Govindarajulu v. Commr. of I. T.*, A. 1959 S.C. 248; *Chimmonlall v. I. T. Commr.*, A. 1960 S.C. 280 (282).

5. *Kunhaiyalal v. Comm. of I. T.*, A. 1962 S.C. 1323; (1962) 2 S.C.R. 839

6. *Harish v. Triloki*, (1957) S.C.R. 370 (392, 395-6).

7. *Dinabandhu v. Jadumani*, A. 1954 S.C. 411

8. *Harinder v. Karnail*, (1957) S.C.R. 208 (213).

9. *Harish v. Triloki*, (1957) S.C.R. 307 (398).

10. *Rattan v. Atma Ram*, (1955) S.C.A. 654.

11. *K. C. Deo v. Raghunath*, (1959) 2 S.C.A. 168.

12. *Cf. G. F. Pendon Fund v. Commr. of I. T.*, A. 1955 S.C. 50.

2. This jurisdiction being statutory, neither the High Court nor the Supreme Court can express opinion on any question other than that referred to the High Court.<sup>13,14</sup>

But—

The Supreme Court may question the competency of reference under s. 66 (2) of the Income Tax Act even where the High Court itself has directed the Tribunal to state a case.<sup>1</sup>

3. The foregoing principle extends to the Supreme Court hearing appeal from decisions of the High Court under similar statutory jurisdiction, e.g., under the Sales Tax Act.<sup>4,16</sup> That Court is to answer the question with reference to the law as it stood at the date of the disputed transaction, but the Court is not precluded from applying a new law where it has superseded the old law with retrospective effect.<sup>1</sup>

4. Where the High Court has not considered the evidence, the Supreme Court would normally remand the case for disposal, but if the reference has been pending for a long time and the assessee's entire property has been attached in enforcement of the order of assessment, the Supreme Court may hear and decide the reference on the merits.<sup>17</sup>

5. There are certain statutes which confer a right of appeal to the Supreme Court from the decision of a tribunal other than the High Court, e.g., from an order of the Disciplinary Committee of a Bar Council, under s. 38 of the Advocates Act, 1961.<sup>18</sup>

6. Even where the appeal to the Supreme Court is or right, under a statutory provision, still the Supreme Court would not entertain an appeal for re-assessment of evidence. It can interfere only if it is established that the judgment under appeal is wrong, e.g. the conclusion of the High Court on the probabilities, and not where the conclusion of the High Court depends upon the credibility of witnesses.<sup>19</sup>

### Appeal under Art. 136 from decision of High Court under statutory jurisdiction.

1. Where statutory appeal to the Supreme Court from the order of a High Court is available (e.g., under s. 116A of the Representation of the People Act, 1951),<sup>21</sup> appeal to the Supreme Court under Art. 136 would not be barred by such statutory provision,<sup>22</sup> even though the decision of the High Court, by such provision, is made 'final and conclusive'.<sup>23</sup>

2. But the Supreme Court would not allow a point to be taken which was not taken before the High Court or in the statement of the case before the High Court.<sup>14</sup> Nor would the Supreme Court ordinarily interfere with a concurrent finding of the Tribunal and the High Court on a question of fact,<sup>24</sup> unless there is any serious error in the approach adopted by the High Court.<sup>24</sup>

13. *D. V. C. v. State of Bihar*, A. 1961 SC 440.

14. *Chatturam v. Commr. of I. T.*, (1935) 2 S.C.R. 290.

15. *C. I. T. v. Annachalam*, A. 1953 SC 118.

16. *Cf. State of Madras v. Habibur*, A. 1948 SC 339 (346).

17. *Commr. of S. T. v. Biji Cotton Mills*, (1964) SC 1CA 546/621.

18. *Seetharamamma v. I. T. Commr.*, A. 1965 SC 1505 (1908), *J. T. Commr. v.*

19. *Mohindrao v. Bar Council*, A. 1966 SC 888 (893).

20. *Narbada Prasad v. Chhaganlal*, A. 1969 SC 395 (399).

21. *Cf. Narbada Prasad v. Chhaganlal*, A. 1969 SC 395 (399).

22. *Bhaiya Lal v. Harishan Singh*, A. 1965 SC 1559 (1559).

23. *Laliteswar v. Baleshwar*, A. 1966 SC 580 (594).

24. *Jagjit v. Kartar Singh*, A. 1966 SC 773 (777).

### Practice and Procedure.

1. A ground which was not raised before the Tribunal<sup>25</sup> nor taken in the petition for special leave to appeal will not be permitted to be raised in the appeal,<sup>1</sup> e.g., a question of *mala fides*,<sup>2</sup> particularly when it involves a question of principle which had not been considered by the Court in any case before.<sup>3</sup>

The same principle has been allowed in an appeal from an income-tax proceeding where to admit the new point would mean a reopening of the entire assessment proceeding.<sup>4</sup>

2. A question of jurisdiction, not depending upon facts to be investigated, can be allowed to be raised at any stage.<sup>5</sup>

3. Nevertheless, where the point could have been urged before the High Court under Art. 226 or 227,<sup>6</sup> the Supreme Court would not permit the appellant to raise it for the first time before it.<sup>7</sup>

4. An application for Special Leave may be summarily rejected where the Court is satisfied that no substantial injustice has been done.<sup>8</sup>

5. Even after a hearing on the merits, the Court, if satisfied that there has been no failure of justice, may *dismiss* the appeal without deciding the question of absence of jurisdiction of the *original* Court or tribunal where that question has been considered by a higher tribunal from which the appeal has come to the Supreme Court.<sup>9</sup>

6. Under O. 13, r. 2 of the Supreme Court Rules, special leave under Art. 136 would not be granted unless the appellant first moved the High Court for a certificate under Art. 132.<sup>7</sup> But the Supreme Court may exempt an appellant from this requirement, in proper cases.<sup>8</sup>

7. Where the statute law has been changed with retrospective effect since the transaction in dispute took place but that change was not or could not be brought to the notice of the Tribunal, the Supreme Court will apply that amended provision.<sup>9, 10</sup>

### 137. Subject to the provisions of any law made by Parliament or

any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or made by it.

Review of judgments or orders by the Supreme Court.

#### Grounds of review.

1. In *civil* cases, review lies on any of the grounds specified in O. 47, r. 1 of the C. P. Code, e.g., error apparent on the face of the record.<sup>11</sup>

On the other hand, the following are no grounds for review—

(i) The fact that other parties have agreed to be governed by the decision in the judgment under review is no ground for review.<sup>11</sup>

25. *I. T. Commr. v. Bhuvaneshwari*, A. 1965 S.C. 6 (10), *Union Co-op. Ins. Society v. C. I. T.*, A. 1968 S.C. 78 (81).

1. *Burma-Shell Refineries v. Their Workmen*, A. 1961 S.C. 917.

2. *Central India Coalfields v. Ram Bilas*, A. 1961 S.C. 1189.

3. *Bengul Kagazkul Union v. Titaguh Paper Mills*, (1964) 11 L.L.J. 123 (127).

4. *Cantonment Board v. Pyare Lal*, A. 1966 S.C. 108 (110).

4a. *Mahabir v. C. I. T.*, A. 1962 S.C. 1323.

5. *Dabur v. Workmen*, A. 1969 S.C. 17 (19) [e.g., the point that the Tribunal's decision was vitiated by an error of law].

6. *Balvantrai v. Nagrashna*, (1961) 1 S.C.R. 113.

7. *Hindusthan Commercial Bank v. Bhagwan*, A. 1966 S.C. 1142; *Indian Aluminium Co. v. C. I. T.*, A. 1962 S.C. 1619.

8. *Khosla & Co. v. Dy. Commr.*, A. 1966 S.C. 1216.

9. *Commr. of Sales tax v. Bijli Cotton Mills*, A. 1964 S.C. 1954.

10. *I. T. Commr. v. Straw Products*, A. 1966 S.C. 1113 (1116).

11. *Balvantrai v. Nagrashna*, (1961) 1 S.C.R. 113.

(ii) That the views pronounced by the judges or any of them during the arguments were different from the judgment as delivered.<sup>12</sup>

(iii) That the decision of the Supreme Court is contrary to English decisions.<sup>13</sup>

2. In *criminal* cases, under O. XI, r. 1 of the Supreme Court Rules, no review lies except on ground of error apparent on the face of the record.

**138. (1) The Supreme Court shall have such further jurisdiction**  
 Enlargement of the jurisdiction of the Supreme Court, **and powers with respect to any of the matters in the Union List as Parliament may by law confer.**

**(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.**

**139. Parliament may by law confer on the Supreme Court power**  
 Conferment on the Supreme Court of powers to issue certain writs, **to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for any purposes other than those mentioned in clause (2) of article 32.**

**140. Parliament may by law make provision for conferring upon**  
 Ancillary powers of Supreme Court **the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.**

**141. The law declared by the Supreme**  
 Law declared by Supreme Court to be binding on all courts **Court shall be binding on all courts within the territory of India.**

### Binding force of Supreme Court decisions.

1. All Courts in India are bound to follow the decisions of the Supreme Court even though they are contrary to decisions of the House of Lords<sup>14</sup> or of the Privy Council<sup>15</sup>

2. But the Supreme Court itself is not bound by its own decisions<sup>16</sup> and is free to depart from a previous decision if the Court is satisfied of its error and its baneful effect on the general interests of the public.<sup>17-18</sup> In reviewing an earlier decision, however, the Court would take into consideration the fact if the said decision has been followed in a large number of cases.<sup>17-18</sup> It would be particularly slow to disturb a unanimous decision of a Bench of five Judges.<sup>19</sup>

### 'Law declared'

1. In case of conflict between decisions of the Supreme Court itself, it is the latest pronouncement which will be binding upon the inferior Courts.

12. *Associated Tubewells v. Guwatmal* A. 1957 S.C. 742

13. *Manipur Administration v. Bira Singh* A. 1965 S.C. 87 (91)

14. *I. T. Commr. v. Shrinubbas* A. 1956 Bom. 586; *Punjabi v. Shamrao*, A. 1955 Nag. 293.

15. *Dwarkan Das v. Sholapur Spinning Co.* A. 1954 S.C. 119

16. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (628).

17. *Sajjan Singh v. State of Rajasthan* A. 1965 S.C. 845 (855).

18. *Keshav Mills v. I. T. Commr.*, A. 1965 S.C. 1630 (1644, 1647); *State of W. B. v. Corpn. of Calcutta*, A. 1967 S.C. 997 (1001).



2. What is binding is the *ratio* of the decision and not any finding on facts,<sup>19</sup> or the opinion of the Court on any question which was *not* required to be decided in a particular case.<sup>20</sup> But so far as subordinate Courts are concerned, even such *obiter dicta* are worthy of respect.

### Obiter dicta.

Some High Courts have<sup>21</sup> held that *obiter dicta* of the Supreme Court constitute 'law' within the meaning of Art. 141. That view may not be correct,<sup>22</sup> but even then, according to the ordinary rules relating to precedents, the *obiter dicta* of the supreme tribunal are entitled to considerable weight.<sup>23</sup> But an *obiter* cannot be relied upon solely, to show that certain statutory rules, challenged as *ultra vires*, must be held to be valid.<sup>24</sup>

**142. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.**

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

### Cl. (1): 'Such order as is necessary'.

1. This clause gives the Supreme Court wide power to make orders ancillary to its power to make decisions under Arts. 131-6.<sup>25</sup> It contains no word of limitation.<sup>26</sup>

2. By reason of this power of the Supreme Court, the Governor's power to suspend the sentence cannot operate during the pendency of appeal before the Supreme Court and the Court may, accordingly, direct a Petitioner for special leave to surrender to the Court even though the Governor had made an order suspending the sentence.

In the result, though the Governor can grant a full pardon at any time, including the period of pendency of the case in the Supreme Court, if he has merely suspended the sentence on the ground that the convict intended to file an appeal before the Supreme Court, the order of the Governor would cease to operate as soon as the convict files his petition for special leave to appeal. It would then be for the Supreme Court to pass such orders as it thought fit as to whether the Petitioner should, pending the disposal of the petition, be granted bail or should surrender to his sentence or the like.<sup>28</sup>

19. *Prakash v. State of U. P.*, A. 1960 S.C. 196; *State of Orissa v. Sudhanan*, A. 1968 S.C. 647 (651); *Shama Rao v. Union Territory*, A. 1967 S.C. 1480.

20. *Ranchhodas v. Union of India*, (1961) 3. S.C.R. 718 (723).

21. *Ram Sural v. Ram Murat*, A. 1955 All. 43; *Kaikhatsu v. State of Bombay*, A. 1956 Bom. 220.

22. *Ranchhodas v. Union of India*, A. 1961 S.C. 935 (937).

23. *I. T. Commr. v. Vazir*, A. 1958 S.C. 814 (821).

24. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. 601.

25. *State of Bombay*, A. 1961 S.C. 112 (120, 122).

3. By reason of this provision, it is competent for the Supreme Court, in an appeal from the decision of a High Court under art 226, to order a remand to the inferior tribunal for a rehearing according to law<sup>1</sup>

**143. (1)** If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

**(2)** The President may, notwithstanding anything in . . . .<sup>2</sup> the proviso to article 131 refer a dispute of the kind mentioned in the said *proviso* to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

#### Art. 143: Consultative Function of the Supreme Court.

1 This Article confers upon the President the power to consult the Supreme Court upon any question of public importance as the President may think fit, whether of law or of fact and whether or not such questions relate to the functions and duties of the President. The President's opinion as to the question being of public importance is not open to question.<sup>3</sup>

2 Till now the President<sup>4</sup> referred questions of the following nature under this Article

(a) The constitutionality of an existing law<sup>5</sup>

(b) The constitutionality of a Bill presented for the President's assent<sup>6</sup>

(c) The implementation of an international agreement<sup>7</sup>

(d) The constitutionality and vires of a draft Bill to be moved in Parliament<sup>7</sup>

(e) The respective jurisdictions of the Legislature and the superior Courts in relation to the power of the latter to punish for contempt<sup>8</sup>

3 While under cl (2) it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon, the Court has under cl (1) a discretion in the matter and may, in a proper case decline to express any opinion on the questions submitted to it,<sup>9</sup> e.g., where the question referred to is a *political* one.

4 It is for the President to determine what question should be referred, including a pending Bill<sup>10</sup> on the other hand the Supreme Court cannot go behind the question referred and discuss other questions because any doubts may have arisen relating to them<sup>11</sup>

5 It is neither obligatory upon the Supreme Court to give its opinion under Cl (1) whenever the President makes a reference, nor for the President to act upon the opinion pronounced by the Supreme Court

1. *Municipal Board v S T A A* 1965 SC 458 (467), (1963) Supp 2 SCR 373 (396)

2. The words 'clause (i) of' have been omitted by the Constitution (Seventh Amendment) Act 1956

3. *Ref under Art 143 A* 1965 SC 745 (755)

4. *In re Delhi Laws Act* 1912 (1951) SCR 747

5. *In re Kerala Education Bill* (1959) SCR 995 A 1958 SC 956

6. *In re Implementation of the Indo-Pakistan Agreement*, A 1960 SC 845.

7. *In re Sea Customs Act, 1878*, A. 1963 SC 975.

**Binding force of opinion under Art. 143.**

1. The advisory opinion given under the present Article is not a judgment<sup>8</sup>, and does not, accordingly, furnish a good root of title such as might spring from a judgment of the Supreme Court.<sup>9</sup> There being no parties before the Supreme Court in a Reference proceeding, the opinion rendered by the Court in proceeding is not binding on any party.<sup>10</sup>

2. An opinion given under Art. 143 does not, *prima facie*, fall within the purview of Art. 141, but the opinion rendered by the Supreme Court in the *Delhi Laws Act*<sup>4</sup> case has been freely referred to and followed by the different High Courts.

Civil and judicial authorities to act in aid of the Supreme Court.

**144. All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.**

**145. (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—**

- (a) rules as to the persons practising before the Court;
- (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
- (c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;
- (d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;
- (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;
- (f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;
- (g) rules as to the granting of bail;
- (h) rules as to stay of proceedings;
- (i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;
- (j) rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the

8. In the matter of Duty on Non-Agricultural Property, (1946) 49 C.W.N. 9 (F.R.).

9. Ref. under Art. 143, A. 1966 S.C. 745 (763).

10. In re Allocation of Lands and Buildings, A. 1943 F.C. 13.

interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion disposing of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

#### CL (1): Rule making power.

1. The power to make rules to regulate its own procedure is in aid of the power of the Supreme Court, under Art. 142, to make such order as is necessary for doing complete justice in any cause or matter pending before it. It is, therefore, competent for the Court to make rules for the suspension of sentence on surrender of the prisoner to Court pending appeal, in supersession of the Governor's power to grant suspension, so long as the matter is *sub judice* before the Court.<sup>12</sup>

2. The rule-making power of the Supreme Court is subject to two-fold limitation:

(1) It is subject to laws made by Parliament, e.g., a statute of limitation.<sup>13</sup>

(ii) Being subordinate legislation, such Rules cannot override the provisions of the Constitution.<sup>12, 14</sup>

**Sub-cl. (b):** Under this sub-clause the Court can make rules to regulate the manner of filing and disposing of an appeal,<sup>1</sup> but not so as to affect an absolute right of appeal.<sup>15</sup>

#### CL (3): Cases involving constitutional interpretation.

1. This clause insists that all constitutional questions should be heard and decided by a Bench of not less than five judges. Hence, whenever a constitutional question is raised before a smaller Bench, it is bound to refer it to the 'Constitution Bench' unless the question has already been decided by a Bench of five Judges, in which case the question ceases to be 'substantial'.<sup>16</sup>

2. But the splitting up of a case into different stages for hearing (on

11. *In re Delhi Laws Act*, 1912, (1950-51) C.C. 328 (1951) S.C.R. 747

12. *Navavati v. State of Bombay*, A. 1961 S.C. 112 (134-5).

13. *Pariha Sarathy v. State of A. P.*, A. 1966 S.C. 38.

14. *Prem Chand v. Excise Commr.*, A. 1963 S.C. 996 (1004).

15. *Mohindron v. Bar Council*, A. 1968 S.C. 888 (894).

16. *Bhagwan v. State of Maharashtra*, A. 1966 S.C. 682 (608); *Shanmugam v. S. R. V.*, A. 1956 S.C. 1626; *Abdul Rahim v. State of Bombay*, A. 1959 S.C. 1315 (1316); *Ram Chandra v. State of Bihar*, A. 1961 S.C. 1629.

constitutional and other questions) by different Benches is not repugnant to this or any other provisions of the Constitution."

**146. (1)** Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct:

Officers and servants and the expenses of the Supreme Court.

Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

**147.** In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

#### CHAPTER V. -- COMPTROLLER AND AUDITOR GENERAL OF INDIA

**148. (1)** There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:

Provided that neither the salary of a Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-general.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

149. The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Power of Comptroller and Auditor-General to give directions as to accounts.

150. The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor General of India may, with the approval of the President, prescribe.

151. (1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor . . . . . of the State, who shall cause them to be laid before the Legislature of the State.

## PART VI

### THE STATES<sup>1</sup>

#### CHAPTER I. - GENERAL

152. In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu and Kashmir<sup>2</sup>.

Definition.

18-25. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

1. The words "in Part A. . . . . Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

2. Substituted for the words "means. . . . . Schedule", by *ibid.*

## CHAPTER II.—THE EXECUTIVE

*The Governor*

Governors of States. **153. There shall be a Governor for each State:**

*Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more States.<sup>3</sup>*

**Amendment.**—The Proviso, inserted by the Constitution (Seventh Amendment) Act 1956, makes it possible to appoint the same person to be a Governor of two or more States.

**154. (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.**

**(2) Nothing in this article shall—**

- (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority, or
- (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

**CL (1): 'Executive power'.**

1. This expression is very wide. It connotes the residue of governmental functions that remain after the legislative and judicial functions are taken away.<sup>4</sup> It includes acts necessary for the carrying on or supervision of the general administration of the State,<sup>5</sup> including both a decision as to action and the carrying out of the decision.<sup>6</sup>

2. The powers of the State Executive are, no doubt, co extensive with the legislative powers of the State Legislature but this does not mean that in order to enable the Executive to function in respect of any matter, there must be a law of the Legislature already in existence relating to that subject or that the powers of the executive are limited to the carrying out of those laws.<sup>4</sup>

3. The Executive cannot, however, go against the provisions of the Constitution or of any law.<sup>4</sup>

4. But power which is vested in the Governor by specific provisions of the Constitution must be excluded from the residuum of 'executive power' which is comprised within Art. 154(1). Such provisions, e.g., are—Arts. 309, 174, 175, 176, 310(1),<sup>6,7</sup> Proviso (c) to Art. 311 etc. In the result, these specific functions or powers—

(a) cannot be delegated by the Governor to his subordinate officers under Art. (1),<sup>6</sup> or 258 (7).<sup>7</sup>

(b) cannot be controlled or affected by legislation, because the legislative power under Art. 245 (1) is "subject to" the other provisions of the Constitution.<sup>6</sup>

3. Added by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.  
 4. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (236): A. 1955 S.C. 549.  
 5. *State of Bihar v. Sonabati*, A. 1961 S.C. 221 (230).  
 6. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751 (760).  
 7. *Jayantilal v. Rama*, A. 1964 S.C. 648 (656).

5. On the other hand, the expression 'executive power' would include quasi-judicial powers vested in the State Government by statute, so that the delegation of such power by the State Government, to be exercised by some officer subordinate to the Governor, would not be unconstitutional.<sup>8</sup>

**'Officers subordinate to him.'** See under Art. 53 (1), *ante*.

It includes Ministers.<sup>9a</sup>

**'In accordance with this Constitution'.**

The executive power of the Governor cannot be so exercised as to override a provision of the Constitution, e.g., dismiss a civil servant at pleasure, otherwise than in accordance with Art. 311 (2).<sup>9</sup>

**CL (2) (a): Functions conferred by existing law on other authority.**

Though the executive power of the State is, by Art. 154 (1), vested in the Governor it does not operate to transfer to the Governor any function which is conferred by any existing law on any other authority, e.g., the power conferred by s. 7 of the Police Act 1861, upon certain superior Police Officers to dismiss their subordinates<sup>10</sup>. Such statutory power is, however, without detriment to the overriding constitutional power of the Governor conferred by Art. 310 (1), a provision independent of Art. 154.<sup>9</sup>

**CL (2) (b): Law relating to executive functions.**

1. When the Legislature confers executive power on any subordinate authority, the Governor can no longer exercise the e functions or act in any manner inconsistent with the provisions of such law<sup>11</sup> provided such power of the Governor is derived exclusively from Art. 154 (1).<sup>9</sup>

2. But a law passed under the present sub clause being a law made under Art. 245 (1), is subject to the other provisions of the Constitution, and cannot, therefore, confer upon any other authority a function which is expressly vested in the Governor by some other specific provision, e.g., the right to dismiss a Government servant at pleasure under Art. 310 (1).<sup>9</sup>

3. On the other hand,

When the conferment of executive power upon another officer or authority is made by statute, the source of power of such officer or authority is entirely statutory, and must be exercised strictly in conformity with the conditions and limitations imposed by the statute<sup>12</sup>. Thus, where a superior Police Officer dismisses a subordinate officer in exercise of his powers under s. 7 of the Police Act, 1861 his order will be invalid if it violates any of the limitations imposed by that section and then it cannot be saved by invoking the power of the Governor to dismiss at pleasure, under Art. 310 (1).<sup>9</sup>

**155. The Governor of a State shall be appointed by the President by warrant under his hand and seal.**

Appointment of Governor

**156. (1) The Governor shall hold office during the pleasure of the President.**

Terms of office of Governor.

8. *Cf. Nagarwarao v. APSRTC*, A. 1959 S.C. 318 (1959) Supp (1) S.C.R. 319.  
 9a. *Manmohan v. State*, A. 1969 Puri 225 (231).  
 9. *State of U. P. v. Babu Ram*, (1961) 2 S.C.R. 679.  
 10. *Avadh Narain v. Supdt. of Police*, A. 1960 All 304 (311).  
 11. *Laxminarayan v. Collector*, A. 1956 M.B. 163 (163).



(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office:

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**Proviso.**

1. There is no provision such as Art. 62 (1) or 68 (1) in the scheme of the Governor's appointment. On the other hand, Art. 153 provides that there must always be a Governor. It is, of course, to be expected that a new Governor will be nominated in time but circumstances may come into being which may take the holder beyond his five years' term without a successor being named. It may not always be possible to appoint a Governor within the term of the incumbent. No doubt the provision of Art. 160 may be resorted to but even that may not be sufficient to prevent an interregnum. It is to avoid an interregnum in such cases that the Proviso to Art. 156 (3) has been provided. The successor may be appointed under Art. 155 or an order may be made under Art. 160, but whatever be the position, the former Governor continues to hold office till the new Governor enters upon his office.<sup>12</sup>

2. But there may be cases where the neglect to appoint a Governor may lead to an inference of failure to act under the Constitution.<sup>13</sup>

**157. No person shall be eligible for appointment as Governor unless**  
 Qualifications for ap- he is a citizen of India and has completed the  
 pointment as Governor age of thirty-five years.

**158. (1) The Governor shall not be a member of either House of**  
 Conditions of Gover- Parliament or of a House of the Legislature of  
 nor's office. any State specified in the First Schedule, and if  
 a member of either House of Parliament or of  
 a House of the Legislature of any such State be appointed Governor,  
 he shall be deemed to have vacated his seat in that House on the date  
 on which he enters upon his office as Governor.

(2) The Governor shall not hold any other office of profit.

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

*(3A) Where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine.<sup>13</sup>*

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.

**159. Every Governor and every person discharging the functions**  
 Oath or affirmation by of the Governor shall, before entering upon his  
 the Governor. office, make and subscribe in the presence of the  
 Chief Justice of the High Court exercising juris-

12. *Krishna Ballabh v. Commission of Inquiry*, A. 1969 S.C. 258 (261).

13. Added by the Constitution (Seventh Amendment) Act, 1956.

diction in relation to the State, or, in his absence, the seniormost Judge of that Court available, an oath or affirmation in the following form, that is to say—

"I, A. B., do <sup>swear in the name of God</sup> <sup>solemnly affirm</sup> that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of----- (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of----- (name of the State)"

**160.** The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.

**161.** The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

#### Scope of Art. 161.

This Article confers upon the Governor a 'pardoning power' of the same nature as enjoyed by the British Crown or the American Sovereign and the scope of the power shall be understood accordingly.<sup>14</sup>

2 The words of Article 161 are very wide and do not contain any limitation as to the time at which the pardon on which, or the circumstances in which the powers conferred by the Article might be exercised.

3 But though the pardoning power can be exercised by the Executive at any time, including the pendency of an appeal before the Supreme Court, so that the Court may be debarred from hearing an appeal if a full pardon was granted by the Governor during the pendency of the appeal,<sup>15</sup> the power to *suspend* a sentence is subject to the Rules made by the Supreme Court with respect to cases pending before it in appeal.<sup>16</sup>

4. The power under Arts. 72 and 161 extends to all persons.

#### Effect of pardon.

The effect of pardon and amnesty is to absolve the person not only from the *penal* consequences of the offence but also from civil disabilities, such as loss of office following from his conviction.<sup>17</sup> But a suspension or remission of the sentence cannot have the latter effect.

#### Forms in which the pardoning power may be used.

The article authorises the making of an order—

(a) Granting amnesty or general pardon to convicts or under trial prisoners<sup>18</sup> charged with political or non-political offence.<sup>19</sup>

(b) Granting pardon to an accused before, during or after trial,<sup>20</sup> even in cases of criminal contempt of Court,<sup>21</sup> with or without condition.

(c) Reprising or suspending a sentence, with or without condition during pendency of an appeal.<sup>22</sup>

14. *Nanavati v. State of Bombay*, A. 1961 SC 112 (173).

15. *Chennugadu*, in re., I.L.R. (1955) Mad 92.

16. *D. I. G. v. Rajaram*, A. 1960 A.P. 259 (261-2).

17. *Balmukund v. K. B.*, (1915) 43 I.A. 133.

(d) Remitting a sentence, that is, exempting the accused from undergoing the sentence, or any part of it<sup>18</sup> notwithstanding the decision of the Court imposing the sentence.

### **Courts' power to interfere, if any.**

1 The power to grant pardon is in essence an executive function to be exercised by the Head of the State after taking into consideration various matters which may be germane for consideration before a Court of law inquiring into the offence.<sup>19</sup> The Court is, accordingly, precluded from examining the wisdom or expediency of exercise of the power in a particular case.<sup>18</sup>

2 The question of remission is exclusively within the province of the appropriate Government and the Court cannot interfere on the ground that it has been improperly refused.<sup>19</sup>

3 On the other hand -

(a) Though the Court will not enter into the propriety or sufficiency of the reasons for the exercise of the power in a particular case, the Court may interfere if the Governor exceeds his powers under the Constitution, e.g. if he exercises the power in respect of an offence against a law relating to a matter to which the executive power of the State *does not extend*<sup>20</sup> or in a case of punishment by a Court Martial.

(b) Art. 361 of the Constitution only gives personal protection to the Governor. Where the action of the Governor is alleged to be against the Constitution or the law, it is competent for the Court to inquire into that question and make a proper order against the Government or its officials even though it will not be possible to make any order against the Governor personally.<sup>21</sup> Thus, if the Court finds that an order of the Governor purported to be issued under Art. 161 has exceeded the constitutional power of the Governor, the Court may issue a writ to the officer who is holding the accused in custody.<sup>22</sup>

**162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:**

Extent of executive power of State

**Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.**

### **'Subject to the provisions of this Constitution'.**

Though the executive powers of the State are co-terminous with the legislative powers of the State Legislature, this general rule is subject to the other provisions of the Constitution. Thus,

(i) Art. 277 empowers the State Executive to collect taxes which are not included in List II of the 7th Schedule.<sup>23</sup>

(ii) The State Executive may lose its powers, in whole or in part, under Art. 356 (1) (a), when a Proclamation as to failure of Constitutional machinery in the State is made.<sup>24</sup>

18 *Gudse v. State of Maharashtra*, A. 1951 S.C. 600 (604).

19 *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383.

20 *South India Corpn. v. Board of Revenue*, A. 1962 Ker. 72 (77).

**No power over exclusively Union subjects.**

It is clear from the present Article, read with Art. 73, that a State shall have no executive power over matters included in the Union List e.g., regulation of exports and imports,<sup>21</sup> except to the extent that it was existing at the commencement of the Constitution, under Art. 73 (2).

*Council of Ministers*

**163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.**

Council of Ministers to aid and advise Governor

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

**Art. 163. Council of Ministers and Governor.**

1. The only difference between Art. 74 (1) and Art. 163 (1) is that the latter speaks of "any functions required by the Constitution to be exercised by the Governor in his discretion". But the two instances of functions required by the Constitution to be exercised by a Governor in his discretion are—the powers of the Governor of Assam under Paras 9 and 18 of the Sixth Schedule, and the functions of a Governor appointed to be Administrator of a Union Territory under Art. 239 (2). There is no other matter in respect of which a Governor may, under the Constitution, act in his discretion. The expression "in his discretion" in Art. 163 (1) should also be read accordingly.

2. Unless a particular Article expressly so provides, an obligation of the Governor to act in his discretion cannot be inferred by implication. Art. 163 makes it quite clear that except in cases where the Governor "is required to act in his discretion" he is to act on the advice of ministers.<sup>22</sup> Thus, Art. 171 does not state that in making the nomination the Governor is to act in his discretion. So it must be presumed that in making the nomination, the Governor had acted on the advice of his council of ministers.<sup>23</sup>

3. A legal consequence of this provision is that resolutions or other deliberations at the meetings of Council of Ministers or the advice finally tendered in pursuance of such deliberations to the Governor are privileged from production in a court of law, irrespective of any provision of the Evidence Act.<sup>24</sup>

**164. (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:**

Other provisions as to Ministers.

21. *Mount Cornu v. Director* A. 1965 Mys 143 (149).

22. *Varadaraja v. State of T. C.*, A. 1953 T.C. 140.

23. *Azad v. State of Assam*, A. 1968 A.P. 619 (623).

24. *Biman Chandra v. Governor*, W. B., A. 1952 Cal 799.

25. *State of Punjab v. Sodhi Sukhdev*, A. 1961 S.C. 493 (512, 532).

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

#### Art. 164: Appointment of Ministers.

The Chief Minister is appointed by the Governor. The choice of the Governor is not limited by anything in the Constitution, and he may even choose a person who is not at the time of appointment a member of the Legislature. The only limitations are: (a) if the person is selected from outside the Legislature, he shall cease to be a Minister unless he becomes a member of the Legislature within six months of the appointment [Art. 164 (1)]. There is, however, no restriction that the Chief Minister or any other Minister must be a member of the lower House, i.e., the Legislative Assembly. Again, he may become a member of the Legislative Council by nomination of the Governor under Art. 171 (3) (c). In the result, there is no constitutional bar to the Governor appointing a person as Chief Minister who is not an elected person. (2) The only effective check against this is that the Ministry shall fall if it fails to command a majority in the Legislative Assembly [Art. 164 (2)]. But if the Legislature is not in session, a Minister may carry on without being sure of such majority, so long as the Legislature is not summoned.

Whatever be the *political sanction*, however, the Courts have no power to interfere when a Governor calls a person to be the Chief Minister and to form a Ministry.<sup>24</sup>

#### *The Advocate-General for the State*

**165. (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate General for the State.**

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

1. Cf. *In re Ramamoorthi*, A. 1953 Mad. 94. [The case of Sri Rajagopalachari becoming Chief Minister of Madras].

**(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.**

**Art. 165 (1): Appointment of Advocate-General.**

The Governor is not answerable to a Court for his order, appointing a person as Advocate-General, purporting to be made under Art. 165, by reason of Art. 361 (1). But *Quo Warranto* lies against the person appointed, to question the legality of his appointment, for there is no prohibition, express or implied, in the Constitution against the Court in this matter.<sup>2</sup> The Governor is not a necessary party to such proceeding.<sup>2</sup>

**'Qualified to be appointed a Judge of a High Court'.**

Art. 217 (2) prescribes the qualifications for appointment as a Judge of the High Court, and cl. (1) of Art. 217 says that every Judge of a High Court 'shall hold office until he attains the age of sixty two years'.

The Nagpur High Court has held<sup>22</sup> that the provision in cl. (1) of Art. 217 does not prescribe the qualifications for appointment as a Judge of the High Court but prescribes the 'duration' of the office of a High Court Judge, and, therefore, while cl. (2) of Art. 217 applies to the appointment of an Advocate-General, cl. (1) does not, since the specific provision in Art. 165 (3) says that an Advocate-General shall 'hold office during the pleasure of the Governor' without any age limit. Hence, there is no bar to a person being appointed Advocate-General after the age of sixty two years or to his continuing in that office after attaining the age of sixty two years. According to this view, therefore, a retired High Court Judge may be appointed Advocate-General.

*Conduct of Government Business*

Conduct of business of the Government of a State.

**166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.**

**(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.**

**(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.**

**Cl. (1): Formality for expression of 'executive action'.**

1. This clause requires that all executive action of a State Government shall be expressed to be taken in the name of the Governor. The Constitution, however, does not require any particular formula of words for compliance with Art. 166 (1). What the Court has to see is whether the substance of its requirements has been complied with,<sup>3</sup> because the provision is only directory.<sup>4-5</sup>

2. *Karkare v. Shende*, A. 1952 Nag. 330.

3. *State of Bombay v. Purushottam*, (1952) S.C.R. 674 (678).

4. *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (615); A. 1952 S.C. 181.

5. *Chitralekha v. State of Mysore*, A. 1964 S.C. 1823 (1329).

Thus, there is a substantial compliance with the clause—

(i) Where a notification is signed by a Secretary 'by order of the Governor'.<sup>6</sup>

(ii) An order signed by the Chief Secretary 'on behalf of the Government' has been held to be in *substantial compliance* with Art. 166, even though it is not expressed to have been made in the name of the Governor.<sup>7</sup>

(iii) An order made in the name of the 'Government' and signed by an assistant Secretary 'for the Secretary to the Government of Bombay'.<sup>8,9</sup>

On the other hand, there is no compliance with this clause—

(a) Where a Secretary to the Government issues a letter without mentioning the name of the Governor at all.<sup>7</sup>

(b) An inter-departmental communication issued by an Under-Secretary, without mentioning that he was acting 'by order of the Chief Commissioner (Delhi)',<sup>7</sup> and there is no independent evidence to show that the Governor had in fact made, or concurred in the making of, the order.<sup>8</sup>

2. Cl. (1) does not prescribe how an executive action of the Government is to be performed, it only prescribes the *mode* in which such act is to be *expressed*. While cl. (1) relates to the mode of *expression*, cl. (2) lays down the ways in which the order is to be *authenticated*. Cl. (1) is *directory* and not *mandatory* in character.<sup>4,7</sup> Hence, failure to comply with Art. 166 (1) does not nullify the order but only takes away the constitutional immunity from proof. The order would be upheld if the State can *otherwise* prove that the order was, in fact, made by the Governor.<sup>4,7,8</sup>

### When does it become an order of the Government.

1. As soon as an order is validly made and expressed under this Article, the Government becomes responsible for it, whether the order originated from the Governor personally or not.<sup>2</sup>

2. But it requires another formality to become binding upon the Government, and the public, namely, that it must be communicated to the person to be affected by it. Until that is done, it is of a provisional character and may be changed by the Ministers, who are free to consider the matter over again.<sup>2a</sup>

### How an order may be proved.

As stated earlier, even where an executive order has not been expressed in the manner laid down in cl. (1), it is still open to the Governor to show, by independent evidence, that the order was, in fact, made by the Governor. This may be proved—

(a) By producing the relevant Government records.<sup>2a</sup>

(b) By the affidavit of a responsible officer.<sup>5,8</sup> It is not necessary to have the affidavit of the Minister-in-charge in every case; it will be enough if the affidavit is made by the Secretary or some other person having the requisite knowledge.<sup>9</sup>

### 'Executive Action'.

1. Cl. (1) is confined to cases where the executive action is required to be expressed in the shape of a formal order or notification or any

6. *John v. State of T. C.*, (1955) 1 S.C.R. 1011; (1952-4) 2 C.C. 600 (604).

7. *Barsay v State of Bombay*, A. 1961 S.C. 1762.

7a. *Backhtar v. State of Punjab*, (1962) Supp. 3, S.C.R. 713.

8. *Ghaio Mall v. State of Delhi* (1959) S.C.R. 1424 (1439).

8a. *State of Rajasthan v. Sripal*, A. 1963 S.C. 1323 (1326).

9. *State of Bihar v. Sonabati*, A. 1961 S.C. 221 (231).

other instrument.<sup>9a</sup> Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate Minister or officer. If every executive decision has to be given a formal expression the whole governmental machinery will be brought to a standstill. But when an executive decision affects an outsider or is required to be officially notified or communicated, it should be normally expressed in the form mentioned in Art 166 (1).<sup>9b</sup>

2 The expression is wide enough to include

(i) Orders which embody quasi judicial decisions taken by Government.<sup>10</sup>

(ii) An order of sanction for prosecution.<sup>11</sup>

3. The following have been held *not* to constitute 'executive action of the Government' and need not, therefore, be expressed or authenticated according to this article—

(i) Noting by a Minister on the file.<sup>12</sup>

(ii) The filing of a memorandum of appeal against an order of acquittal.<sup>13</sup>

(iii) A corrigendum issued merely to correct a clerical mistake or omission in a notification issued in conformity with this Article.<sup>13</sup>

4 The 'executive action' referred to in Art 177 or Art 166 refers to the executive action of the 'Government' of India or of a State. Hence, where the President or a Governor exercises some function, not by virtue of any provision of the Constitution but under a private treaty, e.g., the Articles of Association of a 'Government company' the order of the President need not be authenticated by a Secretary to the Government.<sup>13a</sup> Conversely, when an appointment is made by the President in such personal capacity the appointment does not become an appointment under the Government merely because the order is signed by a Secretary to the Government of India.<sup>14</sup>

### CL (2): 'Shall be authenticated'.

1 Where the Rules made by the Governor lay down that orders made and executed by the Governor shall be authenticated by the signature of a Secretary, no note or order of a Minister which is not so authenticated, can operate as an order of the Government of the State.<sup>15 16</sup>

2 Where several notifications are published in the Gazette together, there is nothing wrong if the signature of the authenticating officer appears at the foot of all the notifications.<sup>17</sup>

### Bar to judicial enquiry.

1. The validity of an order or instrument which is expressed in the name of the Governor (according to clause (1)), and is duly authenticated according to rules, by the Governor on this behalf, shall not be called in

9a. *Dattatraya v. State of Bombay*, (1952) S.C.R. 613 (625, 633).

9b. *State of Bombay v. Purushottam*, (1952) S.C.R. 674.

10. *John v. State of T. C.* (1955) 1 S.C.R. 1011 (1019).

11. *Jayarama Iyer, in re.*, A. 1958 A.P. 643 (645).

12. *Backhittar v. State of Punjab*, A. 1963 S.C. 395.

13. *Naunihal Singh v. Kishorilal*, A. 1961 M.P. 84 (87).

13a. *Ranjit v. Union of India*, A. 1969 Cal. 95 (101).

14. *Belaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (243).

15. *C. Ghalib Mal v. State of Delhi*, (1959) S.C.R. 1424.

16. *Iftikhar v. State of M. P.*, A. 1961 S.C. 140.



question in any Court on the ground that it is *not made or executed by the Governor*.<sup>9, 17</sup> Thus, it is the signature of the Secretary duly authorised by the Rules which signifies the consent of the Governor, and the acceptance of the advice rendered by the Minister.<sup>18</sup>

3. This provision is, however, subject to the following limitations—

(a) It does not oust the jurisdiction of the Court to examine the validity of the order or instrument on *any other* ground, *e.g.*—

(i) That a *condition precedent* for the making of the order has not been fulfilled.<sup>19, 2</sup> Thus, when the satisfaction of a particular authority is necessary under the law to make the order, the Court can enquire whether the order was based on such satisfaction.<sup>21</sup> Of course, in the normal case, a recital in the order to this effect will raise a presumption that the necessary condition has been fulfilled, and throw a difficult onus on the person who wants to challenge the validity of the order; but the Court is not powerless to determine the validity of the order on taking proper evidence.<sup>19</sup>

But unless the statute specifically so requires, it is not necessary that an order must contain a recital as to the satisfaction of the condition precedent.<sup>22, 23</sup> Though it may be desirable for the authority to make such a recital, the absence of the recital does not render the order void *ab initio*.<sup>22</sup> In the absence of such recital, of course, the authority or other person relying on the order will not have the advantage of the presumption in favour of the validity of the order but it is open to the authority to satisfy the court by other means that the condition precedent was fulfilled.<sup>22, 23</sup>

(ii) That the order violates a provision of the Constitution or proposes to do something which is contrary to existing law,<sup>4, 23</sup> or seeks to interfere with judicial functions,<sup>4, 23</sup> or is *ultra vires* where it purports to exercise a statutory power.<sup>19, 20</sup>

(iii) That the person who made the order on behalf of the Government, had no authority to take the decision on behalf of the Governor, under any law or the relevant Rules.<sup>1</sup>

(b) Strict compliance with the requirements of Art. 166 (2) gives immunity to the order that it cannot be challenged in a Court of law on the ground that it is an order of the Governor.<sup>24</sup> If, therefore, the requirements of the Article are not complied with, the resulting immunity cannot be claimed by the State, but this will not nullify the order itself, if it appears from other materials that such a decision was in fact taken by the Government.<sup>25, 2</sup> Thus,—

Where an order is duly signed by the officer authorised by the Rules

17. *Ishwarlal v. State of Gujarat*, A. 1968 S.C. 870 (875).

18. *Pioneer Motors v. Majed*, A. 1967 Mad. 48 (57).

19. *King-Em v. Submath*, (1950) 50 C.W.N. 25 (32); A. 1945 P.C. 156.

20. *B. L. Cotton Mills v. State of W. B.*, A. 1967 S.C. 1145 (1150).

21. *Cf. Ishwarlal v. State of Gujarat*, A. 1968 S.C. 870 (875, 877).

22. *Swadeshi Cotton Mills v. S. I. Tribunal*, A. 1961 S.C. 1381 (1387).

23. *Nageswara Rao v. A. P. S. R. T. C.*, A. 1959 S.C. 308 (320).

24. *Dattatraya v. State of Bombay*, (1952) S.C.R. 613 (625, 633).

25. *State of Rajasthan v. Sripal*, A. 1963 S.C. 1323.

1. *Chitralekha v. State of Mysore*, A. 1964 S.C. 1823.

2. *Cf. Ghaio Mal v. State of Delhi*, (1959) S.C.R. 1424.

3. *Premchand v. State of M. P.*, A. 1955 M.P. 196 (206).

3a. *Cf. Ganga Bishnu v. Calcutta Pinjrapole Society*, A. 1968 S.C. 615 (619).

4-23. *Cf. Jay Engineering Co. v. State*, A. 1966 Cal. 407 (439).

24. *State of Bihar v. Sonabati*, A. 1961 S.C. 221 (para 41).

25. *Dattatraya v. State of Bombay*, (1952) S.C.R. 613 (625, 633).

1. *Chitralekha v. State of Mysore*, A. 1964 S.C. 1823.

2. *State of Rajasthan v. Sripal*, A. 1963 S.C. 1323; *Municipal Corpn. v. Dirla Mills*, (1966) 3 S.C.R. 251 (275).

made by the Governor under Art. 166 (2), but the order was *not* expressed to be made in the name of the Governor, affidavit to the effect that the matter had been placed before the Government was received to hold that the order was that of the Government of Bombay.<sup>3</sup>

But the order cannot be saved where it is not duly authenticated<sup>4</sup> or it was authenticated by a person who was not duly authorised in this behalf,<sup>5</sup> and it is established or conceded that it was made or concurred in by the competent authority.<sup>6</sup>

### CL (3): Rules of Business and Standing Orders.

1. By Rules of Business made under cl (3), the Governor may allocate all his functions to Ministers, except those which he is required by or under the Constitution to exercise in his own discretion; and, in relation to the business allotted to a Minister, another Minister or Deputy Minister may<sup>7</sup> be associated to perform such functions as may be assigned to him.<sup>8a</sup>

2. The Rules of Business, again, may empower the Minister-in-charge of a subject to make Standing Orders regarding the disposal of cases under his charge; and, by making Standing Orders in exercise of such power, a Minister may direct that, except in regard to specified matters which must be placed before him personally, all other matters shall be disposed of by a Secretary or other officer mentioned therein. Where such Standing Orders are made empowering a Secretary or other officer to dispose of a matter without placing it before the Minister-in-charge, the validity of the order issued by such order cannot be questioned on the ground that the order was made without being considered by the Minister.<sup>9</sup>

3. Except where the Rules of Business specifically provide that arrangements within the Department can be made only by written Standing Orders, it is competent for the Minister-in-charge to do this by oral instructions.<sup>10</sup> Hence, where the Minister verbally instructs a Secretary that certain matters need not be placed before him, the eventual order issued by the Secretary cannot be challenged.<sup>11</sup>

4. But the Secretary has no independent power to dispose of a matter without authorisation by the Minister-in-charge and where no such authorisation or direction is proved, the Secretary's order will be invalid.<sup>12</sup>

5. In making Rules of Business the Governor cannot override statutory provisions relating to a particular function or business, e.g., s. 68D of the Motor Vehicles Act.<sup>13a</sup>

### Allocation of Business.

1. The allocation of business among Ministers need not be made with reference to each law after it is made. It is made with reference to the subjects of legislation under the three Lists in the 7th Schedule.<sup>14</sup>

2. Since the Chief Minister has a residuary power, an order does not become invalid merely because it has been made by the Chief Minister instead of the Minister-in-charge of the relevant portfolio.<sup>15</sup>

3. *Cf. Ghai Mal v. State of Delhi*, (1959) SCR 1424

4. *Premchand v. State of M. P.*, A. 1965 MP. 196 (206)

5. *B. L. Cotton Mills v. State of W. B.*, A. 1967 S.C. 1145 (1151).

5a. *Municipal Corpn. v. Birla Mills*, (1968) 3 S.C.R. 251 (275).

6. *Ishwarlal v. State of Gujarat*, A. 1968 S.C. 870 (877).

7. *Mannohan v. State*, A. 1969 Punj 225 (234); *Tickooram v. State*, A. 1969 Raj, 129 (131).

7a. *Raipur Transport Co. v. State*, A. 1969 M.P. 150; *Rukhmanibai v. Mahendralal*, A. 1949 Nag. 174 (F.B.).

8. *Gadavari v. State of Maharashtra*, A. 1964 S.C. 1128.

9. *Beckhitter v. State of Punjab*, A. 1963 S.C. 395 (399).

### When the plea as to non-compliance with Art. 166 is to be raised.

The objection that an order is invalid because of non-compliance with Art. 166 is to be raised in the court of first instance so that those who rely upon the order may have an opportunity to lead evidence as to how the order had been made.<sup>10</sup> In the absence of such a plea, it will not be entertained before the Supreme Court.<sup>10</sup>

### Whether statutory and quasi-judicial duties can be delegated.

1 It has now been settled by the Supreme Court<sup>11, 12</sup> that even the functions or duties which are vested in a State Government by a statute may be allocated to Ministers by the Rules of Business framed under Art. 166 (3). It has been pointed out that when a function is vested by a statute in the State Government the statutory provision has to be interpreted with the aid of the General Clauses Act. The General Clauses Act, 1897, defines a State Government to mean a Governor [s. 3 (60)]. A statutory function of the State Government thus becomes a function of the Governor, and the business of the State Government under Art 166 (3) includes such statutory business. It is, therefore, competent for the Governor to allocate such statutory functions (including matters relating to his subjective satisfaction)<sup>13, 14</sup> to the Ministers by making rules under Article 166(3),<sup>12</sup> e.g., the function under sec 68D of the Motor Vehicles Act,<sup>14</sup> but not so as to override the statutory provision.<sup>15</sup>

2 Whether there can be further delegation by the Minister to the officers subordinate to him depend upon the provisions of the rules of the business. If the rules enable the Minister in charge of a particular department to arrange for the disposal of cases before him by means of standing orders and the statutory functions are included within such enabling provision, they can be delegated by the Minister to his subordinate officers.<sup>12</sup> Such delegation may be made by oral order,<sup>16</sup> unless the Rules of Business provide to the contrary.<sup>16</sup>

3 Except in regard to matters with respect to which the Governor is required by or under the Constitution to act in his discretion, the personal satisfaction of the Governor is not required and any function may be allocated to Ministers.<sup>13</sup>

4. The requirements of the Rules of Business, however, must be strictly complied with.<sup>12</sup>

5. Thus, if the rules do not specifically authorise such sub-delegation, a delegation of a statutory function by the Minister to his Secretary would be invalid.<sup>12</sup>

6. If the preceding conditions are satisfied it is not open to a person aggrieved to challenge the order on the ground that the duty of forming an 'opinion' as required by the statute could not be delegated.<sup>13, 16</sup>

7. Where a statute requires an order to be signed by a 'secretary', without defining that term, signature by an under-secretary or any other secretary authorised by the Rules of Business would suffice.<sup>16</sup>

10. *Tulsi Ram v. State of U. P.*, A. 1963 S.C. 666.

11. *Nageswara v. A. P. S. T. R. C.*, A. 1959 S.C. 308 (325); *Cl. State of Bihar v. Sonabati*, A. 1961 S.C. 221 (230).

12. *Shamrao v. State of Maharashtra*, (1965) S.C.D. 477 (486).

13. *Bhiv Lakshmi Cotton Mills v. State of W. B.*, A. 1967 S.C. 1145.

14. *Cl. Malik Ram v. State of Rajasthan*, (1962) 1 S.C.R. 978; A. 1961 S.C. 1575; *Ram Nath v. State of Rajasthan*, (1963) 2 S.C.R. 152; *Nehru M. T. C. S. v. State of Rajasthan*, A. 1963 S.C. 1098.

15. *Rajpur Transport Co. v. State*, A. 1969 M.P. 150 (168).

16. *Iskcon v. State*, A. 1966 S.C. 870 (877).

8. Quasi-judicial functions vested in the State Government can also be similarly allocated provided those rules conform to the principles of judicial procedure.<sup>17</sup> Thus, if the statute confers upon a party a right of *personal hearing* before the State Government, the Rules of Business cannot provide for the delegation of the function of hearing to a Secretary. In such a case the Minister who is to decide must also hear the party.<sup>17</sup>

8. There is no requirement to publish the Rules framed under Art. 166(3),<sup>18</sup> and the Governor may change them at any time.

**Quasi-judicial order cannot be reviewed, in the absence of statutory provision.**

Where the order coming under Art. 166 is quasi-judicial, it cannot be reviewed, in the absence of any statutory power in that behalf, even though the order may not have been authenticated under Art. 166(3).<sup>19</sup>

**167. It shall be the duty of the Chief Minister of each State –**

Duties of Chief Minister as respects the furnishing of information to Governor, etc.

- (a) to communicate to the Governor of the state all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and
- (c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

**CHAPTER III - THE STATE LEGISLATURE**

*General*

**168. (1) For every State there shall be a Legislature which shall consist of the Governor, and**

Constitution of Legislatures in States. (a) in the States of *Andhra Pradesh*,<sup>20</sup> *Bihar*, *Maharashtra*,<sup>21</sup> *Madhya Pradesh*,<sup>22</sup> *Madras*, *Mysore*,<sup>23</sup> *Punjab*, *Uttar Pradesh*,<sup>24</sup> two Houses:

(c) in other States,<sup>25</sup> one House.

- 17. *Nageswara v. A. P. S. T. R. C.*, A. 1959 SC 308 (325), *CI State of Bihar v. Sonabati*, A. 1961 SC. 221 (230).
- 18. *Muralidhar v. State of A. P.*, A. 1959 AP 477 (111).
- 19. *State of Mysore v. Putte Gowda*, (1957) S.C. [CA 1108/65, d 30-167].
- 20. Inserted by the Legislative Councils Act, 1957.
- 21. Substituted for Bombay, by s. 20 of the Bombay Reorganisation Act, 1968.
- 22. Inserted by the Constitution (Seventh Amendment) Act, 1956, but not yet given effect to.
- 23. Inserted by the Constitution (Seventh Amendment) Act, 1956 w.e.f. 1-11-56.
- 24. The words 'and West Bengal' have been omitted by s. 4 of the West Bengal Legislative Council (Abolition) Act (20 of 1969). West Bengal has abolished its second House - the Legislative Council, with effect from 1-8-69 [by a notification under s. 1 (2) of the West Bengal Legislative Council (Abolition) Act, 1969].
- 25. The new State of Gujarat, formed out of Bombay, shall have one House, but Jammu and Kashmir has two Houses by virtue of her own State Constitution.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

**Madhya Pradesh.**—By reason of s. 8(2) of the Constitution (Seventh Amendment) Act, 1956, Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by the President.<sup>1</sup> So long as such notification is not made laws made by the unicameral Legislature are quite valid.<sup>1</sup>

**169.** (1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition<sup>2</sup> of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

**170.**<sup>3</sup> (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

(2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

*Explanation.*—In this clause, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine.

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

**171.** (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-third<sup>4</sup> of the total number of members in the Legislative Assembly of that State:

1. *Ramdas v. State*, A. 1959 M.P. 353 (335).

2. The Legislative Council for West Bengal has been abolished under this Article, by enacting the West Bengal Legislative Council (Abolition) Act (20 of 1969).

3. Substituted by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.  
3a. May be altered by a law under Art. 4 [*Mangal Singh v. Union of India*, A. 1967 S.C. 944].

4. Substituted for 'one-fourth' by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(2) Of the total number of members of the Legislative Council of a State —

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art, co-operative movement and social service.

**Amendment.**—In cl. (1), the word 'one fourth' has been substituted by the word 'one-third', by the Constitution (Seventh Amendment) Act, 1956.

**Object of Amendment.**—In the Statement of Objects and Reasons of the Amendment Bill it was explained that in the case of the smaller States, the  $\frac{1}{4}$  ratio caused difficulties in the matter of representation in the Legislative Council; hence, the maximum has been raised by making its strength  $\frac{1}{3}$  of that of the Assembly.

**Cl. (3), sub-cl. (e):** No right to challenge the nomination under Art. 226.

1. The nomination of a member by the Governor under the present sub-cl. (e) does not infringe the personal right of any elected member

of the Legislative Assembly even in an indirect manner so as to entitle him to sustain an application for the issue of a writ of *certiorari* to quash the nomination made by the Governor.<sup>5</sup>

2. For the same reason, *Quo Warranto* does not lie against a nominated person so long as the notification making the nominations stands.<sup>6</sup>

**Cl. (5).**—It is not correct to hold that in order to make a nomination under Cl. (3) (e) valid, all the branches of knowledge specified in Cl. (5) must be represented by nomination.

**172. (1)** Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly:

*Duration of State Legislatures.* Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

*Qualification for membership of the State Legislature.* **173.** A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule,<sup>7</sup>

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

**Amendment.**—Cl. (a) was substituted by the Constitution (Sixteenth Amendment) Act, 1963, to provide that not only before taking his seat shall a member of the Legislature take the oath prescribed by the Third Schedule as already required by Art. 188, *post*, but that even before standing for election or nomination, a candidate must take the same oath. This is to ensure that only a person having allegiance to India shall be eligible for membership of the Legislature.

**Cl. (a).**—Read with the Third Schedule, and s. 36 (2) of the Representation of the People Act, 1951, this Clause means that the oath or affirmation must be taken or made before the date fixed for the scrutiny of the nomina-

5. *In re Ramamoorthi*, (1952) II M.L.J. 671.

6. *Bhimsen Chandra v. Dr. H. C. Mookerjee*, (1952) 56 C.W.N. 651.

7. *Vidhyasagar v. Krishna*, A. 1965 Pat. 321 (327).

8. Cl. (a) was substituted for the words "is a citizen of India", by the Constitution (Sixteenth Amendment) Act, 1963, w.e.f. 6-10-63.

tion paper. If he has failed to do so till the date of scrutiny, he becomes disqualified to be chosen to fill the seat and his nomination paper is liable to be rejected.<sup>9</sup>

But where a candidate stands from more than one constituencies, the Constitution does not require that he must make oath or affirmation in each of the constituencies. Once he has done so before a competent authority of one constituency, his disqualification in this behalf is removed.<sup>10</sup>

**Cl. (b).**—Read with s. 36 (2) of the Representation of the People Act, 1951, the present clause means that a candidate is not qualified unless he has attained the age specified in the clause on the date fixed for scrutiny of nominations.<sup>11</sup>

### Effect of contravention.

1. The election of a person who is lacking in any of the above qualifications is void,<sup>12a</sup> even though the Returning Officer accepted his nomination paper.<sup>11</sup>

2. Whether a person possesses any of these qualifications or not can be determined by an election petition.<sup>12b</sup>

**"174. (1)** *The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session*

Session of the State Legislature, prorogation and dissolution

**(2)** *The Governor may from time to time—*

(a) *prorogue the House or either House*

(b) *dissolve the Legislative Assembly*

**Dissolution.**—A Single Judge of the Kerala High Court has held that the power of dissolution may be exercised at any time after the Legislative Assembly is constituted by a notification under s. 73 of the Representation of the People Act, 1951 and that it is not correct to hold that an Assembly may be dissolved only after the date appointed for its first meeting under Art. 172(1).<sup>13</sup>

**Prorogation.**—The Governor's power to prorogue is unfettered by any limitations and may be exercised while the House stands adjourned under orders of the Speaker.<sup>14a</sup> It takes effect as soon as the order of the Governor is notified in the Official Gazette, notwithstanding anything in the Rules of the House to the contrary.<sup>14b</sup>

**175. (1)** *The Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of members.*

Right of Governor to address and send messages to the House or Houses.

**(2)** *The Governor may send messages to the House or Houses of*

9. *Pashupati v. Harihar*, A. 1968 SC 1034 (1968) 2 SCR 812.

10. *Khaje Khanaiar Khaderkhan v. Siddavambali*, (1969) SC [C.A. 1621/67].

11. *Amrithlal v. Himathbhai*, A. 1968 SC 1455.

11a. *Cf. Jagadanunda v. Rabindra*, A. 1968 Cal 533 (535).

11b. *Cf. Brij Mohan v. Priya Brat*, (1965) 1 S.C.A. 378.

12. Substituted by the Constitution, (First Amendment) Act, 1951 (s. 8) for the original articles, w.e.f. 18-6-51.

13. *Aboo v. Union of India*, A. 1965 Ker 229 (231) [This view, it is submitted, is open to question; vide C. 5, vol. 3, p. 292n.

13a. *State of Punjab v. Satya Pal*, (1968) SC [C.A. 1427/68, d. 30-7-68].



the Legislature of the State, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

176. (1) At the commencement of *the first session after each general election to the Legislature Assembly and at the commencement of the first session of each year*, the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of the House or either House for the allotment of time for discussion of the matters referred to in such address.

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### 'Commencement of the session'.

'Session' connotes the sitting together of the Legislative body for the transaction of business. The Legislature cannot be said to have 'met' until the preliminaries have been gone through. Hence, if the date for address of the Governor is fixed after the members assemble for the administration of oaths in response to the notice of the Secretary, and take their oath, there is no violation of Art 176 (1).<sup>14</sup>

177. Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote.

Rights of Ministers and Advocate-General as respects the Houses.

### *Officers of the State Legislature*

178. Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The Speaker and Deputy Speaker of the Legislative Assembly.

Vacation and resignation of, and removal from the offices of Speaker and Deputy Speaker.

179. A member holding office as Speaker or Deputy Speaker of an Assembly—

- (a) shall vacate his office if he ceases to be a member of the Assembly;
- (b) may at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

14 Substituted, by the Constitution (First Amendment) Act, 1951, (s. 9) for "every session", w.e.f 18-6-51.

15. The words "and for the precedence of such discussion over other business of the House" were omitted by s. 9 of the Constitution (First Amendment) Act, 1951.

16. *Sardar Sahib v. Legislative Assembly*, A. 1962 Orissa 234.

(c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as Speaker.

180. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

181. (1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

182. The Legislative Council of every State having such Council shall, as soon as may be, choose two members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chairman or Deputy Chairman, as the case may be.

The Chairman and Deputy Chairman of the Legislative Council.

Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.

183. A member holding office as Chairman or Deputy Chairman of a Legislative Council—

(a) shall vacate his office if he ceases to be a member of the Council;

(b) may at any time by writing under his hand addressed, if such member is

the Chairman, to the Deputy Chairman, and if such mem-

ber is the Deputy Chairman, to the Chairman, resign his office; and

- (c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

184. (1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

185. (1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the Chairman, or

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

186. There shall be paid to the Speaker and the Deputy Speaker

Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman.

of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively, fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

187. (1) The House or each House of the Legislature of a State shall have a separate secretarial Staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

Secretariat of State Legislature

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

#### Art. 309 not applicable.

By reason of the special provisions contained in Arts. 98 and 187, Art. 309 or the rules framed thereunder do not apply to the secretarial staff of a House of Parliament or a State Legislature.<sup>17</sup>

#### *Conduct of Business*

188. Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.

#### Art. 188: Consequence of failure to take oath.

The penalty for refusal to take oath is prescribed in Art. 193. It does not *ipso facto* render the seat vacant. Hence, an application for *Quo Warranto* also does not lie on the ground that a member has not taken the oath and is not, accordingly, entitled to be a member.<sup>18</sup>

189. (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth of the total numbers of the House, whichever is greater.

(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

17. *Motilal v. Union of India*, A. 1965 Punj. 444.

18. *Anand v. Ram Sahay*, A. 1953 M.B. 31.

*Disqualifications of Members*

190. (1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation of seats. by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

(3) If a member of a House of the Legislature of a State--

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

CL (3) (a): 'Becomes'.

This word refers to disqualifications incurred by a member after he was elected.<sup>19</sup>

CL (3) (b): *Resignation*.

1. It has been held<sup>20-21</sup> that the letter of resignation must proceed from the member and that the resignation must relate to the membership held by the person who sends the same, and that it must be the result of a voluntary act of his. The mere receipt by the Speaker of a letter of resignation will not cause that member's seat to be vacant. It is open to the Speaker to enquire whether that letter is a genuine letter or a forged letter, or one obtained by force or fraud.

2. A corollary from the above view is that if the Speaker notifies a resignation notwithstanding his protest that the letter of resignation is not genuine, he may come to Court and challenge the validity of the notification and the Speaker's refusal to administer oath to the Petitioner on the ground that he has resigned his seat.<sup>20</sup> But the Courts would be powerless to interfere before the Speaker's decision on a dispute as to the genuineness of an alleged resignation is pronounced.<sup>21</sup>

3. If the resignation is not conditional but absolute in its terms, the mere fact that it is to take effect from a special future date does not take it out of Art. 190 (3).<sup>21, 22</sup> But it cannot be made to operate from a date earlier than the date on which the letter is written.<sup>21</sup>

19. *Election Commn. v. Venkata*, (1952-54) 2 C.C. 450 (463): (1953) S.C.R. 1144.

20. *Theppakumari v. Speaker*, A. 1952 T.C. 166.

21. *Suresh v. Sudama*, A. 1965 All. 536 (540).

22. *Kanjukrishnan v. Kerala Legislative Assembly*, A. 1964 Ker. 194 (196).

4. If the resignation can be given effect to from a prospective date as mentioned in the letter, it may next be contended that a withdrawal of the letter of resignation by a letter addressed to the Speaker before the effective date would operate as a revocation of the resignation.<sup>23</sup>

The Kerala High Court<sup>22</sup> has gone to the length of holding that if the Speaker does not pay any heed to the letter of withdrawal and the resignation<sup>23</sup> is notified notwithstanding the withdrawal, the notification becomes a nullity.

5. The word 'addressed' means 'conveyed' or 'communicated' to the Speaker.<sup>24</sup>

#### CL (4): Absence for sixty days.

While the circumstances mentioned in cl. (3) of Art. 101 automatically cause a vacancy, the absence under Art. 101 (4) causes a vacancy only if the House considers it fit to unseat the member and declares the seat vacant.<sup>24</sup>

**191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—**

Disqualifications for membership.

- (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purpose of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

#### 'Office of profit'.

1. In order to attract Art. 102 (1) (a) [*ante*], or Art. 191 (1) (a), the person must hold an 'office' and that office must be an 'office of profit'.

2. 'Office' means a position or place to which certain duties are

23. It is submitted that this conclusion is open to question because—(i) Art. 212 would bar the interference of the Court with the Speaker's jurisdiction unless of course, the Speaker's refusal to give effect to the withdrawal,—which is not provided for in the Constitution itself,—can be held to be unconstitutional; (ii) Even though the word 'addressed' be interpreted to mean 'conveyed' to the Speaker, there is no reason why the resignation should not be taken to have become *irrevocable* as soon as it is conveyed to the Speaker, as is indicated by the words 'thereupon become vacant' in Art. 190 (3) of the Constitution, though the resignation may take effect from the subsequent date specified in the letter of resignation.

24. *Annamalai v. State of W. B.*, A. 1952 Cal. 623 (637).

attached, which, in the present context, means duties of a public character.<sup>25</sup> A permit to ply a bus cannot be said to be an office.<sup>1</sup>

3. An 'office of profit' is an office which is *capable* of yielding a profit or pecuniary gain.<sup>2</sup> If employments are attached to the office, it does not cease to be an office of profit because the holder does not actually receive the emoluments.<sup>2a</sup> On the other hand, if a profit does actually accrue from an office, it is an 'office of profit', no matter how it accrues.<sup>2b</sup> Thus, the office of an Oath Commissioner, who receives fees for his services, is an office of profit even though he receives no salary from the Government.<sup>3</sup>

4. 'Profit' means any pecuniary gain. The amount of such profit is immaterial for the present purpose; but fees to reimburse out-of-pocket expenses do not constitute profit for the present purpose.<sup>2-2a</sup>

5. It need not be a payment in money. Where lands are allotted to the officer by way of remuneration for services rendered or he is authorised to deduct his remuneration from the Government revenue collected by him, the office held by him is an 'office of profit'.

### 'Under the Government'.

1. In order to constitute a disqualification under Art. 102 (1) (a) or 191 (1) (a), the office of profit must be held under the Government. Employees of a statutory body corporate cannot be said to be holding their office under the Government where they are neither appointed nor are removable by the Government nor are they paid out of the revenues of Government,<sup>4</sup> even though the corporation itself may be under the control of the Government.<sup>4</sup>

This theory of separate juristic entity of a statutory corporation or a 'Government company' has been carried to its logical extreme to hold that when an undertaking is transferred to a Government Company, the employees of the Department who continue in the service of the Company cease to hold offices of profit under the Government within the meaning of Art. 191 (a), even though no arrangement or regulation is made, terminating the services of those employees under the Government and their names continue to appear in the Official Civil List.<sup>5</sup> For the same reason an office in an 'aided' educational institution does not constitute a disqualification under this clause.<sup>4</sup>

On the other hand, an Auditor to a statutory corporation (a 'Government owned Company') who is appointed and removed by the Government and is under the control of a Government official holds an office of profit under the Government even though he is paid out of the funds of the statutory corporation.<sup>6</sup>

2. The expression 'office of profit under the Government' in this Article is wider than the expression 'post or service under the Government' in Arts. 309-14, because while the relationship of master and servant is essential for the application of Arts. 309-14, there need not be any such relationship for attracting Art. 102 (1) (a) or 191 (1) (a).<sup>1</sup> The object of these latter Articles is to maintain the independence of members of the Legislature from any sort of Governmental control or influence. When, therefore, Government has a say in the matter of appointment or removal

25. Cf. *Ramappa v. Sangappa*, A. 1958 S.C. 987.

1. *Yugal v. Nagendra*, A. 1964 Pat. 543 (547).

2. *Ravanna v. Kogeerappa*, A. 1954 S.C. 663 (557).

2a. *Umrao Singh v. Darbara Singh*, A. 1969 S.C. 262 (265).

3. *Abdul Shakoor v. Rikhab Chand*, A. 1958 S.C. 52 (55).

4. *Gopala v. Paul*, A. 1961 Ker. 242.

5. *Gangadharappa v. Abdul*, A. 1969 S.C. 744 (747).

6. *Gopi Gobinda v. Sankari Prasad*, A. 1966 S.C. 254 (258).

of a person, he should not be allowed to sit in the Legislature, even though by such appointment, the relationship of master and servant is not constituted between such person and the Government.<sup>6</sup>

3. 'Government' in this context includes all the three branches of Government,—legislative, executive and judicial, so that persons appointed to the Secretariat of the Legislature are also officers under the Government.<sup>7</sup> But an elected member of the Legislative Council does not hold an office *under* the State Government, for his appointment or removal does not lie within the power of the State Government.<sup>8</sup>

4. It is the power of appointment and removal and not the source of the remuneration paid that constitutes the test of an office being held under the Government or not.<sup>9</sup>

5. Where an *appointment* to an office is made by the Government and the person holds the office by reason of such appointment, it is immaterial for the present purpose that Government has no option but to appoint a particular person (e.g., the heir of a village *patel*,<sup>10</sup> or of a Sarbarakar in Orissa).<sup>9</sup> Similarly, where Government has the power to *dismiss* an officer, it is immaterial for the present purpose that such dismissal is not at the pleasure of the Government but has to be made under statutory grounds.<sup>9</sup>

For the same reason, where a person, in fact holds an office by virtue of an appointment by the Government, any defect in the order of appointment is immaterial for the purpose of determining whether he is 'holding' an office of profit'.<sup>9</sup>

#### A. Instances of persons holding 'offices of profit' under Arts. 102 and 191:

- (i) Village Patel;<sup>9</sup>
- (ii) Sarbarakar;<sup>9</sup>
- (iii) Oath Commissioner;<sup>9</sup>
- (iv) Holder of Ghatwali tenure,<sup>11</sup> but not after the estate is taken over by the State under the Land Reforms Act,<sup>12</sup>
- (v) Auditor of Durgapur Projects Ltd or Hindusthan Steel Ltd;<sup>13</sup>
- (vi) Adjutant appointed under the I. P. Home Guards Scheme,<sup>14</sup>
- (vii) A panel lawyer, appointed under s. 127B of the U. P. Zemindari Abolition and Land Reforms Act 1951,<sup>14</sup>
- (viii) An Insurance Medical Practitioner appointed under the Employees State Insurance Act, 1948.<sup>15</sup>

#### B. Offices held not to be 'offices of profit under the Government', for purposes of Arts. 102 and 191:

- (i) Manager of Durgah Khwaja Sahib, Ajmer.<sup>16</sup>
- (ii) Chairman of Gubbi Taluk Development Committee.<sup>16</sup>

7. *Hoti Lal v. Raj Bahadur*, A. 1959 Raj 227 (230).

8. *Ramnarain v. Ramchandra*, (1957) 60 Bom.L.R. 770 (773).

9. *Raghunath v. Kishore*, A. 1958 Orissa 260 (264).

10. *Abdul Shakoor v. Rikhabchand*, A. 1958 S.C. 52.

11. *Badri Narain v. Kamdas*, A. 1961 Pat. 41.

12. *Man Mohan v. Sailabala*, A. 1965 Pat. 277.

13. *Gobinda v. Sanhari Prasad*, A. 1964 S.C. 254.

14. *Balak Ram v. Badri Prasad*, A. 1969 All. 88 (99, 103).

15. *Deorao v. Keshav*, A. 1958 Bom. 314.

16. *Ravanna v. Kaggeerappa*, A. 1964 S.C. 653.



(iii) Chairman of a Panchayat Samiti under the Punjab Panchayat Samities and Zilla Parishads Non-Official Members (Payment of allowances) Rules, 1965.<sup>17</sup>

**192. (1)** If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

Decision on questions as to disqualifications of members.

**(2)** Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

**Scope of Cl. (1): Question as to disqualification.**

1 The three conditions for the application of the Clause are—

(i) That a question as to disqualification has arisen. The Clause, however, does not lay down where, by whom and in what manner the question should arise.<sup>18</sup> It is not necessary that it should arise in the Legislature itself.

(ii) That question must be referred for the decision of the Governor. It does not, however, say that some other authority must receive the complaint, hold an inquiry and then refer it for the decision of the Governor. If any such question arises in any manner, it has to be decided by the Governor alone and the courts shall have no jurisdiction to determine it.<sup>19</sup>

(iii) Though the ultimate decision is that of the Governor, the Constitution has practically left it to the Election Commissioner, to whom the complaint is forwarded by the Governor to try the complaint, arrive at his decision and then pronounce it *in the name of the Governor*.<sup>18</sup>

**'Has become'.**

These words indicate that the disqualification which can be referred to the Governor under the present Article is a disqualification arising subsequent to the election and not existing at the time of the election.<sup>19</sup>

**Cl. (2): 'Shall act according to such opinion'.**

It would appear from these words that the Government has no discretion to decide such question contrary to the opinion of the Election Commission. Thus, when an Election Tribunal has adjudged a member to be guilty of a corrupt practice, the Governor cannot legitimately refuse to act according to that decision except perhaps on the ground that the Tribunal was not validly constituted.<sup>20</sup>

**193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.**

Penalty for sitting and voting before making oath or affirmation under article 188 or when not qualified or when disqualified

17. *Umrao Singh v. Darbara Singh*, A. 1969 S.C. 262 (265).

18. *Brindaban v. Election Commissioner*, A. 1965 S.C. 1892 (1896).

19. *Election Commission v. Saka Venkata*, (1963) S.C.R. 1144 (1154).

20. *Ibrahim v. Election Tribunal*, A. 1957 All. 292.

*Powers, Privileges and Immunities of State Legislatures  
and their Members*

**194. (1)** Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

**Art. 194: Privileges of the Legislature.**—See p 238, ante, under Art. 105

**CL (1): Freedom of Speech:**

'Subject to the . . . . Constitution'.

1 Art 194 (1) is 'subject to the Constitution' i.e. subject to the provisions of Arts 208 and 211 (in the case of Parliament Arts 118 and 121). Hence, in the exercise of his freedom of speech a member cannot raise a discussion as to the conduct of a Supreme Court or High Court Judge, which is prohibited by Art 211<sup>21 21a</sup>

2 The words 'regulating the procedure of the Legislature,' however, suggest that the freedom of expression of members of the Legislature under 10 (1) (a) is subject to Rules of Procedure of the Legislature<sup>21a</sup>

**Scope of CL (1).**

1 The scope of CL (1) is to confer freedom of speech on legislators independently of and uncontrolled by, anything in Art 19(1)(a)<sup>21a</sup>

2 This freedom of the legislators is, however, subject to two restrictions

(a) Those provisions of the Constitution which relate to the procedure in the Legislature, e.g., Arts 208, 211

(b) The Rules and Standing Orders of the House in question which regulate the procedure in the House

**Scope of CL (2): Immunity from legal action.**

This clause goes one step further than CL (1), in one respect, namely, the legal liability of a legislator for anything said in the Legislature. He

21. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (409).

21a. Ref. under Art. 143, A 1965 S.C. 745 (760).

will be completely immune from any legal proceedings even if his speech violates the fundamental right of any other person under Art. 19 (1) (a), and even if he transgresses any other provision of the Constitution, e.g., Art. 211, though he may be answerable to the House itself for such transgression and the Speaker may take appropriate action against him.<sup>21a</sup>

The restrictive words "subject to the provisions of this Constitution . . . ." at the beginning of cl. (1) have been omitted from cl. (2).<sup>21</sup> It means that while the freedom of speech within the House is subject to the restrictions imposed by the Arts. 19 and 121 or by the relevant Rules of the House, no action in a Court of law lies for violation of any of the foregoing provisions, say, for contempt of Court, defamation, etc. The remedy against such utterances is the power in the hands of the Speaker to prevent or to take action against the violation of these provisions.<sup>21</sup>

### **'Anything said . . . . .'**

These words do not extend to anything which is said or done outside the walls of the House<sup>22</sup> or questions which have been disallowed.

'Proceedings' in cl. (2) include not only speeches but also motions, questions etc. as form part of the proceedings of the House. But questions which are disallowed never form part of the proceedings.<sup>22</sup>

### **'Publication by or under the authority of a House'.**

1. The immunity under cl. (2) is confined to a publication by or under the authority of a House. A newspaper is not privileged under this clause even though its report be faithful, unless it is authorised by the House.<sup>22, 23</sup>

2. Even a member, who has absolute immunity for anything said within the House, has no immunity if he *causes* his speech to be published in a newspaper.<sup>24</sup> Of course, he is not liable if a newspaper published his speech without any inducement from him.<sup>24</sup>

3. The immunity extends to the publication of the 'proceedings' of the House which include any *formal* action of the House, but not questions which have been disallowed.<sup>22</sup>

4. The House has an absolute privilege to prohibit the publication of its proceedings entirely or such part of its proceedings as has been directed to be expunged. Such part of the proceedings as has been directed to be expunged does not form part of the 'proceedings' of the House and a publication thereof without authority of the House constitutes contempt.<sup>25</sup>

5. It has, accordingly, been held by the Calcutta High Court<sup>24</sup> that the principle laid down in the English decision in *Wason v. Walter*, which protects unauthorised but fair or faithful publication of the proceedings of a House of the Legislature, does not apply in India. Cl. (2) of the present Article of our Constitution protects only authorised publication and there is no exception in our law of defamation contained in the Penal Code in favour of publication of the proceedings of the Legislature.<sup>24</sup>

### **Scope of Cl. (3).**

1. This clause provides that in the absence of any legislation by the State Legislature, the powers, privileges etc. by a House of the Legislature

22. *Jatish v. Harisadhan*, A. 1961 S.C. 613: (1961) 3 S.C.R. 486.

23. *Surendra v. Nabakrishna* A. 1958 Orissa 168 (175).

24. *Suresh v. Punit*, A. 1951 Cal. 176.

25. *Sharma v. Sri Krishna*, A. 1959 S.C. 393.

or any Committee thereof shall be the same as those of the House of Commons at the commencement of the Constitution.<sup>25</sup> It thus gives the power to punish for contempt either a member<sup>1</sup> or a stranger<sup>23</sup> in like cases as would have enabled the House of Commons to act in such matters. Similarly, a House has the power to prohibit even a faithful report of its proceedings.<sup>26</sup>

2. Clauses (1), (2) and (3) of Art. 194 are mutually exclusive, so that if a matter relates to the publication of the proceedings of the Legislature but is not covered by cl. (2), immunity for it cannot be claimed under cl. (3).<sup>26</sup>

3. The provisions of the present clause are not subject to Art. 19 or any other provision of the Constitution.<sup>26</sup> In the result, the privileges of the House of Commons, so long as they are applicable in India are not liable to be invalid on the ground of contravention of any of the fundamental rights, e.g., Art. 19 (1) (a)<sup>25</sup> though, if Parliament [or the State Legislature, under Art. 194 (3)] chooses to make a law under the present clause, such law cannot abridge any of the fundamental rights by reason of Art 13 (2).<sup>25</sup>

### Privileges as in England.

1. No such legislation, as is referred to in this clause has yet been undertaken by Parliament or by any State Legislature. Hence, in matters outside cls (1) and (2), the privileges of Parliament or of a State Legislature and its members are the same as those of the House of Commons and its members, as they existed at the commencement of this Constitution.<sup>1</sup>

2. Thus, it has been held that, as in England, the immunity of members of Parliament from arrest does not extend to cases of preventive detention<sup>2-4</sup> or under the Defence of India Rules.<sup>4</sup> For the same reason, though during his period of detention under the Preventive Detention Act, a member has a right to correspond with the Legislature as a sitting member, he is not entitled to attend the sittings of the House.<sup>4,5</sup>

3. In short, the immunity from arrest applies only to arrest under civil process and does not extend to arrest under the criminal law, in which respect a member of Legislature has no higher privilege than an ordinary citizen.<sup>2</sup>

4. The immunity from arrest under civil process exists during a session of Parliament or of the State Legislature (as the case may be) and forty days before and after each session. The privilege cannot be claimed when the Legislature has been prorogued and has not yet been summoned for the next session.<sup>7</sup>

5. Where a member has been arrested in breach of this privilege, he is entitled to be released by a proceeding for *habeas corpus*.<sup>6</sup>

6. Each House has an absolute right to exclude a stranger from its proceedings;<sup>3</sup> or to expunge any part of its proceedings and to punish for contempt the publication of such expunged matter.<sup>1</sup>

7. Each House has the absolute right to prohibit the publication of even a true and faithful report of its debates.<sup>1</sup>

1. *Sharma v Sri Krishna*, A. 1959 S.C. 393

2. *Ananda Nambiar v. Chief Secy.*, (1965) S.C. [W.P. 47/65, d. 47-10-65].

3. *Ansumali v State of W. B.*, (1952) 56 C.W.N. 711 (716).

4. *Kunjan v. State*, A. 1955 T.C. 154.

5. *Ananda Nambiar, In re*, (1952) 1 M.L.J. 1: A. 1953 Mad. 117.

6. *Venkateswarlu v. D. M.*, A. 1951 Mad. 269.

7. *Premade v. Deputy Secy.*, (1965) 69 C.W.N. 913.

**'At the commencement of the Constitution'.**

1. The powers, privileges and immunities which may be claimed by a House of the Legislature or its members under the second part of Art. 194 (3) are only those which subsisted in the House of Commons on 26-1-50.<sup>8</sup>

2. It must also appear that the said power or privileges was not only claimed by the House of Commons, but was also *recognised* by the English Courts.<sup>9</sup>

**Power to punish for contempt.**

1. The power of a Legislature, no less than of a Court, has to be used sparingly and cautiously.<sup>8</sup>

2. It is not available against a Judge of the High Court for anything done by him in the discharge of his duty.<sup>8</sup>

**Speaker's jurisdiction to take steps for contempt.**

1. Though the normal procedure for a House to take cognisance of an alleged contempt is by a regular contempt proceeding before itself, it is competent for the Speaker, as the representative of the dignity of the House, to take cognisance of a contempt committed in the House itself or outside and then to set the House and its machineries for an appropriate action against the offender.<sup>9-10</sup>

2. At any rate, the Court has no jurisdiction to interfere with a writ to summon a person for appearing before the Privilege Committee, on the ground that there was no resolution authorising the Speaker to summon such person.<sup>9-10</sup> The Court cannot interfere with any action taken for contempt unless, the Legislature or its duly authorised officer is seeking to assert a privilege not known to the law of Parliament;<sup>11</sup> or the notice issued or the action taken was without jurisdiction.<sup>12</sup>

3. Once a privilege is held to exist, it is for the House to judge the occasion and its manner of exercise. The Court cannot interfere with an *erroneous* decision by the House or its Speaker in respect of a breach of its privilege.<sup>9-10, 11</sup>

**Whether warrant issued by a State Legislature to punish for contempt can run beyond the territory of the State.**

The Bombay High Court<sup>13</sup> has held that a warrant issued for the arrest of a person for the purpose of answering a charge of contempt, by a House of the Legislature of a State may run and be effective beyond the territory of that State inasmuch as the very object of the privileges of a Legislature would be defeated if it is denied execution outside the boundaries of the State, and, further, because there is no difference in the provisions of Arts. 105 (3) and 194 (3) in this respect.

This view, it is submitted, overlooks the basic fact that *our* Constitution is federal and the limitations to the powers of all the organs of a State follow from that basic fact. That is why express provision is required in Art. 261 for the recognition of all the public acts of a State,—executive, legislative and judicial, outside the territory of that State. A Legislature is constituted under the Constitution for the purposes of legislation and

8. Ref. under Art. 143, A. 1965 S.C. 745 (750, 761).

9-10. *Harendra v. Dev Kanta*, A. 1958 Assam 160.

11. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (413).

12. *Phukan v. Mohendra*, A. 1965 Assam 74 (78).

13. *Homi Mistry v. Harnad*, (1958) 80 Bom.L.R. 279 (291).

if that legislative power cannot extend beyond the boundaries of the State [Art. 245 (1)], it is difficult to imagine that the powers ancillary thereto shall extend beyond that, in the absence of express constitutional provision. Further, the judgment does not take into account the situation in other federal countries

### Parliamentary Privileges and the Courts.

1. Since the privileges of each House of our Parliament [Art 105 (3)] and of a State Legislature [Art 194 (3)] are the same as those of the English House of Commons, it follows that—

(a) Each House is the sole judge of the question whether any of its privileges has, in a particular case, been infringed,<sup>14</sup> and the Courts have no jurisdiction to interfere with the decision of the House on this point.<sup>14</sup>

(b) Each House has the power to punish for breach of its privileges or for contempt<sup>14, 15</sup>

No House of the Legislature has, however, the power to create for itself any new privilege not known to the land and the Courts possess the power to determine whether the House in fact possesses a particular privilege.<sup>14, 15</sup>

2. But it is competent for a High Court to entertain a petition for *habeas corpus* under Art 226, challenging the legality of a sentence imposed by a Legislature for contempt and to release the prisoner on bail, pending disposal of that petition.<sup>16</sup>

3. A writ of Prohibition should not issue on a notice of the Legislature to proceed in contempt.<sup>17</sup>

4. Because of the guarantee of Fundamental Rights under our Constitution, a Legislature in India has no power to punish a citizen for contempt on a general warrant.<sup>18</sup>

### Arts. 19 (1) (a) and 105 (3) and 194 (3).

According to the principle of harmonious construction between different parts of the Constitution, it has been held that the provisions of Art. 19 (1) (a) which are general, must yield to Art 105 (3) and 194 (3), which are particular provisions relating to the Legislature. The Editor of a newspaper cannot, accordingly, claim a right to publish those portions of a speech in Parliament which have been directed to be expunged by the Speaker.<sup>14</sup>

### 195. Members of the Legislative Assembly and the Legislative

Salaries and allowances of members.

Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

14. *Sharma v. Sri Krishna (II)*, A. 1960 S.C. 1186 (1191).

15. *Raj Narain v. Atmaram*, A. 1964 All. 319.

16. Ref. under Art. 143, A. 1965 S.C. 745 (791).

17. *Subraminam v. Speaker*, A. 1969 Mad. 10 (13).

*Legislative Procedure*

**196. (1)** Subject to the provisions of articles 196 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

Provisions as to introduction and passing of Bills.

(2) Subject to the provisions of articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

**Cl. (3): Effect of Prorogation on pending Bills.**

A Bill pending in either House of the Legislature of the State shall not lapse by reason of prorogation of the House or Houses thereof.<sup>18</sup> It goes without saying that a Bill which has been passed by the Houses of the Legislature and is pending for assent of the Governor shall not lapse.<sup>18</sup>

Restriction on powers of Legislative Council as to Bills other than Money Bills.

**197. (1)** If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree;

the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or

(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree;

18. *Purnakothaman v. State of Kerala*, A. 1962 S.C. 694.

the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

198. (1) Money Bill shall not be introduced in a Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Special procedure in respect of Money Bills. Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council, for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

199. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely -

Definition of 'Money Bills'

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;
- (c) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;
- (d) the appropriation of moneys out of the Consolidated Fund of the State;
- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;
- (f) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money; or
- (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).



(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under article 198, and when it is presented to the Governor for assent under article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

**Deputy Speaker's power to certify.** The Supreme Court has held<sup>18a</sup> that when the Deputy Speaker acts as the Speaker during the absence of the Speaker, he can exercise the power to certify a Bill as a Money Bill under Art. 199 (4).

**200.** When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom;

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

#### **No interference by Court.**

By reason of Art 212, a Court cannot interfere with the presentation of Bill for the assent of the Governor on the ground that it has not been duly passed.<sup>19</sup>

#### **'Reservation for consideration of the President'.**

1. Art. 200 does not contemplate that the Governor shall first give his assent, and, when the Bill has become a full-fledged law, reserve it for the consideration of the President. Reservation is an alternative to his

<sup>18a</sup> *State of Punjab v. Satya Pal*, (1968) S.C. [C.A. 1427/68, 4 30-7-68].

19. *Rameshchandra v. A. P. Regional Committee*, A. 1965 A.P. 305 (214).

giving or refusing assent to the Bill. Indeed, in matters where reservation is compulsory, the Governor is prohibited from giving his assent.<sup>20</sup>

2. If constitutional questions are involved, the President may, on receipt of a reserved Bill, make a reference to the Supreme Court, under Art. 143, before giving his assent.<sup>21</sup>

### **Proof of assent.**

1. When an Act is published in the Official Gazette, showing that the assent of the head of the State was given on a particular date, the burden to prove that it did not receive his assent on that date lies on the person who disputed the fact.<sup>22 23</sup>

2. The mere fact that the head of the State was not present in the capital on a particular date is not enough to prove that his assent could not be given on that date, as there are other methods of obtaining his assent, e.g., by telegram, telephone or the like.<sup>24 25</sup>

3. 'Declaration' of assent means nothing more than a public notification that assent has been given.<sup>1</sup>

### **No time limit for Governor's declaration.**

The Constitution does not impose any time limit within which the Governor should make any of these declarations and there is no means to compel him to come to a declaration if he simply keeps a Bill pending before him indefinitely.<sup>2</sup>

The dissolution of the Legislative Assembly does not prevent the exercise of the powers of the Governor under Arts. 200-201 with respect to a Bill which had been presented for his assent prior to the dissolution.<sup>3</sup> There is nothing in the Constitution to direct that the assent of the Governor or the President must be given during the lifetime of the Assembly which passed the Bill.<sup>4</sup>

### **Proviso 2: 'Derogate from the powers of the High Court'.**

These words are qualified by the words "which endangers the position of that Court which by the Constitution it is designed to fill". Hence, if a Bill merely seeks to affect the rights of the parties in a case pending before the High Court without endangering the constitutional position of the High Court, it need not be reserved under this Proviso.<sup>4</sup>

**201. When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom:**

Bills reserved for consideration.

**Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with**

20. *State of Bihar v. Kameshwar*, A. 1962 S.C. 252 (265).

21. *Cf. In re Kerala Education Bill*, A. 1968 S.C. 956.

22-25. *Hari Singh v. State of Rajasthan*, A. 1954 Raj. 117.

1. *Gajapati v. State of Orissa*, A. 1953 Orissa 185.

2. *Purushothaman v. State of Kerala*, A. 1962 S.C. 694 (701-2).

3. *Pichayappa v. State of Kerala*, A. 1961 Ker. 324 (330).

4. *Prem Narain v. State of U. P.*, A. 1960 All. 205 (207).

or without amendment, it shall be presented again to the President for his consideration.

*Procedure in Financial Matters*

202. (1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement."

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State;

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(a) the emoluments and allowances of the Governor and other expenditure relating to his office;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court;

(e) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

203. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

**Cl. (2)-(3): 'Demands'.**

These clauses require that every 'demand' shall be recommended by the Governor and separately put to the vote of the Assembly. The Article makes no reference to the items included in each demand or to the purpose for which each item is required.<sup>5</sup>

**204. (1)** As soon as may be after the grants under article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

- (a)* the grants so made by the Assembly; and  
*(b)* the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

**(2)** No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

**(3)** Subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

**Effects of the Appropriation Act.**

1. The appropriation Act gives legal sanction to the grants voted by the Legislature. After the Act is passed, the limitation of expenditure under a head is to be determined solely with reference to the Schedule of the Act.<sup>5</sup>

2. Money appropriated towards a particular heads is to be spent on that head only unless the Schedule is amended by an appropriate law, or rule having the force of law, consistent with the Constitution.<sup>6</sup>

3. But any expenditure incurred under any of the heads mentioned in the Schedule and within the limits specified therein cannot be questioned as unconstitutional.<sup>6</sup>

**205. (1) The Governor shall—**

- (a)** if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

- (b)** if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year.

5. *Pierrel v. State of M. P.*, A. 1965 Nag. 11.

cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

#### Applicability of Art. 205.

1. The provision in Art. 205 can be availed of only if the money already voted in the Budget for a particular purpose is sufficient or when a need arises after the Budget was passed for incurring a particular expenditure or when some new service not contemplated in the Budget has been started.<sup>6</sup>

2. Hence, where the Memorandum accompanying a Budget clearly states that a need has already arisen and a new service is contemplated, a provision for such expenditure has to be made in the Budget itself.<sup>6</sup>

**206. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power—**

Votes on account, votes of credit and exceptional grants

- (a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure;
- (b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;
- (c) to make an exceptional grant which forms no part of the current service of any financial year;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

6. *Pierdel v. State of M. P.*, A. 1955 Nag. 11.

**207. (1)** A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council:

Special provisions as to financial Bills. Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

#### Non-compliance with Art. 207.

By reason of Art. 212, the question of non compliance with Art. 207 is not justiciable.<sup>7</sup>

#### *Procedure Generally*

**208. (1)** A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of Procedure

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

#### Arts. 208 and 21.

Rules made under Art. 208 constitute 'law' within the meaning of Art. 21.<sup>8</sup>

**209.** The Legislature of a State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and, if and so far as any provision of any law so made is inconsistent

Regulation by law of procedure in the Legislature of the State in relation to financial business.

7. *Kesavan v. State of Kerala*, A. 1961 Ker. 36 (40).

8. *Sharma v. Sri Krishna*, A. 1969 S.C. 395 (411).

with any rule made by the House or either House of the Legislature of the State under clause (1) or article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of the article, such provision shall prevail.

210. (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English;

Language to be used in the Legislature.

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

211. No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

212. (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

Courts not to inquire into proceedings of the Legislature.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

CL (1): Courts not to inquire into proceedings of the Legislature.

1. It is clear from the above clause, that our Courts would not be entitled to question the validity of any 'proceeding' in Parliament on the ground of irregularity of 'procedure'. Thus,—

(i) The Courts cannot invalidate an Act on the ground that changes were introduced into the Bill by the Select Committee in contravention of the Rules of Procedure and business of the House, or that the members<sup>9-10</sup> or Speaker<sup>11</sup> had not taken the oath.

(ii) Where a bill is duly endorsed by the Speaker as passed it cannot be questioned in the Courts on the ground that proceedings of the Legislature do not record that the bill was formally put to the House under the rules of business and carried by it.<sup>12</sup>

(iii) Proceedings inside the Legislature cannot be called into question on the ground that they have not been carried on in accordance with the rules of business.<sup>13</sup> Thus,

9-10. *C. J. Ram Dutt v. Govt. of M. B.*, A. 1952 M.B. 57 (74).

11. *Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

12. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (266).

13. *Sharma v. Sri Krishna* (No. 2), A. 1963 S.C. 1186 (1189).

A notice issued by the Speaker of a Legislature for breach of its privilege cannot be quashed by the Supreme Court or any other Court on the ground that the Rules of Procedure relating to proceedings for breach of privilege have not been followed by the Legislature.<sup>14</sup>

2. But the immunity from judicial interference is confined to matters of *irregularity of procedure*. There would be no immunity if the proceedings are held without jurisdiction,<sup>15</sup> e.g., in defiance of the mandatory provisions of the Constitution or by exercising powers which the Legislature does not under the Constitution possess.<sup>16</sup>

3. The question whether the Speaker himself has been duly elected according to the provisions of the Constitution is not a question relating merely to irregularity of proceedings in the House, and a proceeding for *Quo Warranto* lies to challenge his *right* to the office.<sup>17</sup>

<sup>14</sup> **Cl. (2): Powers exercisable by an officer of the Legislature.**

1. Even an erroneous decision or interpretation of the Rules of Procedure<sup>18</sup> by the Speaker cannot be the subject-matter of scrutiny in a Court of law. The High Court or the Supreme Court cannot act as a Court of revision against the Legislature or the rulings of the Speaker,<sup>17</sup> with respect to the proceedings within the House in question.<sup>17a</sup>

2. By reason of this provision, the High Court cannot give a direction upon the Speaker on the question whether the discussion on the address of the Governor would come under Art. 176 (2) or would be treated as a discussion of an ordinary resolution.<sup>18</sup>

3. No writ will lie against the Speaker or other officer of the Legislature to interfere with the proceedings of the Legislature<sup>19</sup> e.g., to prevent a resolution from being moved or to restrain the Legislature from enacting any legislation even if it be *ultra vires*<sup>20, 21</sup> or unconstitutional.<sup>19</sup>

If, however, a law is passed or a motion or resolution carried, which is not in accordance with the Constitution, it can be declared invalid by the Courts.<sup>19</sup>

4. The immunity is restricted to matters of 'procedure' and would not extend to any matter relating to the constitution of the Legislature itself, e.g., the absence of a notification under s. 74 of the Representation of the People Act, 1951.<sup>22</sup>

**'By or under'.**

These words have been used to include not only the powers vested by the Constitution itself but also by *intra vires* Rules made in exercise of powers conferred by the Constitution.

**'Conduct of business'.**

1. It has been held by the Travancore High Court that the taking or administering of the oath under Art. 177 or 188 of the Constitution is

14. *Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

15. *Nesamony v. Varghese*, A. 1952 T.C. 66.

16. *Harindra v. Dev Kanta*, A. 1958 A.S. 160 (165).

17. *Rajnarain v. Atmaram*, A. 1951 All. 319.

17a. Supreme Court refusing special leave to appeal from the decision of the Punjab High Court rejecting the writ petition of Madhu Limaye against the Speaker, Lok Sabha [Statesman, 26-11-66, p. 7].

18. *Saradhekar v. Orissa Legislative Assembly*, A. 1952 Orissa 234.

19. *Him Chandra v. Speaker*, A. 1956 Cal. 378 (384).

20. *Sriniketan v. State*, A. 1956 Hyd. 186.

21. *Chaitry Lal v. State of U. P.*, A. 1951 All. 228.

22. *C. Vinod v. State of H. P.*, A. 1969 S.C. 223.



not an item of 'conduct of business' within the meaning of Art. 122 (2) or 212 (2) but is only a condition precedent to entitle the members to sit in the assembly and conduct the business. Hence, a wrongful refusal by the Speaker to allow a member to take the oath can be interfered with by the Court. It has also been held that where the Speaker is authorised by the President or Governor to administer the oath under Art. 99 or 188, he discharges the function not as an 'officer' of the Assembly and that, in the discharge of this function, he cannot claim the protection given by Art. 122 (2) or 212 (2).<sup>23</sup>

2. A point of order raised by a member relates to the conduct of business of the Assembly.<sup>24</sup> So also is the giving of notice of a question.<sup>24</sup>

#### CHAPTER IV.—LEGISLATIVE POWER OF THE GOVERNOR.

**213. (1)** If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Power of Governor to promulgate Ordinances during recess of Legislature.

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

- (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or
- (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or
- (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

- (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and
- (b) may be withdrawn at any time by the Governor.

*Explanation.*—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different

23. *Thakuramma v. T. C. Assembly*, A. T.C. 166 (169). (The soundness of both these propositions, it is submitted, is open to question).

24. *Godavaris v. Nandkishore*, A. 1953 Orissa 111.

dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

## \* Arts. 213: Ordinance-making power of Governor.

### CL (1): 'Is satisfied'.

1 As in the case of an Ordinance made by the President, the Courts cannot question the validity of an Ordinance made by a Governor on the ground that there were no sufficient reasons for promulgating an Ordinance.<sup>25</sup> or that it was made *mala fide*, e.g. to circumvent judicial decisions.<sup>26</sup> The only question with which the Courts are concerned is only one of legislative competence.<sup>1-9</sup>

2. It is an *absolute* condition for the exercise of the power that the Legislature or either House thereof must not be in session at that time.<sup>11</sup> But the Governor may prorogue the Legislature or either House<sup>10</sup> for the purpose of making an Ordinance. If, however, the Ordinance is promulgated *before* the order of prorogation is notified, the Ordinance would be invalid.<sup>12</sup>

### 'Except when the Legislative Assembly . . . in session'.

(a) When the State Legislature consists of one House, viz., the Assembly, no Ordinance can be promulgated at a time when the Assembly is in session.<sup>13</sup>

(b) But where there are two Houses, the Governor may promulgate an Ordinance if *either* of the two Houses has been prorogued. In an Allahabad case,<sup>14</sup> the validity of an Ordinance was upheld even though the Assembly was in session and the Council had been prorogued just a few days before promulgation of the Ordinance.

'In session' — A House is said to be in session from the date of its first meeting till its prorogation or dissolution.<sup>14</sup>

### CL (2): 'Same force and effect as an Act of the Legislature.'

1. Subject to the limitation as to the duration of the Ordinance as laid down in cl (2) (a), there is no other limitation upon the Ordinance-making power of the Governor save those that are imposed upon the State Legislature under the Constitution. A law under Art 209 may, therefore, be made by an Ordinance.<sup>16</sup>

2. Hence, an Ordinance may amend or repeal not only another Ordinance

25. *Jnan Prasanna v. Prov. of West Bengal*, A 1949 Cal. 1 (F.B.); *Lakshinarayana v. State of Bihar*, A 1950 F.C. 59.

1-9. *Bhuvanath v. Prov. of Bihar*, (1949) 4 D.L.R. 201 (Pat.).

10. *State of Punjab v. Satya Pal*, A. 1969 S.C. 903 (912).

11. *Bidya v. Prov. of Bihar*, A. 1950 Pat. 19.

12. *In re, Voerakadrayya*, A. 1930 Mad. 243.

13. *Vishwanath v. State of U. P.*, A. 1956 All. 567 (560).

14. *CL C.*, Vol. II, p. 518.

nance but also any law passed by the Legislature itself, subject to the limitation as to its own duration.<sup>15</sup>

3. Similarly, where a law passed by the Legislature could be retrospective in operation, there is nothing to bar an Ordinance on the same subject from being retrospective.<sup>16</sup> Hence, an Ordinance can be given retrospective operation even from a date when the Legislature was in session,<sup>18</sup> overriding a judicial decision.<sup>17</sup>

4. Though the duration of the Ordinance itself is limited to the period laid down in cl. (2) (a), there is nothing to prevent an Ordinance from prescribing a sentence<sup>18</sup> or from making other provision such as the creation of an office,<sup>19</sup> which will endure even after the expiry of the Ordinance.

5. On the other hand, an Ordinance would be invalid for contravention of the constitutional limitations to which the State Legislature is subject, e.g., Art 14,<sup>20</sup> 254 (2).<sup>20</sup>

### CL (2) (a): 'Shall be laid before the Legislative Assembly . . .'

Notwithstanding the word 'shall' the requirement of laying before the Legislative Assembly of the State (or, where there is a Legislative Council in the State before both the Houses) is directory.<sup>21</sup> The only consequence of non compliance with this requirement is that the Ordinance will cease to operate at the expiration of six weeks from the reassembling of the Legislature. It does not affect the initial validity of the Ordinance.

### 'Resolution disapproving it.'

These words refer to a resolution directly disapproving the Ordinance. The fact that the Assembly has refused leave to introduce a Bill incorporating the provisions of the Bill does not amount to a resolution disapproving the Ordinance within the meaning of Art 213 (2) (a) and it cannot be contended that the Ordinance ceased to be operative from the date when leave to introduce the Bill was refused.<sup>22</sup>

### Proviso to Cl. (3).

1. This Proviso gives validity to an Ordinance made by the Governor with respect to a matter in the Concurrent List, which is repugnant to a Union law, in the same manner as laid down in Art 254 (2) as regards an Act of the State Legislature which is repugnant to such Union law. But whereas under Art 254 (2), assent of the President is required after the Act is passed, the present Proviso validates the Ordinance only if it has been made by the Governor in pursuance of 'instructions' received from the President. Thus, in the one case the assent of the President is previous and the other it is subsequent to the legislation.

2. A Governor's Ordinance, made without such previous instructions, is void.<sup>23</sup>

3. The concluding words of the Proviso make it clear that where an Ordinance is promulgated in pursuance of instructions from the President, further reservation of the Ordinance for the assent of the President under Art. 254 (2), would not be required.<sup>23</sup>

15. *Vide Emperor v. Banoorlal*, (1945) C.W.N. (P.C.), CL *Juan Prosonna v Province of West Bengal*, (1948) 53 C.W.N. 27 (71) (F.B.).

16. *United Province v Aliqua*, (1942) F.C.R. 110.

17. *State of Orissa v. Bhupendra*, A. 1962 SC 945.

18. *Jogendra v Superintendent*, A. 1933 Cal. 280.

19. *Haren v State of W. B.*, A. 1952 Cal. 907.

20. *Bhupendra v. State of Orissa*, A. 1960 Orissa 46 (54).

21. *Ch. Krishnan v. R. T.*, A. 1956 Andhra 129 (137).

22. *Achiah v. State of Mysore*, A. 1962 Mys. 215 (231).

23. *Laxmibai v. State of M. P.*, A. 1951 Nag. 94.

## CHAPTER V.—THE HIGH COURTS IN THE STATES.

High Courts (or States.

214. . . . . There shall be a High Court for each State . . . .

215. Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

**Comments.**— See under Art. 129, *ante*. A High Court's power to commit for contempt is now based upon the present article and it is not necessary to refer either to the Letters Patent or the Rules of the Court to determine the ambit of this power.<sup>1</sup>

**'High Court'.**

A Judge of the High Court appointed to an Industrial Tribunal is not a Judge of the 'High Court' and is not entitled to exercise the power to punish for contempt under Art. 215.<sup>2</sup>

**'Court of record'.**

The following are the incidents of a court of record—

(i) It has the power to determine questions about its own jurisdiction.<sup>3,4</sup>

(ii) It has inherent power to punish for its contempt summarily.<sup>5</sup>

**Procedure to be followed.**

The High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it is fair and gives a reasonable opportunity to the contemner to defend himself. Nothing in the Criminal Procedure is applicable to such proceeding.<sup>6</sup> It has also all powers necessary for the proper exercise of that power.<sup>6</sup>

**Territorial limitation.**

As a court of record, a High Court can punish a person for contempt committed outside its territorial jurisdiction by a person if such person happens to be within its jurisdiction. But there is no power in the High Court itself to arrest for contempt a person who is outside its jurisdiction.<sup>7</sup>

**Limitation as to quantum of punishment.**

Though the power of the High Court to punish for contempt of itself as a court of record under Art. 215 is not controlled by anything in the Constitution itself, the second Proviso to s. 4 of the Contempt of Courts Act lays down that even in the case of contempt of itself, the High Court cannot, "notwithstanding anything elsewhere contained in any law for the time being in force", award a punishment exceeding the maxima specified in that section, i.e., "simple imprisonment for . . . six months or . . . fine which may extend to two thousand rupees, or with both". Without examining whether this statutory provision can control the writ jurisdiction under

24-25. Cls. (2) and (3) have been omitted by the Consitution (Seventh Amendment) Act, 1956.

1. *State of Bombay v. Mr. P.*, (1958) S.C.R. 182.

2. *Hayles, in the matter of*, A. 1955 Mad. 1 (F.B.).

3. *Narash v. State of Maharashtra*, A. 1967 S.C. 1 (17-18).

4. *Sp. Ref. 1 of 1964*, (1965) 1 S.C.R. 413 (499).

5. *Sukhdave v. Chief Justice*, (1961) S.C.R. 454 (463).

6. *Petersen v. Forbes*, A. 1963 S.C. 692 (697).

7. *Estimote in re*, (1943) Bom.L.R. 94.

Art. 226 and the power to punish for contempt for violation of a writ, under Art. 215, the statutory provision has been held to be applicable in the case of contempt for disobedience to a writ of *habeas corpus*.<sup>8</sup>

**216. Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.**

**Amendment.**—The Constitution (Seventh Amendment) Act, 1956, has omitted the Proviso, which was as follows:

"Provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may, from time to time by order, fix in relation to that Court."

**Object of Amendment.**—The reason for the omission of the Proviso is that it was of little significance from the practical point of view, since the Order fixing the maximum may be changed by the President whenever necessary".<sup>9</sup>

**217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and<sup>a</sup> shall hold office, in the case of an additional or acting Judge, as provided in article 221, and in any other case, until he attains the age of sixty-two<sup>11</sup> years.**

**Provided that—**

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
- (c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

- (a) has for at least ten years held a judicial office in the territory of India; or
- (b) has for at least ten years been an advocate of a High Court . . . or of two or more such Courts in succession.

**Explanation.**—For the purposes of this clause—

- (a) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate;

8. *Ikram v. State of U. P.*, A. 1964 S.C. 1625 (1630).  
 9. Statement of Objects and Reasons.  
 10. Substituted for the words "shall hold office . . . sixty years" by the Constitution (Seventh Amendment) Act, 1956.  
 11. The words 'sixty-two' have been substituted for the word 'sixty' by the Constitution (Fifteenth Amendment) Act, 1963, with effect from 6-10-63.

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

<sup>12</sup>(3) If any question arises as to the age of a judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final

## \* CL (2):

### Sub-cl. (a): 'Has held'.

These words make it clear that a person who has at any time held a judicial office may be appointed a Judge of the High Court even though he does not hold a judicial office at the time of the appointment.<sup>13,14</sup>

### 'Judicial Office'.

From the observations of the Supreme Court in *Statesman v. H. R. Deb*,<sup>14a</sup> it would appear that the expression 'judicial office' would refer to the posts referred to in Art. 236(b), so that an executive officer, having magisterial experience, would not be entitled to be a Judge of the High Court, but that this connotation of this expression would be confined to Ch. V of Part VI of the Constitution and cannot be of any help in interpreting the same expression in ordinary statutes. Hence, such executive officer may legitimately be appointed as a member of an Industrial Tribunal under s. 7(3) of the Industrial Disputes Act, 1947.<sup>14a</sup>

### CL (3): Determination of question as to Judge's age.

1. This provision vests the jurisdiction to determine the question about the Judge's age exclusively in the President, and so, it follows that in the presence of this provision, no court can claim jurisdiction to deal with the said question. It is true that before this provision was inserted in the Constitution, the question about the age of a sitting Judge of a High Court could have been brought before the High Court in a proceeding by way of a writ of *Quo Warranto* under Art. 226. But now there can be no doubt that the question about the age of a judge of a High Court has to be determined only in one way, and that is the way prescribed by Art. 217 (3).<sup>15</sup> In other words, art. 217 (3) has impliedly taken away the writ jurisdiction under Art. 32 or 226 to question the age of a High Court Judge. This view has been applied by the Supreme Court in dismissing in limine two Petitions brought to question the validity of the title of Ekbote J. of the Andhra Pradesh High Court on the allegation that he had been continuing in office beyond the age-limit prescribed by the Constitution.<sup>16</sup>

2. The provision requires that before the President reaches his deci-

12. Cl. (3) was inserted, with retrospective effect *ab initio*, by the Constitution (Fifteenth Amendment) Act, 1963.

13. *Cf. Mubarak v. Banerji*, A. 1958 All 323 (324).

14. The correctness of this view has not been questioned by the Supreme Court in *Ramashwari v. State of Punjab*, A. 1961 S.C. 816 (822).

14a. *Statesman v. H. R. Deb*, A. 1968 S.C. 1495 (1499).

15. *Jyoti Prakash v. Chief Justice*, A. 1965 S.C. 961 (966).

16. *Statesman*, 29-3-67, p. 13.

sion, he has to consult the Chief Justice of India; consultation with the Chief Justice of India is clearly a mandatory requirement of clause (3).<sup>16</sup>

3. It is also implicit in this provision that before the President reaches his decision on the question, he ought to give the Judge concerned a reasonable opportunity to give his version in support of the age stated by him at the time of his appointment and produce his evidence in that behalf. How this should be done is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself.<sup>17</sup>

4. It is also clear that the decision of the President under Art. 217 (3) is final, and its propriety, correctness, or validity is beyond the reach of the jurisdiction of court.<sup>18</sup>

#### **'A question as to age'**

1. It is only where a genuine dispute arises as to the age of a Judge that Art. 217 (3) would be allowed to be invoked; but that is a matter for the President to consider.<sup>19</sup> The President should, in every case, consult the Chief Justice of India as to whether a complaint received in respect of the age of a sitting Judge of any High Court should be investigated, and it is with such consultation that he should decide whether the complaint should be further investigated and decision reached on the point.<sup>20</sup>

2. If a dispute is raised about the age of a sitting Judge and in support of it, evidence is adduced which *prima facie* throws doubt on the correctness of the date of birth given by a Judge at the time of his appointment, it is desirable that the said dispute should be dealt with by the President.<sup>21</sup>

3. But, as a matter of law, a Judge does not cease to be a Judge merely because a dispute has been raised about his age and the same is being considered by the President.<sup>22</sup>

#### **'Decided'.**

1. The decision under cl. (3) must be that of the President.<sup>23</sup>

2. The Executive could not determine the age of a Judge, whether before or after the insertion of cl. (3), inasmuch as that would impair the independence of the Judiciary.<sup>24</sup>

3. A decision by the Home Minister, even though made after consulting the Chief Justice and approved by the President, does not become a decision of the President under Art. 217 (3).<sup>25</sup>

4. Nor could it be done by arbitration, even though directed by the President.<sup>26</sup>

#### **Conditions for the validity of the power under Art. 217 (3).**

Under Art. 217 (3), the age of a Judge can be determined by the President, provided he complies with the following requirements which follow from the provision, expressly or impliedly<sup>27</sup>—

(i) that, before giving his decision, the President consults the Chief Justice of India, formally.<sup>28</sup>

(ii) that the Judge in question is offered a reasonable opportunity to put before the President his contention, his version and his evidence, in accordance with the requirements of natural justice.<sup>29</sup>

17. *Jyoti Prakash v. Chief Justice*, A. 1965 S.C. 961 (967, para. 24).

18. *Jyoti Prakash v. Chief Justice*, A. 1965 S.C. 961 (paras. 21, 26, 27, 29).

**Effect of adverse determination by President.**

If the decision of the President goes against the date of birth given by a sitting Judge, a serious situation may arise because the cases which the said Judge might have determined in the meanwhile *would have to be reheard*, for the disability imposed by the Constitution when it provides that a Judge cannot act as a Judge after he attains the age of superannuation, will inevitably introduce a constitutional invalidity in the decisions of the said Judge.<sup>19</sup>

**218. The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.**

Application of certain provisions relating to Supreme Court to High Courts

**219. Every person appointed to be a Judge of a High Court . . . . " shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.**

Oath or affirmation by Judges of High Courts

**Art. 219: Taking of oath.**

1 This Article is mandatory in the sense that a person cannot be said to have entered office as a Judge of the High Court until and unless he has subscribed the oath or affirmation as required by this Article<sup>20</sup>

2 When, however, an additional Judge is appointed a permanent Judge it cannot be said that he enters upon his office as 'Judge of the High Court' afresh, so that the omission to take a fresh oath cannot affect the validity of his appointment as a permanent Judge<sup>20 21</sup>

**'Subscribed'.**

This word means that the oath taken orally should be reduced to writing and be signed by the person taking it in token of his adhesion to what is written<sup>20</sup>

**'Before the Governor or some person appointed in that behalf.'**

The Allahabad High Court has held<sup>20</sup> that the Governor should as a rule, be present personally and that if for good reasons he is unable to attend, he should appoint another person in this behalf by a specific order. Hence, a general authorisation that every time a Judge takes oath under Art 219, he shall take it in the presence of the Chief Justice would be contrary to the requirement of Art 219 but that would constitute a mere irregularity and would not affect the jurisdiction of a Judge who has entered office upon an oath taken before the Chief Justice in pursuance of such authorisation<sup>20</sup>

**'According to the form set out . . . .'**

1. The oath to be taken must be in accordance with the form as it exists in the Third Schedule at the time when the Judge is entering upon his office, under Art 219.<sup>21</sup>

19. The words "in a State" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

20. *Shabbir v. State*, A. 1965 All 97 (99).

21. *Hira Singh v. Jai Singh*, A. 1937 All. 588.



2. But where, immediately, before the taking of oath of a particular Judge the form of oath in the Third Schedule had been amended by the Constitution (Sixteenth Amendment), but through inadvertence the Judge was administered oath according to the pre-amendment form; it was held that since the 16th Amendment had not introduced into the oath any obligation which was not already there in the old form, the appointment of the Judge had not become invalid.<sup>22</sup>

**220.** *No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.*

Restriction on practice after being a permanent Judge,

*Explanation—In this article, the expression, "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956.*

**Amendment.**— This Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, with the following object—

"An important factor affecting the selection of High Court Judges from the bar is the total prohibition contained in article 220 on practice after their retirement from the bench. It is proposed to revise the article so as to relax this complete ban and permit a retired judge to practice in the Supreme Court and in any High Court other than the one in which he was a permanent Judge "

**221. (1)** There shall be paid to the Judges of each High Court such salaries as are specified in the Second Schedule.

Salaries, etc., of Judges.

**(2)** Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

**222. (1)** The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court . . . . .

Transfer of a Judge from one High Court to another.

**(2)** When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined, such compensatory allowance as the President may by order fix .

**Amendment.**— The words "within the territory of India" in cl. (1) and cl. (2) were omitted by the Constitution (Seventh Amendment) Act, 1956. Cl. (2) has been re-inserted by the Fifteenth Amendment Act, 1963.

22. *Shabbir v. State*, A. 1965 All. 97 (105)

23. Substituted by the Constitution (Seventh Amendment) Act, 1956.

**223.** When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one or the other Judges of the Court as the President may appoint for the purpose.

**224.** (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work thereon, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty years.

**Amendment.**—This Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, for the following reason—

"The provision in article 224 for recalling retired judges to function on the bench of a High Court for short periods has been found to be neither adequate nor satisfactory. It is, therefore, proposed to replace the article by a provision for the appointment of additional judges to clear off arrears and for the appointment of acting judges in temporary vacancies."

**224A.** Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.]

**225.** Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

24. Substituted by the Constitution (Seventh Amendment) Act, 1956

25. Inserted by the Constitution (Seventh Amendment) Act, 1956.

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

**'Subject to the provisions of any law'.**

The existing jurisdiction of a High Court, say, under the Letters Patent, is subject to appropriate legislation.<sup>1,20</sup>

**Law administered at the commencement of Constitution.**

According to this Article, a decision of the Privy Council<sup>21</sup> or the Federal Court<sup>21</sup> is binding upon the High Courts until the Supreme Court frames rules to the contrary.

**'Jurisdiction'.**

1. The inherent jurisdiction of the High Court is saved by this provision.<sup>21</sup>

2. The pre-Constitution laws relating to jurisdiction, e.g., the Rajasthan High Court Ordinance, 1949, are also saved by this article,<sup>22</sup> subject to appropriate legislation.<sup>22</sup>

**'Power to make rules'.**

1. These words, together with Art. 372 (1), save the Rules made by the High Courts which were in existence at the commencement of the Constitution.<sup>23</sup> They have the force of law unless *ultra vires* the enactments under which they were made,—the Government of India Acts, 1915, and 1935.<sup>24</sup> Hence, where any Act (made prior or subsequent to the Constitution) provides for an appeal to the High Court but does not lay down the procedure to be followed for hearing that appeal, the appeal will be heard in the manner provided by the rules framed under s. 108 of the Government of India Act, 1915, and when the appeal is heard by a single Judge according to such rules, a further appeal will lie to the Division Bench from the decision of the single Judge.<sup>25</sup>

2. A rule making power which existed at the commencement of the Constitution can be exercised after such commencement as well.<sup>1</sup>

3. The Rules made by the High Court would, however, cease to have effect if the appropriate Legislature made any law on the subject.<sup>2,3</sup>

**Arts. 225 and 226.**

The power to issue the writs under Art. 226 is not subject to or controlled by anything in Art. 225.<sup>4</sup>

1-20. *Shivaramappa v. Kapurchand*, A. 1965 Mys. 76 (84).

21. *Sitarama v. State of A. P.*, 1959 S.C. 359; *Hari v. Chief Conservator*, A. 1959 Mad. 406.

22. *Rewachand v. Anandsingh*, A. 1965 Raj. 58.

23. *In re. Ranganayakula*, A. 1966 Andhra 161 (164) F.B.

24. *Venkatapuram v. Satyanarayana*, A. 1967 Andhra 49.

25. *Seethadri v. Prov. of Madras*, A. Mad. 543.

1. *N. S. Thread & Co. v. James Chadwick*, (1953) S.C.R. 1028 (1036); A. 1953 S.C. 387.

2. *Satyanarayana Murthi v. I. T. Appellate Tribunal*, A. 1967 Andhra 123.

3. *U. Shivaramappa v. Kapurchand*, A. 1965 Mys. 76.

4. *Shyam Krishan v. State of Punjab*, A. 1962 Punj. 70; *Venkata v. Dt. Collector*, A. 1969 A.P. 381.

**226. (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.**

<sup>5</sup> (1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories,

**(2) The power conferred on a High Court by clause (1) or clause (1A)<sup>6</sup> shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.**

#### Amendment.

Cl (1A) has been inserted by the Constitution (Fifteenth Amendment) Act, 1963.

#### Object of Amendment.

As a result of the view taken by the Supreme Court in *Election Commission v. Venkata*<sup>7</sup> and subsequent cases,<sup>8</sup> it was location or residence of the respondent which gave territorial jurisdiction to a High Court under Art 226, the situs of the cause of action being immaterial for this purpose. This overruled the view taken in a number of High Court decisions that the situs of the cause of action was an additional factor which gave jurisdiction. The decision of the Supreme Court led to the result that only the High Court of Punjab would have jurisdiction to entertain petitions under Art 226 against the Union of India and those other bodies which were located in Delhi.

The object of cl. (1A) is to restore the view taken by the High Court<sup>9</sup> and to provide that the High Court within which the cause of action arises wholly or in part, would also have jurisdiction to entertain a petition under Art 226 against the Union of India or any other body which were located in Delhi. The Amendment thus supersedes the Supreme Court decisions<sup>10-11</sup> to the contrary.

#### Art. 226, not retrospective.

1. The Article has no retrospective operation and cannot be used to affect transactions past and closed and rights and liabilities vested before the commencement of the Constitution,<sup>10-11</sup> e.g., to interfere with an order of dismissal passed by a competent authority prior to the commencement of

5 Cl. (1A) was inserted by the Constitution (Fifteenth Amendment) Act, 1963, w.e.f. 6-10-63.

6 The italicised words were added by *ibid*.

7 *Election Commission v. Saka Venkata*, (1953) S.C.R. 1145 (1152).

8 *Rashid v. I. T. Commr.*, (1954) S.C.R. 738; *Khasar Singh v. Union of India*, A. 1961 S.C. 532; *Collector of Customs v. E. I. Commercial Co.*, A. 1963 S.C. 1124; (1963) 2 S.C.R. 563

9 *Ranganathan v. Madras Electric Co.*, A. 1952 Mad. 659; *Anwar v. Collector*, A. 1952 Assam 91; *Rashid v. I. T. Commr.*, A. 1951 Punj. 74.

10 *State of U. P. v. Nooh*, A. 1958 S.C. 86 (94); (1958) S.C.R. 595.

11 *Ranjit v. Commr. of I. T.*, A. 1962 S.C. 92; (1962) 1 S.C.R. 966.

the Constitution even though the final order in departmental revision proceedings against the order of dismissal has been passed after the commencement of the Constitution.<sup>10</sup>

2. But the position would be otherwise if the injury is continued from day to day or periodically.<sup>11</sup> In other words, where, though the deprivation of the right was made by a pre-Constitution order, the deprivation is continued from day-to-day, the order becomes void owing to the contravention of a fundamental right as soon as the Constitution came into force,<sup>12</sup> and relief is available under Art. 32 or 226 in respect of all occasions of such contraventions as take place after commencement of the Constitution.<sup>13</sup>

### General Principles relating to Art. 226.

1. Art. 226 empowers the High Court to issue the writs, directions or orders in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant* and *certiorari*—(a) for the enforcement of any of the rights conferred by Part III and (b) for any other purposes. Under the first part, a writ may be issued under the Article only after a decision that the aggrieved party has a *fundamental* right and that it has been infringed. Similarly, under the second part, it may be issued only after a finding that the aggrieved party has a *legal* right which entitles him to any of the aforesaid writs and that such right has been infringed.<sup>14, 15</sup>

2. Where there has been infringement of fundamental rights, an application under Art. 226 should not be thrown out simply on the ground that the proper writ has not been prayed for.<sup>16 17</sup> The petitioner is, in such cases, entitled to a suitable order for the protection of his *fundamental* right,<sup>18</sup> or enforcement of the legal duty of the respondent.<sup>19</sup>

Thus, where the Petitioner has asked for relief in a very wide form, the Court would issue the order in the proper form.<sup>20</sup> A High Court is as much bound as the Supreme Court to enforce the Fundamental Rights guaranteed by the Constitution.<sup>21, 22</sup>

3. Art. 226 confers on all the High Courts very wide powers in the matter of issuing writs which they never possessed before. There are only two limitations placed upon the exercise of these powers by a High Court under this Article: (a) that the power is to be exercised "throughout the territories in relation to which it exercise jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction, (b) that the person or authority to whom the High Court is empowered to issue the writs "must be within those territories", and this implies that they must be amenable to the jurisdiction of the Court either by residence or location within those territories,<sup>23</sup> except where the cause of action arises, in whole or in part, within the territorial jurisdiction of that High Court [cl. (1A)].

4. But though the powers of the High Courts under Art. 226 are discretionary and no limits can be placed upon that discretion, it must be

12. *Promod v. State of Orissa*, A. 1962 S.C. 1288 (1229).

13. *Santusarup v. Union of India*, A. 1956 S.C. 624.

14. *State of Orissa v. Madanagopal*, (1952) S.C.R. 28.

15. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044.

16. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 689; (1950-51) C.C. 10.

17. *State of Mysore v. Chandrasekhar*, A. 1963 S.C. 523 (537).

18. *Himmattal v. State of M. P.*, (1964) S.C.R. 1122; (1952-4) 2 C.C. 242 (244); C 3, Vol. II, p. 62.

19. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (582).

20. This view of the Author now finds support from the observations in *Devilal v. S. T. O.*, A. 1966 S.C. 1150.

21. *Rashid v. Income-Tax Investigation Commn.*, (1954) S.C.R. 738.

exercised along recognised lines and not arbitrarily,<sup>22</sup> and subject to certain self-imposed limitations.<sup>23</sup> Thus,—

(i) In the exercise of this discretionary jurisdiction, the High Courts should not act as courts of appeal or revision to correct mere errors of law<sup>22a</sup> or of fact.<sup>22, 24</sup>

(ii) Resort to the jurisdiction under Art. 226 is not intended as an alternative remedy for relief which may be obtained by suit<sup>25</sup>,<sup>25</sup> or other mode prescribed by statute.<sup>21</sup> Where it is open to the aggrieved person to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided in a statute, the High Court will not, by entertaining a petition under Art. 226, permit the machinery created by the statute to be by-passed.<sup>21, 1</sup>

(iii) The High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed.<sup>26</sup>

5. The law declared by the High Court in a case under Art. 226 would be binding on all inferior courts as well as tribunals within the State.<sup>26a</sup>

### Purposes for which the power under Art. 226 may be exercised.

The power of the High Court to issue the writs under Art. 226 can be exercised for a twofold purpose, viz., the enforcement of (a) fundamental rights, as well as of (b) non fundamental or ordinary legal rights.<sup>2</sup>

The words 'for any other purpose' at the end of Art. 226 make the jurisdiction of the High Court to issue the writs more extensive than that of the Supreme Court inasmuch as these words are absent from Art. 32, and the Supreme Court may have power for 'other purpose' only if such power is conferred by legislation (Art. 139). But Art. 226 itself confers upon the High Court power to issue the writs for the enforcement of Fundamental Rights as well as for 'other purpose'.<sup>2</sup>

'Any other purpose' means a purpose for which any of the writs could, according to well established principles,<sup>3</sup> issue.

The result is that while under the first part, a writ may be issued under the Article only after a decision that the aggrieved party has a *fundamental* right and that it has been infringed, under the second part, it may be issued only after a finding that the aggrieved party has a *legal* right which entitles him to any of the aforesaid writs and that such right has been infringed.<sup>4</sup>

'Any other purpose', in short, means 'the enforcement of any legal right',<sup>5</sup> and the performance of any legal duty'. A legal right, of course, means any *legally enforceable* right, and includes contractual rights,<sup>5</sup> other than merely *personal* rights.

It follows that relief under Art. 226 is not available—

(i) For the enforcement of *political rights*.<sup>6</sup>

22. *Sangram v. Election Tribunal*, (1965) 1 S.C.R. (1955) 1 S.C.R. 1 (8).

22a. *Dwarka v. I. T. O.*, A. 1966 S.C. 81 (85).

23. *Thansingh v. Supdt. of Taxes*, A. 1964 S.C. 1419 (1432).

24. *Veerappa v. Raman*, (1952) S.C.R. 583.

25. *State of M. P. v. Bhailal*, A. 1964 S.C. 1006 (1011).

25a. *E. I. Commercial Co. v. Collector of Customs*, A. 1962 S.C. 1895.

1. *S. T. O. v. Shivratn*, A. 1966 S.C. 142 (145).

2. *State of Orissa v. Madangopal*, (1962) S.C.R. 28 (33).

3. *Election Commn. v. Saka Venkata*, (1963) S.C.R. 1144.

4. *Cy. Samarth Transport Co. v. R. T. A.*, A. 1961 S.C. 93 (95).

5. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1047-8).

6. *Ramamurthi, in re.*, A. 1963 Mad. 94; *Chakraborti, in re.*, A. 1963 Mad. 96.

(ii) For vindicating *mental* or *sentimental* injury.<sup>7</sup>

**Relief under Art. 226 cannot be barred by statute.**

1. Art. 226 not being one of those provisions of the Constitution which may be changed by ordinary legislation, the powers under Art. 226 cannot be taken away or curtailed by any legislation short of amendment of the Constitution.<sup>8</sup>

2. It follows that any law which seeks to take away or restrict<sup>9</sup> the jurisdiction of the High Court under Art. 226 must so far be held to be void<sup>10</sup> and that the High Court shall be entitled to exercise the powers under Art. 226, free from the fetters imposed, directly or indirectly, e.g.,

(a) by making an order or decision of an administrative authority or inferior tribunal 'final', as in s. 105, Representation of the People Act, 1950;<sup>11</sup> or s. 28 of the Administration of Evacuee Property Act, 1950;<sup>12</sup>

(b) by prescribing a notice or other formality to be complied with before bringing a proceeding under Art. 226, as in s. 535 of the Bengal Municipal Act,<sup>13</sup>

(c) by preventing the Court from determining whether the provisions of a statute have been complied with,<sup>14</sup> or

(d) by barring particular relief,<sup>15</sup> or reliefs other than those provided by the Act.<sup>16</sup>

3. Of course, before pronouncing a law to be void on the ground of inconsistency with Art. 226, an attempt should be made to give the statute a construction, if possible, as will not affect the constitutional jurisdiction of the Supreme Court or High Court according to 'the well-known principle of construction that if a provision in a statute is *capable of two interpretations* then that interpretation should be adopted which will make the provision valid rather than the one which will make it invalid.'<sup>17</sup>

4. But there is no abridgement of the relief conferred by Art. 226 if, as an *incidental* result of some legislation which the Legislature is otherwise competent to make, the area over which the jurisdiction under Art. 226 could otherwise be exercised is curtailed.<sup>18</sup>

**Powers not limited to Prerogative Writs.**

1. The powers of the High Court under Art. 226, like those of the Supreme Court under Art. 32 (see p. 223, *ante*), are not confined to the 'prerogative writs' and the High Court, in issuing directions, orders and writs under Art. 226 can travel beyond the contents of the writs which are normally issued as writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*.<sup>19, 20</sup>

2. Art. 226 speaks not of the English writs but of writs 'in the nature of those writs'; consequently, there is no reason why the High Courts in India should feel oppressed by the procedural technicalities of the English writs.<sup>21</sup> Thus, the Court "can make an order or issue a writ in the nature

7. *D. G. Vidyala Assocn. v. State of U. P.*, A. 1962 All. 187 (191).

8. *Kerala Education Bill*, in *re*, A. 1958 S.C. 956, (1959) S.C.R. 996 (107-3); *Prem Sagar v. Standard Oil Co.*, (1964) 5 S.C.R. 1030 (1038).

9. *Rajkrishna v. Binod*, (1954) S.C.R. 913; A. 1954 S.C. 202; *Durgashanker v. Raghuraj*, (1955) 1 S.C.R. 267; *Sangram Singh v. Election Tribunal*, (1955) 2 S.C.R. 1 (1).

10. *Custodian v. Jafraz Begum*, A. 1968 S.C. 109.

11. *Mehar Singh v. Municipality of Bally*, A. 1954 Cal. 131.

12. *Lalvati v. State of Bombay*, A. 1957 S.C. 521 (528); (1957) S.C.R. 721.

13. *Bharat Kala Bhandar v. Dharmangan Municipality*, A. 1966 S.C. 249 (262).

14. *Sujan Singh v. State of Rajasthan*, A. 1965 S.C. 845 (853).

15. *Yani v. State of Madras*, A. 1951 S.C. 1731 (1738).

16. *Basappa v. Nagappa*, (1952-4) 2 C.C. 475 (477); A. 1954 S.C. 440.

of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law".<sup>16</sup>

3. The Court can also mould the reliefs to meet the peculiar and complicated requirements of this country.<sup>17</sup> Any technical construction of this power would defeat the purpose of the Article itself.<sup>17</sup>

4. For the same reason--

(a) Under Art. 226, the High Court has the power to set aside an *ultra vires* executive order, whether or not the writ of *certiorari* is attracted to it.<sup>18</sup> The same principle has been applied to prohibition.<sup>18</sup>

(b) The Court, under Art. 226, has also the power to give consequential relief, such as ordering repayment of money realised without the authority of law or under an invalid law.<sup>19</sup>

(c) In proper cases, declaratory relief may be granted in a petition under Art. 226, e.g., declaring some act of a statutory body to be *ultra vires* and the like,<sup>20</sup> even though such relief was not available in proceeding for a prerogative writ under English law

### Grounds upon which only an application should not be refused.

1. Though it is desirable that the prayers in an application under Art. 226 should be as specific and definite as they can be, the Court is not powerless to afford necessary relief in proper cases. Merely because in the cause title Art. 226 has not been specifically mentioned and the proper writ or direction has not been prayed for,<sup>21 22</sup> an application which is in substance one under Art. 226 cannot be thrown out.<sup>23</sup> The Court should mould the remedy according to the circumstances of the case. Thus, *certiorari* may be issued where only prohibition was sought for.<sup>24</sup>

2. It is open to the applicant to ask for some specific reliefs and 'such other relief as the Court may deem fit and proper'.<sup>25</sup> Under such residuary prayer, the Court may grant applicant the proper relief which he should get in view of changed circumstances, even though that relief may be altogether different from the specific reliefs asked for.<sup>1</sup>

### General Grounds for refusing relief under Art. 226.

(i) The exercise of the powers for 'other purposes' (i.e., purposes other than the enforcement of fundamental rights)<sup>2</sup> is discretionary.<sup>1, 3</sup>

Hence, in such cases, the application may be refused by the Court upon a consideration of certain circumstances as disentitling the applicant to relief even though he may have a legal right which has been infringed, e.g.—

(a) That there is an alternative remedy.<sup>1, 3</sup>

17. *Dwarka v. I. T. O.* A. 1966 S.C. 81 (85).

18. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380).

19. *State of M. P. v. Bhailal*, A. 1964 S.C. 1006 (1010-11).

20. *B. B. L. & T. Merchants' Assn. v. State of Bombay*, A. 1962 S.C. 486 (496); *Abdul Kadir v. State of Kerala*, A. 1962 S.C. 922 (926); *Tewari v. Dt. Board*, A. 1964 S.C. 1680 (1863); *Menon v. Union of India*, A. 1963 S.C. 1160.

21. *Dwarka v. I. T. O.*, A. 1966 S.C. 81.

22. *Himmattal v. State of M. P.*, (1964) S.C.R. 1122 (1128).

23. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 969 (900-1).

24. *Srinivas v. S. D. O.*, A. 1952 All. 590 (602).

25. *Satya Narain v. Dt. Engineer*, A. 1962 S.C. 1161.

1. *Rashid v. Income-Tax Investigation Commn.*, (1954) S.C.R. 738; A. 1954 S.C. 207.

2. *Amalgamated Coalfields v. Janapada Sabha*, A. 1961 S.C. 964 (965).

3. *Vehsuwami v. Raja*, (1960) Supp. (1) S.C.R. 623 (638); A. 1959 S.C. 422.



(b) That the conduct of the applicant is such that he does not deserve the discretionary remedy, e.g., that he is guilty of laches (or unreasonable delay<sup>4</sup>) or acquiescence.<sup>5</sup>

(c) That the applicant has mis-represented or suppressed material facts in his affidavit<sup>6</sup> (see *post*).

(d) That disputed facts have to be investigated in order to give relief to the Petitioner (see *below*).

(e) That the petition is premature.<sup>8</sup>

(f) That the writ would be futile<sup>9</sup> or ineffective,<sup>10</sup> or of a mere academic interest.<sup>11</sup> But not if the impugned order or notification subsists by virtue of legislation,<sup>11a</sup> or, where renewal of a yearly licence is almost automatic.<sup>11b</sup>

(g) That the Petitioner had applied in revision before the High Court under Art 115, C. P Code and failed.<sup>12</sup>

(h) Where during pendency of the proceeding under Art. 226, the authority against whose order the Petitioner brought the application, offers to the Petitioner all the relief which the Court could have given to the Petitioner, the Court may dismiss the application without costs with a note that no other order on the application is called for in view of the action of the authority subsequent to the filing of the application.<sup>13</sup>

(i) Where the order of the Court cannot be carried out without prejudicing the rights of others.<sup>14</sup>

### **Whether disputed facts can be investigated in a proceeding under Art. 226.**

#### *(A) Where Fundamental rights are not affected*

One of the grounds against the exercise of the discretion, in such cases, would be that the right claimed by the Petitioner is not capable of being established in the summary proceeding under Art 226 because it requires a detailed examination of the evidence as may be had in a suit.<sup>15</sup> The object of Art 226 is the enforcement and not the establishment of a right.<sup>16</sup> A petition under Art. 226 cannot be converted into a suit.

4. *Union of India v. Verma*, A 1957 SC 882 (884) (1958) S.C.R. 499.

5. *Pannalal v. Union of India* A. 1957 SC 497 (412) (1957) S.C.R. 233.

6. *S H Motor Transport v. Motilal*, (1964) 11 L.I.J. 595 (Bom.).

7. *Cf. Indian Sugar Refineries v. Union of India*, (1968) S.C. [W.P. 183/66, d. 12-3-68].

8. *Surat v. Sudama*, A. 1965 All. 536 (542).

9. *Rashikari v. State of Orissa*, A. 1969 S.C. 1081 (1088).

10. *Guruswami v. State of Mysore* A 1954 SC 592; *Nand Kishore v. State of Rajasthan*, A. 1965 S.C. 1992 (1994).

11. *State of Madras v. Periaswami*, (1961) S.C. [C.A. 444/60, d. 6-11-61] [But even in such cases, though the Petitioner cannot get any relief, the Supreme Court has given its decision on the questions of law involved where the State has expressed its anxiety to have a decision of the Court as to the correct legal position (cf. *State of Gujarat v. Mehbubkhan*, (1968) S.C. (Cr.A. 167/65, d. 11-4-68)].

11a. *Subramania v. State of Madras*, (1965) S.C. [C.A. 560/65, d. 10-2-65].

11b. *Ghaio Mal v. State of Delhi*, A. 1959 S.C. 65.

12. *Shankar v. Kishanji*, (1969) S.C. [C.A. 670/68, d. 16-4-69].

13. *Lokanath v. Vice-Chancellor*, A. 1962 Orissa 198.

14. *Ramanlal v. Iron & Steel Controller* (1964) S.C. [W.P. 89/63, d. 24-7-64].

15. *Union of India v. Ghaus*, A. 1961 S.C. 1986; *Bohara v. State of Bihar*, A. 1963 S.C. 516; *Mojji v. Sakti*, A. 1969 S.C. 942.

16. *Sohan Lal v. Union of India*, A. 1957 S.C. 829 (831).

In general, therefore, a disputed question of fact is not investigated in a proceeding under Art. 226,<sup>17</sup> e.g.—

(a) the merits of rival claims to property;<sup>18,19</sup>

(b) whether a person is a 'foreigner' within the meaning of the Foreigners Act, 1946;<sup>15</sup>

(c) whether a Government Servant has been given an opportunity to show cause as required by Art. 311 (2),<sup>17</sup> except where a substantial question of interpretation of that Article is involved;<sup>17</sup>

(d) claims arising out of breach of contract or tort.<sup>18</sup>

(e) whether the Petitioner was a casual labourer or not.<sup>20</sup>

(B) *Where a Fundamental Right has been infringed*

As has been stated earlier under Art. 32, the Supreme Court has held<sup>20</sup> that where the breach of a fundamental right has been *prima facie* established, the Court would not be justified to reject the petition on the simple ground that it involves a determination of disputed questions of fact, because it is the duty of the Supreme Court to enforce fundamental rights.

There is no reason why the above principle should not be applicable to a petition under Art. 226, where it has been brought for the enforcement of a fundamental right for the duty of the High Court to protect the fundamental rights cannot, in any way, be less than that of the Supreme Court.

### Delay, as barring relief.

1. Though there is no specific period of limitation, the High Court may refuse to exercise this extraordinary power where the Petitioner is guilty of laches or undue delay, for which there is no satisfactory explanation.<sup>21,22</sup>

Where—

2. There is a consensus of opinion that the pursuit of an *extra-legal* remedy, such as a departmental representation or correspondence<sup>23</sup> in the nature of an appeal for mercy, is no ground for condoning delay.<sup>24</sup> But where a departmental remedy such as appeal is provided by *statute*, an application under Art. 226 would not be entertained unless and until the applicant exhausts the statutory remedy. In such a case, the departmental remedy should be considered as a legal remedy.<sup>25,1</sup>

3. Delay, however, is not an absolute bar—

(a) Where the delay is explained,<sup>2</sup> e.g., where the applicant is a social organisation like a club which does not ordinarily seek litigation, and thus did not promptly object to an illegal tax,<sup>3</sup> or where the petitioner

17. *Union of India v. Varma*, A. 1957 S.C. 882.

18. *Burmah Construction Co v State of Orissa*, A. 1962 S.C. 1320 (1321).

19. *Dabur v. Workmen*, A. 1968 S.C. 17 (19).

20. *Kochuni v State of Madras*, A. 1959 S.C. 725, 1959 Supp. (2) S.C.R. 316.

21. *Khub Chand v. State of Rajasthan*, A. 1967 S.C. 1074 (1078).

22. *Chandra Bhushan v. Dy. Director*, (1967) 2 S.C.R. 286 (287-8).

23. *Rajalakshmalah v. State of Mysore*, A. 1967 S.C. 993 (997).

24. *Gandhinagar M. T. Society v. State of Bombay*, A. 1954 Bom. 202; *Sikri Bros. v. State of Punjab*, A. 1957 Punj. 220; *Devre v. Home Minister*, A. 1967 Hyd. 14.

25. *S. T. & E. Co. v. State of Punjab*, A. 1954 Punj. 264.

1. *Phoolchand v. Nagpur University*, A. 1957 Bom. 215.

2. *State of Rajasthan v. Karamchand*, A. 1965 S.C. 913 (916).

3. *Cosmopolitan Club v. D. C. Tax Officer*, A. 1952 Mad. 814.

was pursuing a legal remedy,<sup>4</sup> or where he had promptly protested to the proper authorities and the latter did not reply.<sup>5</sup>

(b) Where a fundamental right has been infringed.<sup>6</sup>

(c) In a petition for prohibition, where lack of jurisdiction is *patent*.<sup>7</sup>

4. In a petition for *certiorari*, where the order complained of is manifestly erroneous or without jurisdiction, the Court would be loath to reject the petition simply on the ground of delay.<sup>8</sup> Unless owing to laches inconsistent legal or equitable considerations have arisen which cannot be ignored, e.g., where the other party has been induced to alter his situation,<sup>9,12</sup> the Court cannot be precluded from rectifying a grave injustice simply because the Petitioner did not move in the matter earlier.<sup>9-12</sup>

5. A Court of appeal would not entertain an objection on the ground of delay unless it was raised in the proceeding under Art 226,<sup>13</sup> so as to afford an opportunity to the applicant to show that there were sufficient reasons why he could not come earlier.<sup>13</sup>

6. As regards the lapse of time that would be considered as constituting delay, the proper view seems to be that no hard and fast rule can be laid down in the matter and each case should be decided according to its circumstances,<sup>14-14a</sup> without adhering to any fixed period, long or short. In other words, there may be inexcusable delay even where the application is filed within 45 days of the order complained of.<sup>14</sup> On the other hand the Court may interfere in appropriate cases even where the application is filed beyond the period prescribed for revision or appeal.<sup>15</sup>

But the Court may take cognisance of the period of limitation where, if the Petitioner had brought a suit for the same relief, it would have been barred by limitation.<sup>16,17</sup>

7. Where the High Court, after considering the relevant facts, comes to the conclusion that the delay made by a party in a given case is not fatal, the Supreme Court in appeal would be reluctant to interfere with that decision.<sup>18</sup>

### Acquiescence.

I Relief under Art 32 or 226 has also been refused on the ground of *acquiescence*

(i) In general, a person who submits to the jurisdiction of an inferior tribunal and takes part in the proceedings without objection on the ground that the tribunal has no jurisdiction, cannot, after having failed in these proceedings, turn round and question the jurisdiction of that tribunal, in a petition under Art 226.<sup>19,20</sup> Thus,

4. *Gandhinagar M T S v State of Bombay*, A. 1954 Bom 203

5. *General Manager v Yakub*, A. 1959 Mad 88

6. *Suleman v Naranarayan*, A. 1955 Assam 163 (170); *Gajraj v State of M. P.*, A. 1960 MP 299; *Suleman v Custodian*, A. 1954 MB 173

7. *Shrivast v S D O*, A. 1962 All 590 (603)

8. *Damodar v Naranarayan*, A. 1955 Assam 163 (170).

9-12. *Moon Mills v. Meher*, A. 1967 S.C. 1450

13. *Nanda v. Board of Trustees*, A. 1957 Cal 578 (581).

14. *Narayani v State of Bihar*, (1964) S.C. [C.A. 140/64, d. 22-9-64].

14a. *Kalipada v S. D. O.*, A. 1969 Cal. 164 (166).

15. *Chandya Bhushan v. Dy. Director*, (1967) 2 S.C.R. 286 (287-8); *Union of India v. Khas Karampura Colliery*, A. 1969 S.C. 125 (6 months).

16. *State of M. P. v Bhailal*, (1964) 6 S.C.R. 261 (271-2); cf. *State of Kerala v. Aluminium Industries*, (1966) 16 S.T.C. 689 (S.C.).

17. *Tilok Chand v. Munshi*, (1969) 1 SCC 110.

18. *Tripathi v. Rammanorath*, (1964) S.C. [C.A. 255/62, d. 8-9-64].

19. *Pannalet v. Union of India*, A. 1957 S.C. 397; (1957) S.C.R. 233.

20. *M. S. R. T. C. v. B. R. M. Service*, A. 1969 S.C. 329 (337).

Where the Petitioners' income-tax cases were transferred from one Income-tax officer to another and they acquiesced in the jurisdiction of the officer before whom they were transferred until assessments were made by him and thereafter challenged the validity of the law under which the transfer was made, in the light of a decision of the Supreme Court on the constitutionality of an analogous provision, the Petition under Art. 32 was refused on the ground that the acquiescence of the Petitioners disentitled them to relief.<sup>23</sup>

(ii) As regards the constitutionality of statutes even, the view has been taken that though an unconstitutional statute cannot be validated by estoppel or acquiescence, a person who has received a benefit under a statute is not entitled to challenge its constitutional validity.<sup>24</sup>

(iii) As to the effect of acquiescence in proceedings of Prohibition or *Certiorari* on the ground of want of jurisdiction, see under those writs, *post*

II. The principle underlying the doctrine of acquiescence is that the omission on the part of the Petitioner to assert his right, has caused prejudice to the adverse party.<sup>25a</sup>

III. In another group of cases it has been held that where a fundamental right has been infringed, acquiescence, by itself, may not be a ground for refusing relief, e.g., for challenging an unconstitutional tax which infringes Article 19 (1) (g),<sup>26</sup> or a law which infringes Art. 30 (1).<sup>27</sup>

The principle is: 'There can be no loss of fundamental rights merely on the ground of non exercise of it'.<sup>2</sup>

### Suppression and misstatement of facts.

1. An application under Art. 22b would be refused<sup>3</sup> without a hearing on the merits or a rule *not* discharged, if it appears that the applicant has made a *deliberate* concealment or misstatement of *material* facts, with a view to mislead the Court.<sup>24</sup>

2. Before coming to this conclusion, however, a careful examination will be made of the facts as they are and as they have been made in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has been set in motion by means of a misleading affidavit.<sup>25</sup>

3. Where there is no concealment of facts, but a mere wrong interpretation of some document, the application, cannot be refused on that ground alone.<sup>1</sup>

(A) 1. The remedy under Art. 22b being, in general, *discretionary*,<sup>2</sup> the High Court may refuse to grant it where there exists an alternative

21. *Nalin Sekh v State of U. P.* (1953) S.C.R. 1184

21a. *M. S. R. T. C. v. B. R. M. Service*, A. 1959 SC 329 (335).

22. *Amalgamated Coalfields v. Janpada Sabha*, A. 1961 SC 964 (965).

23. *Kerala Education Bill*, in *re*, A. 1958 S.C. 956 (981).

24. *Ziker v. Madhya Pradesh*, A. 1961 ag. 16; *Ibrahim v. High Comm.*, A. 1951 Nag. 38 (43); *Rekhi v. I. T. Officer*, A. 1951 Simla 1, *Asiatic Engineering v. Achhu Ram*, A. 1961 All 746 F.B.; *Ratan v. Adhar*, (1951) 55 C.W.N. 303 (304).

25. *Marappa v. C. R. T. Board*, (1956) 1 M.L.J. 324.

1. *Agarwal v. R. T. A.*, (1952) 7 D.L.R. 41 (45).

2. *Union of India v. Verma*, A. 1957 S.C. 882 (884); *Veluswami v. Raja*, A. 1959 S.C. 422 (429); (1959) S.C.R. 623.

remedy,<sup>3,4</sup> equally efficient and adequate,<sup>5,6</sup> unless there are good grounds therefor.<sup>6</sup>

2. Whether the alternative remedy is equally efficacious or adequate is a question of fact to be decided in each case, the onus being on the applicant to show that it is not adequate.<sup>6</sup>

3. Where the Petitioner may get *adequate* relief by an ordinary action at law, i.e., a civil<sup>7,8</sup> or a criminal proceeding, relief under Art. 226 may be refused. Thus,

(a) An application under Art. 226 will not be entertained for the purpose of enforcement of a contract<sup>10</sup> or for a declaration that it is void;<sup>11</sup> or for relief for torts<sup>12</sup> or infringement of a copyright,<sup>13</sup> or for refund or repayment of money realised by Government, where there are defences on which a suit brought for the same purpose could be defeated;<sup>8</sup> or where refund is the *sole* relief claimed in the petition under Art. 226, alleging that the invalidity of the assessment has been held in another proceeding;<sup>8</sup> or for a relief amounting to a declaration of the Petitioner's title.<sup>14</sup>

(b) A writ under Art. 226 has, accordingly, been refused where the Petitioner could get adequate remedy—

(i) under ss. 386-7;<sup>15</sup> or s. 439<sup>16</sup> of the Cr. P. C.; or

(ii) under s. 14 of the Arbitration Act.<sup>16</sup>

4. Where there is an adequate statutory remedy, e.g. —

(i) By raising a dispute under the Industrial Disputes Act.<sup>17</sup>

(ii) By appeal under the Income-tax Act;<sup>18</sup> particularly, when the questions urged in the Petition could be decided by the appellate authority and yet the Petitioner gives no explanation for not resorting to that remedy.<sup>19</sup>

5. Where the Petitioner *has already instituted* a suit<sup>20</sup> or other proceeding under the ordinary law,<sup>21</sup> no application under Art. 226 will ordinarily be entertained on the same questions, at least so long as those proceedings are not disposed of.

But even in such cases, the Court has jurisdiction to grant relief under Art. 226 in proper cases, e.g., where the tax imposed is without the authority of law.<sup>22</sup>

3. *Abraham v. I. T. O.*, A. 1961 S.C. 609.
4. *Veluswami v. Raja*, A. 1959 S.C. 423.
5. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 (572).
6. *Rashid v. I. T. I. Commission*, A. 1954 S.C. 207 (210); (1954) S.C.R. 738.
7. *Sohan Lal v. Union of India*, A. 1957 S.C. 529; (1957) S.C.R. 738.
8. *State of M. P. v. Bhalal*, A. 1964 S.C. 1006 (1011); *Union of India v. Verma*, (1958) S.C.R. 499 (507).
9. *Suganmal v. State of M. P.*, A. 1965 S.C. 1740 (1742); *Thansingh v. Supdt. of Taxes*, A. 1964 S.C. 1419 (1423).
10. *Burmah Construction Co. v. State of Orissa*, A. 1962 S.C. 1320 (1323). [But the Court may interfere where an order of the Government, based on a contract, violates a constitutional provision (*Hanif v. State of Assam*, (1969) 2 S.C.C. 782 (785-6))].
11. *B. B. Light Ry. v. State of Bihar*, A. 1951 Pat. 231; *Indian Tobacco Corp. v. State of Madras*, A. 1964 Mad. 549.
12. *Sohan Lal v. Union of India*, A. 1957 S.C. 529.
13. *K. Publishing House v. Govt. of T. C.*, A. 1952 T.C. 38.
14. *Ram Singh v. State*, A. 1952 Pepsu 136.
15. *Ganapathi v. Narayanaswami*, A. 1957 Mad. 405.
16. *Govind v. State*, A. 1957 All. 737.
17. *Basant v. Eagle Rolling Mills*, A. 1964 S.C. 1280 (1263); (1964) II L.L.J. 105.
18. *Abraham v. I. T. O.*, A. 1961 S.C. 609.
19. *Gita Devi v. C. I. T.*, (1969) S.C. [C.A. 1619/66, d. 31-7-69].
20. *Ajit v. Sardamangala*, A. 1964 Pat. 476.
21. *Rashid v. I. T. I. Comm.*, A. 1954 S.C. 207; (1954) S.C.R. 738.
22. *Khurai Municipality v. Kamal Kumar*, A. 1966 S.C. 1321 (1324).

6. Where an alternative remedy was available, the Petitioner cannot allow that to be time-barred and then apply under Art. 226 and urge that he has no other remedy,<sup>23</sup> unless there are exceptional circumstances to explain how the alternative remedy became time-barred.<sup>24</sup>

(B) 1. But the existence of an alternative remedy is not absolute bar to the relief under Art. 226. It is a circumstance which the Court has to take into consideration, in exercising its discretionary power under Art. 226.<sup>25-1</sup> It does not take away the jurisdiction of the Court to grant relief under Art. 226.<sup>2</sup>

2. It follows that if any High Court makes a rule to the effect that "no application under this Chapter shall be maintainable if adequate relief is obtainable by the applicant by any other process of law," such rule must be struck down as *ultra vires*, because it seeks to take away the power conferred by Art. 226.<sup>4</sup>

3. The existence of an adequate alternative remedy, whether statutory<sup>4</sup> (e.g., an administrative appeal<sup>4a</sup> or revision<sup>4b</sup>) or otherwise,<sup>5</sup> is no bar to relief under Art. 226—

(a) Where a fundamental right has been infringed,<sup>4, 5</sup> e.g.,—

Where a sales-tax has been imposed under a law which contravenes Art. 286;<sup>5</sup> or the imposition is *ultra vires* being covered by the exemptions granted by the law itself, because the illegal taxation imposed on sales violates Art. 19 (1) (g).<sup>6</sup>

(b) Where some mandatory provision of the Constitution has been violated, such as Art. 265,<sup>7a</sup> 311<sup>8</sup> or 320.<sup>9</sup>

(c) Where the Act which provides the alternative remedy is itself unconstitutional or *ultra vires*.<sup>10</sup>

(d) Where the statutory rule under which the order has been made is itself *ultra vires* the statute under which the order has been made.<sup>10</sup>

(e) Where the authority against whom complaint is made has violated the rules of natural justice.<sup>6, 11</sup>

(f) Where there is some defect going to the jurisdiction of the

23. *Viswamitra Press v. Authority*, A. 1955 All. 702; *Pramode v. A. D. M.*, A. 1957 Cal. 164.

24. *B. T. Depot v. Commr. of Commercial Tax*, A. 1958 Cal. 246.

25. *Addl. Collector of Customs v. Shantilal*, A. 1966 S.C. 197 (202).

1. *Baburam v. Zilla Parishad*, A. 1969 S.C. 556 (558).

2. *Union of India v. Verma*, (1958) S.C.R. 499 (503-4); *Velusami v. Raja*, A. 1959 S.C. 422 (429); *Venkateswararam v. Ramchand*, A. 1961 S.C. 1506 (1509); *Kharai Municipality v. Kamal Kumar*, A. 1965 S.C. 1421 (1324).

3. *Gyan Chand v. R. C. & E. Officer*, A. 1966 All. 57 (62) F.B.

4. *B. I. Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (620, 627); *Himmattil v. State of M. P.*, (1954) S.C.R. 1122 (1126).

4a. *Zila Parishad v. K. S. Mills*, A. 1968 S.C. 98 (100).

4b. *Collector of Customs v. Bava*, A. 1968 S.C. 13 (15).

5. *State of Bombay v. United Motors*, (1953) S.C.R. 1069.

6. *State of Rajasthan v. Karamchand*, A. 1965 S.C. 913 (916).

7. *Kailash Nath v. State of U. P.*, A. 1957 S.C. 790.

7a. *Kharai Municipality v. Kamal Kumar*, A. 1965 S.C. 1321 (1324).

8. *Bedi v. Govt. of Punjab*, A. 1953 Pepsu 196; *Ramchandra v. State of Bhopal*, A. 1954 Bhopal 25; *Krishna v. General Manager*, A. 1951 Punj. 245; *Chowdhury v. Union of India*, A. 1956 Cal. 662 (688).

9. *Chelaram v. State of Rajasthan*, A. 1954 Raj. 12.

10. *B. I. Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (620, 672).

11. *Venkateswararam v. Ramchand*, A. 1961 S.C. 1506 (1509).

authority to make the impugned order,<sup>12</sup> or the authority imposes an *ultra vires* condition.<sup>13</sup>

(g) Where the restoration of property should be made in order to rectify the Court's own mistake, namely, that where, in a contempt proceedings, the High Court attached property not liable to be legally attached and made it over to the Government who had no title to retain it, an application under Art. 226 cannot be defeated on the ground that the remedy was available by suit.<sup>14</sup>

(h) Where the alternative remedy is ineffective or entails such delay that the applicant would be irreparably prejudiced,<sup>15</sup> or subjected to lengthy proceedings and unnecessary harassment,<sup>1</sup> or the remedy might prove valueless.<sup>16</sup>

(i) Where a large number of persons are involved and the question is of general importance, and relegating the parties to a suit would cause hardship<sup>17</sup> or serious delay,<sup>20</sup> e.g., where the validity of a tax or other imposition is in question.<sup>18</sup>

(j) If the law which provides the alternative remedy is *ultra vires* for contravention of a mandatory provision of the Constitution,<sup>22</sup> e.g., Art. 286,<sup>21</sup> or, for want of legislative competence, it cannot be said that there is an alternative remedy and, therefore, the plea cannot be entertained.

4 The possibility of having the following remedies have not been considered as 'alternative remedies' for refusing relief under Art. 226, on the ground that these are not alternative specific legal remedies, but discretionary remedies which are granted in extraordinary circumstances,<sup>24</sup> e.g., appeal by special leave under Art. 136.<sup>24</sup>

5 The existence of an alternative remedy is no ground for refusing prohibition or *certiorari* where—

(a) the absence or excess of jurisdiction is patent and the application is made by the party aggrieved,<sup>2</sup> or

(b) there is an error apparent on the face of the records,<sup>1, 2</sup> or

(c) there has been a violation of the rules of natural justice,<sup>3</sup> or

(d) where there has been a contravention of fundamental rights.<sup>4</sup>

12. *S. T. O. v. Shu Ratan*, A. 1966 S.C. 142, *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372.

13. *Collector of Customs v. Bata*, A. 1968 S.C. 13 (15), (1968) 1 S.C.J. 658.

14. *Peterson v. Forbes*, A. 1963 S.C. 692 (697-8).

15. *Gobardhan v. Collector*, A. 1966 All. 271 [liability to be arrested], *Unni v. Union of India*, A. 1966 Ker. 99.

16. *Purshottam v. State of U. P.*, 1959 All. 26 [where unless the order of removal was immediately quashed, the petitioner would be debarred from contesting at the next election which was to take place shortly].

17. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380).

18. *Rakhaldas v. Ghose*, A. 1952 Cal. 171, *Rajswari v. State of U. P.*, A. 1954 All. 608.

19. *Amar Datt v. Govt. of Pepsu*, A. 1954 Pepsu 88.

20. *Buddhu v. Municipal Board*, A. 1952 All. 753 (F.B.).

21. *Ram Adhar v. Dt. Bd.*, A. 1955 All. 184, *Konduri v. State of Hyderabad*, A. 1954 Hyd. 1 (F.B.), *Bommarilal v. State of Rajasthan*, A. 1953 Raj. 180.

22. *Bengal Immunity v. State of Bihar*, (1955) 2 S.C.R. 603 (620).

23. *Cf. Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1621).

24. *Ranganathan v. M. E. T.*, A. 1952 Mad. 659 (622).

25. *Venkataraman v. Ramchand*, A. 1961 S.C. 1506 (1510); *Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1621).

1. *Swinda v. Pattabhatra*, A. 1954 Mad. 161.

2. *Naim v. Ananda*, A. 1952 Cal. 112.

3. *State of U. P. v. Nook*, A. 1968 S.C. 86.

4. *Himmatilal v. State of M. P.*, (1954) S.C.R. 1122.

6. Similarly, notwithstanding the existence of an alternative remedy, the Court would issue *Quo Warranto* where the alleged intrusion is patent.<sup>6</sup>

(C) Where, notwithstanding the existence of an alternative remedy, the High Court exercises its discretion to grant relief, the Supreme Court, on appeal, would not normally interfere with the exercise of that discretion.<sup>6</sup>

### Rule of exhaustion of statutory remedy.

1. When a right or liability is created by a statute which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Art. 226.<sup>7</sup> 8 The High Court may, in the exercise of its discretion, decline to interfere *until* all the statutory remedies are exhausted,<sup>9</sup> 10 particularly when the decision of the question of jurisdiction depends upon the appreciation of evidence,<sup>11</sup> or on disputed facts.<sup>12</sup>

Thus, a writ under Art. 226 has been refused—

Where the Petitioner has the remedies of appeal and revision under the Income Tax<sup>12, 13</sup> or Sales Tax<sup>8</sup> Act to challenge the amount of assessment; or under the Customs Act to challenge an order of confiscation or other penalty.<sup>10</sup>

2. This rule is applied even where that statutory remedy is a reference to the High Court itself, on a question of law.<sup>8</sup>

3. But this rule of exhaustion of statutory remedies before a writ will be granted : a rule of policy, convenience and discretion rather than a rule of law<sup>15</sup> and the Court may, in exceptional cases, issue a discretionary writ, such as *certiorari*, notwithstanding the fact that the statutory remedies have not been exhausted.<sup>9, 13</sup> The rule does not bar the jurisdiction of the Court under Art. 226.<sup>14, 16</sup>

4. What these exceptional circumstances are cannot be exhaustively enumerated<sup>15</sup> because the matter is pre-eminently one for the discretion of the Court issuing the writ,<sup>14</sup> which is to be exercised according to the facts of each case. Nevertheless, the following may be mentioned amongst instances where the Court may grant relief even though the statutory remedies have not been exhausted—

(i) Where there was a complete lack of jurisdiction in the officer or authority to take the action impugned,<sup>17, 18</sup> e.g., where the proceedings have been taken under a law which is *ultra vires*;<sup>19, 20</sup> or upon an erroneous inter-

5. *Venkati v. State of M. P.*, A. 1955 Nag. 9.

6. *First I. T. O. v. Short Bros.*, (1965) S.C. [C.A. 97/65, d. 15-12-65].

7. *Abraham v. I. T. O.*, A. 1961 S.C. 609; (1961) 2 S.C.R. 765.

8. *Thansingh v. Supdt. of Taxes*, A. 1964 S.C. 1419 (1423); *Veluswami v. Raia*, A. 1959 S.C. 422 (429).

9. *State of U. P. v. Nook*, (1958) S.C.R. 595 (605-7).

10. *B. I. S. N. Co. v. Jasjit*, (1965) 1 S.C.A. 424 (429); A. 1964 S.C. 1451 (1453).

11. *Express Newspapers v. Workers*, A. 1963 S.C. 569 (574).

12. *S. T. O. v. Shiv Ratan*, A. 1966 S.C. 142 (145); *Standard Mills v. Ramalingam*, (1964) S.C. [C.A. 24/64].

13. *Collector of Monghyr v. Keshar*, A. 1962 S.C. 1694 (1703).

14. *Venkateswaran v. Ramchand*, A. 1961 S.C. 1506 (1509-10); (1962) 1 S.C.R. 753.

15. *Abraham v. I. T. O.*, A. 1961 S.C. 609; (1961) 2 S.C.R. 765.

16. *Union of India v. Varma*, (1958) S.C.R. 499 (503-4).

17. *Bhopal Sugar Industries v. Dube*, (1963) 14 S.T.C. 410 (S.C.).

18. *S. T. O. v. Shiv Ratan*, A. 1966 S.C. 142.

19. *Cf. Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1621).

20. *Collector of Customs v. Bawa*, A. 1968 S.C. 13 (15).

21. *Baburam v. Zila Parishad*, A. 1969 S.C. 556 (559).



pretation of the statute;<sup>22</sup> or where the imposition is without authority of law<sup>23</sup> or *ultra vires*;<sup>24</sup> or without any materials to support the conclusion that the statutory conditions precedent for the assumption of jurisdiction did exist;<sup>25</sup> but not where the determination of the jurisdictional fact itself involves a long and elaborate inquiry on taking evidence and cannot be made on affidavit.<sup>26, 28</sup>

(ii) Where the impugned order has been made in violation of the principles of natural justice;<sup>19, 21</sup>

(iii) Where the right to obtain the statutory remedy has been lost or barred by no fault of the Petitioner;<sup>1</sup>

(iv) Where it is evident from the acts of the statutory appellate or revisional authority that it would be futile to approach him for revising the impugned order.<sup>1, 2</sup>

(v) Where it is beyond the competence of the statutory authority<sup>3, 4</sup> to grant relief on the ground urged in the Petition under Art. 226, e.g.,—

Where the objection of the Petitioner is not against a particular entry in the Electoral Roll prepared under a municipal law, but that the entire Roll has been prepared in contravention of the law.<sup>5</sup> The same principle applies where the grievance of the Petitioner is otherwise beyond the scope of an election petition.<sup>6</sup>

(vi) Where fundamental rights have been infringed by the impugned order.<sup>1</sup>

But the Petitioner cannot get relief under Art. 226—

Where he has disabled himself for the statutory remedy by his own fault,<sup>1</sup> e.g., by allowing it to be time-barred,<sup>1</sup> unless he shows that it would have been futile to pursue the statutory remedy.<sup>1</sup>

5. But in the absence of any exceptional circumstances as above, a Petition under Art. 226 would not be maintainable without exhausting the statutory remedy merely because the statutory remedy is onerous, e.g., that the appellant has to deposit the assessed amount as a condition precedent for preferring an appeal.<sup>28</sup>

But it will be otherwise if the order or the law imposing the burden is without jurisdiction.<sup>7</sup>

#### Where alternative remedy not adequate.

1. A statutory remedy cannot be said to be an adequate alternative remedy—

(a) Where the remedy is *discretionary* and the Petitioner cannot avail of it as of right,<sup>8</sup> e.g.

(b) Appeal by special leave under Art. 136.<sup>9, 10</sup> Even where leave

22. *Beharilal v S T O.* (1965) 17 S.T.C. 508 (509) S.C.

23. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380).

24. *Express Newspapers v. Workers*, A. 1963 S.C. 569 (574).

25. *S. T. O. v. Shiv Ratan*, A. 1966 S.C. 142 (145).

1. *Venkateswaran v. Ram Chand*, A. 1961 S.C. 1506.

2. *Addl. Collector of Customs v. Shantilal*, A. 1966 S.C. 197 (202).

3. *Beharilal v. S. T. O.*, (1966) 17 S.T.C. 508 (509) S.C.

4. *Venkataraman v. State of Madras*, (1966) 17 S.T.C. 418 S.C.

5. *Amulya Ratan v. Commr.*, A. 1969 Cal. 548 (550).

6. *Hariprasad v State of M. P.*, 1969 M.P. 342 (345) F.B.

7. *Collector of Customs v. Bawa*, A. 1968 S.C. 13 (15).

8. *W. I. Match Co. v. Industrial Tribunal*, A. 1958 Mad. 398.

9. *S. T. O. v. Shiv Ratan*, A. 1966 S.C. 142 (145).

10. *State of U. P. v. Md. Nosh*, A. 1958 S.C. 86 (83).

under Art. 136 has been already refused by the Supreme Court that fact cannot take away the *jurisdiction* of the High Court to interfere, under Art. 226, even though it may be taken into consideration in deciding whether the discretion to grant the relief should be exercised in a given case,<sup>11</sup> particularly if the grounds upon which relief is sought under Art. 226 are the very grounds upon which special leave under Art. 136 has been refused.<sup>12</sup>

(c) Relief under Art. 227.<sup>13</sup>

(d) Where the remedy is *illusory*, e.g.,

(i) An appeal to the Government would be of little use to the Petitioner where the order complained of was issued by the subordinate authority under prior constitution with the Government,<sup>14a</sup> or under directive issued by the Government.<sup>14</sup>

(ii) An appeal would be similarly useless where the appellate authority or tribunal was not competent to decide the question agitated in the petition under Art. 226, e.g., the question of jurisdiction,<sup>15</sup> or that an assessment was *ultra vires*.<sup>16, 17</sup>

(iii) Availability of a remedy by suit has not been accepted as a ground for refusing relief under Art. 226 when a person's services have been terminated<sup>18</sup> or reduced in rank<sup>19</sup> in violation of Art. 311.

(e) Where the alternative remedy would involve inordinate delay.<sup>20</sup>

(f) Where a constitutional question is involved, as distinguished from a mere question of fact.<sup>21</sup>

### Right to apply under Art. 226, where proceedings before statutory tribunal are pending.

1. The foregoing deals with the right to apply for a writ under Art. 226 where the party has failed to resort to the statutory remedy.

2. We are now examining the case where the party has already applied before the statutory tribunal and proceedings before such tribunal are pending. In such a case—

I. Where the tribunal has jurisdiction to decide the question,—the High Court will decline to interfere with the proceedings before the tribunal, or to remove such proceedings, by issuing a writ under Art. 226.<sup>22</sup>

In other words—

Where the Petitioner has *already taken resort to the statutory machinery*, he cannot, simultaneously, apply under Art. 226, without waiting for the decision of statutory authority.<sup>23</sup>

11. *Shivram v. I. T. O.*, A. 1964 SC 1095 (1099).

12. *Cf. Bharat Kala Bhandar v. Municipal Committee*, A. 1966 SC 249 (261).

13. *Sarin v. Patil*, A. 1954 Bom. 171.

13a. *Raich v. Inspector*, A. 1955 Mad. 584.

14. *B. E. S. Co. v. C. T. O.*, A. 1956 Cal. 400 (301).

15. *Indian Metal Corp. v. Industrial Tribunal*, A. 1953 Mad. 98.

16. *Venkataraman v. State of Madras*, (1966) 17 S.T.C. 418 (S.C.).

17. *Beharilal v. S.T.O.*, (1966) 17 S.T.C. 508 (S.C.).

18. *Hiranmay v. State of Assam*, A. 1955 Assam 224; *Budh Singh v. State of U. P.*, A. 1958 All. 607.

19. *Mohinder v. State of Punjab*, A. 1955 Punjab 106.

20. *Floekchand v. Motichand*, (1969) S.C.R. 110; *Rabinder v. Union of India*, (1969) S.C. [W.P. 146/67, d. 9-10-69].

21. *State of Mysore v. Chabiani*, A. 1958 S.C. 325 (328).

22. *Cert. Still v. State of Bihar*, A. 1961 S.C. 1615 (1621).

23. *Rasid v. I. T. O. Commr.*, (1954) S.C.R. 738.

## II. On the other hand—

1. If the proceedings before the Tribunal are without jurisdiction, it is open to the party aggrieved to move the Court for issuing a writ to quash the incompetent proceedings, without his being obliged to wait until those proceedings run their full course,<sup>24</sup> e.g.—

Where the law under which the proceedings have been taken before a Tribunal is *ultra vires*<sup>25</sup> or unconstitutional.<sup>26</sup>

2. The High Court also retains its discretion to interfere in proper cases, notwithstanding the pendency of the statutory appeal or like proceeding, e.g., where the impugned tax is *ultra vires*.<sup>27</sup>

## Effect of merger.

1 Where the person aggrieved has availed of a statutory remedy such as appeal or revision, the original order becomes merged in that of the superior authority,<sup>28</sup> so that thereafter his remedy, if any, lies only against the decision of the appellate authority and not the original order.<sup>29</sup>

2. This principle has been applied to the case where the person moved the High Court in revision under s. 115 of the C. P. Code and failed, so that the order of the inferior tribunal became merged in the order of the High Court. Thereafter, no petition under Art. 226 or 227 will lie against the order of the inferior tribunal.<sup>30</sup>

## Nature of Proceeding.

I It is now settled that a proceeding under Art. 226 may be either civil or criminal, according to the nature of the questions raised and decided in such proceedings. Thus, if the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding,<sup>31-7</sup> even though the order is passed by a Revenue authority.<sup>8</sup>

Applying the above principle—

(i) A proceeding for *habeas corpus* in a case of detention by a private person would be a civil proceeding but if would be a criminal proceeding where the detention is by the State.<sup>9</sup>

(ii) Proceedings are either civil or criminal and there is no third category. Proceeding under Art. 226 against orders of Revenue authorities would be a 'civil proceeding' if it affects civil rights.<sup>10-9</sup>

II Another question which has arisen in relation to the writ jurisdiction is whether it appertains to the original, appellate or revisional jurisdiction of the High Court.

The Supreme Court has authoritatively laid down<sup>10</sup> that the jurisdiction under Art. 226 is an *original* jurisdiction but that it is not an *ordinary* original jurisdiction but an *extraordinary* original jurisdiction.

24. *Union of India v. Varma*, (1958) S.C.R. 499 (503-4).

25. *State of Bombay v. United Motors*, (1953) S.C.R. 1089 (1077).

1 *Khurai Municipality v. Kamal Kumar*, A. 1965 S.C. 1321 (1324).

2. *Cf. Chand Prasad v. State of Bihar*, A. 1961 S.C. 1709; *Indian Aluminium Co. v. Commr. of I. T.*, A. 1962 S.C. 1619.

3. *Collector of Customs v. E. I. Commercial Co.*, A. 1963 S.C. 1124.

4. *Shankar v. Kishanji*, (1969) S.C. [C.A. 870/66, d. 16-4-69].

5. *Cf. Tirath Singh v. Bachhattar*, A. 1955 S.C. 830.

6 *Cf. State of Bihar v. Kameshwar*, (1962) S.C. [Cr. A. 242/60].

7. *Deshpande v. Gendal*, (1966) S.C. [C.A. 980/65, d. 6-1-66].

8. *Narayan v. Ishwarlal*, A. 1965 S.C. 1818. [The Supreme Court thus affirms the view expressed by the author at p. 390 of the previous Ed.].

9. *N. U. C. Employees v. Industrial Tribunal*, A. 1962 S.C. 1080 (1097).

10. *P. v. Vijay*, (1963) 1 S.C.R. 1.

III. It is an independent proceeding and not a continuation of the proceedings before the administrative authorities.<sup>10</sup>

### Territorial jurisdiction.

1. The writs do not run beyond the territories in relation to which each High Court exercises jurisdiction.<sup>11</sup> Hence, a High Court cannot issue a writ or order under Art. 226 unless the person, authority or Government against whom the writ is sought is (physically) resident or located within the territorial jurisdiction of the High Court,<sup>12</sup> or [under the new cl. (1A)] the cause of action arises, wholly or in part, within the territorial jurisdiction of that High Court.

2. As a result of the insertion of cl. (1A), a petition under Art. 226 can be presented before any of the High Courts coming under the following heads—

(a) The High Court within whose territorial jurisdiction the person or authority against whom relief is sought resides or is situate.<sup>13</sup>

This means that in the case of the Government of India and other authorities and inferior tribunals situated at Delhi or within the territorial jurisdiction of the Punjab High Court, the Punjab High Court.<sup>12-13</sup> If the authority be situated within the territorial jurisdiction of any other High Court,—that High Court,—irrespective of the place where the cause of action arises.<sup>14</sup>

(b) The High Court within whose jurisdiction the cause of action in respect of which relief is sought under Art. 226 has arisen, wholly or in part.<sup>14</sup>

The result is that if a Central Government employee,<sup>11</sup> serving in the Himachal Pradesh, is removed from service, the Judicial Commissioner of Himachal Pradesh<sup>15</sup> would have jurisdiction to entertain a petition under Art. 226, besides the Punjab High Court. Similarly, an assessee in the U. P. would be entitled to institute in the Allahabad High Court a proceeding under Art. 226 against any taxing authority outside the State by whose order the Petitioner may have been affected.<sup>16</sup>

3. Since an appeal is in the nature of a rehearing and the Appellate Court is bound to take into consideration any change in the law that has taken place since the institution of the original proceeding, an Appellate Court cannot hold that the trial Court had no jurisdiction to entertain a Petition under Art. 226 against an authority resident outside the jurisdiction of that Court, if the subsequent insertion of cl. (1A) confers jurisdiction upon that Court.<sup>17</sup> The provision in this clause, being procedural in nature, is retrospective in its operation to apply to causes of action arising prior to the amendment.<sup>17-18</sup>

11. *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738; (1952-4) 2 C.C. 454 (456).

12. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144; *Khajoor Singh v. Union of India*, A. 1961 S.C. 532.

13. *Shriram v. State of Bombay*, A. 1962 S.C. 670; *Madan Gopal v. Govt. of Orissa*, A. 1962 S.C. 1513.

14. *Nair v. Regional Director*, A. 1969 Bom. 315.

15. *Dev Raj v. Union of India*, A. 1966 H.P. 13.

16. Cl. (1A) overrides the contrary view in *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738, and cases which followed it, e.g., *Madan Gopal v. Govt. of Orissa*, A. 1962 S.C. 1513; *Shriram v. State of Bombay*, (1962) 2 S.C.R. 738; *Khajoor Singh v. Union of India*, (1961) 2 S.C.R. 828. [See p. 403, ante].

17. *Nair v. Regional Director*, A. 1969 Bom. 315 (318).

18. *Amar Md. v. Custodian of Evacuee Property*, A. 1964 Raj. 260.

4. A distinction has, in this connection, to be made between (a) cases where a subordinate agency works within the jurisdiction of a High Court *under the direction* of a superior situated outside, and (b) cases in which the order of a superior tribunal, situated outside the jurisdiction, remains outstanding and cannot be reached by the High Court:

(A) Where, though the Authority is located outside the jurisdiction of the High Court, the impugned illegal act or order is done or made by an *agent or subordinate officer* of that Authority who is resident within the jurisdiction of the High Court, the Court can proceed *against such agent or officer* who cannot be heard to say that he is simply obeying the unlawful directions of his superior Authority which is located outside the jurisdiction of the High Court.<sup>19</sup> It would follow that where the order of a tribunal outside jurisdiction is a *nullity*, the High Court may restrain a person within jurisdiction from enforcing it.<sup>20</sup>

(B) Where, however, the order made by a subordinate officer within the jurisdiction of the High Court *merges*<sup>21, 22</sup> in the order of the superior authority which is located outside the jurisdiction, the High Court cannot issue the writ either against the subordinate or the superior authority.

There is such merger in the case of an administrative appeal, or revision,<sup>22</sup> whether the appellate authority affirms,<sup>22-24</sup> reverses or modifies<sup>25</sup> the order of the subordinate authority,<sup>23</sup> provided the scope of the appeal or revision was co-extensive with that of the order of the inferior tribunal.<sup>24, 26</sup>

But the appellate authority cannot be held to be outside the jurisdiction of the High Court of a State where, even though for the sake of convenience its head office is situate at Delhi, it is appointed by the State Government under the relevant statute and entertains and disposes of appeals relating to that State within the territory of that State.<sup>21</sup>

5. Where the tribunal has finished its work and become *functus officio*, that High Court has jurisdiction to issue *certiorari* against the order of that tribunal, within whose jurisdiction the records of the tribunal are in custody.<sup>1</sup>

### Application and Affidavit.

1. In the absence of Rules framed under Art. 226, an application must be drawn in conformity with the provisions of the Civil Procedure Code relating to pleadings, as far as possible.<sup>2</sup> The application should contain in a concise form the material facts on which the party relies for his claim.<sup>3</sup> Thus,

(i) Where the Petitioner alleges *mala fides*,<sup>4</sup> arbitrary exercise of discretion<sup>5</sup> or discrimination,<sup>6</sup> specific particulars must be given in support of the allegation.

19. *Musaliar v Potti*, (1955) 2 S.C.R. 1196; A. 1956 S.C. 246.

20. *Punjab Sugar Mills v. State of U. P.*, A. 1960 All. 444.

21. *Noor Mohammad v. Competent Officer*, (1967) 3 S.C.R. 134 (145).

22. *Collector of Customs v. East India Commercial Co.*, A. 1963 S.C. 1124, reversing *E. I. Commercial Co. v. Collector of Customs*, A. 1960 Cal. 1 (F.B.).

23. *Shriram v. State of Bombay*, A. 1962 S.C. 670.

24. *Commr. of I. T. v. Bhogikal*, A. 1959 S.C. 868 (871).

25. *State of Madras v. Madurai Mills*, A. 1967 S.C. 681.

1. *Harl Vishnu v. Ahmed*, A. 1955 S.C. 233; (1955) 1 S.C.R. 1104.

2. *Kishori Lal v. Dy. Commr.*, A. 1955 Assam 183 (195).

3. *I. T. O. v. Damodar*, A. 1960 S.C. 408 (414).

4. *Pratap Singh v. State of Punjab*, A. 1964 S.C. 72 (101); *Barium Chemicals v. Company Law Bd.*, (1966) 1 S.C.A. 747; A. 1967 S.C. 296.

*Society v. State of U. P.*, A. 1966 S.C. 1307 (1313).

(ii) The right of the applicant which has been affected by the act or omission of the respondent, the nature of the respondent's duty, and the fact of demand and refusal must be stated in the application.<sup>6</sup> If there has been any apparent delay sufficient explanation of the delay must be given in the application.<sup>7</sup>

(iii) Questions of fact should be raised in the Petition at the first available occasion,<sup>8</sup> and the Petition cannot be allowed to be amended so as to give it a new and altogether different complexion.<sup>9</sup>

(iv) The application must state precisely the act to be done or forborne by the respondent.<sup>10</sup>

2. (a) The allegations in the application must be supported by affidavit and should be similarly answered by an affidavit in opposition by the respondent; a copy of the affidavit in opposition should be furnished to the applicant in good time before the date fixed for hearing and the applicant will also be at liberty to use a reply, also furnishing copies to the respondent.<sup>11</sup>

(b) The affidavit must be that of the applicant himself. An affidavit of an agent or employee is not in order.<sup>12</sup>

(c) The affidavit should be confined to statements of facts and should not be used as vehicle of argument.<sup>13</sup>

(d) An affidavit which is not in conformity with O. 19, r. 3<sup>14</sup> of the Cr. P. Code is liable to be rejected, unless the defect can be cured by giving the Petitioner an opportunity to swear a fresh affidavit, clarifying the defect.<sup>15</sup> If any averment is not based on personal knowledge, the source of information must be disclosed.<sup>16</sup>

(e) The affidavit must be sworn by the person in whose knowledge the facts are. Thus, where there is an allegation of *mala fides* against a minister personally, it must be sworn by himself;<sup>17</sup> but that would not be necessary where there is no such personal allegation.<sup>18</sup>

3. On the other hand, no relief can be asked for on the basis of incidental statements made by the respondent in his reply. If any new plea arises from the reply of the respondent, it should be squarely raised and further time given to the other side.<sup>19</sup>

### Need for counter-affidavit.

1. An averment in the application which is not traversed by the respondents by a counter affidavit must be taken to have been admitted.<sup>20</sup> Where the respondents do not file a counter-affidavit, there is no opposition to the petition and the return of the respondents need not be taken into consideration.<sup>21</sup> When allegations are made against a Minister who is a respondent and such allegations can be refuted by facts within the personal

6. *Ratan v. Adhar*, A. 1952 Cal. 72 (73).

7. *Sikri Bros. v. State of Punjab*, A. 1957 Punj. 220.

8. *Shivanandan v. State of W. B.*, A. 1954 Cal. 60.

9. *Sohan Singh v. State of Pepsu*, A. 1955 Pepsu 1 (F.B.).

10. *Khagendra v. D. M.*, A. 1961 Cal. 3.

11. *Khudiprasad v. State of W. B.*, A. 1952 Cal. 798.

12. *Tropical Ins. Co. v. Union of India*, (1965) 2 S.C.R. 517 (519).

13. *Dwarka v. I. T. O.*, (1965) 52 I.T.R. 361; (1965) 2 S.C.A. 868 (879).

14. *Barium Chemicals v. Company Law Bd.*, A. 1967 S.C. 295 (319).

15. *Kapur v. Pratap Singh*, A. 1961 S.C. 1117 (1125); *Partap Singh v. State of Punjab*, A. 1964 S.C. 72 (85); *Rowjee v. State of A. P.*, A. 1964 S.C. 962 (970).

16. *Lakhanpal v. Union of India*, A. 1967 S.C. 908 (915).

17. *Khanderwal v. State of U. P.*, A. 1955 All. 12.

18. *Rowjee v. State of A. P.*, A. 1964 S.C. 962 (970).

knowledge of the Minister, the counter-affidavit should be filed by the Minister himself and not by the secretaries or other officers.<sup>19</sup> But the Court should not entertain unnecessary affidavits.<sup>19a</sup>

2. When allegations of *mala fides* are made against a Minister<sup>20</sup> (or any official), the counter-affidavit must be filed by the Minister (or official) himself, unless there be any other person having personal knowledge of the facts, and, in the absence of such counter-affidavit, the allegations will go unrebutted.<sup>19</sup>

3. In case of allegation of *mala fides* against responsible officers, the Court may take oral evidence of the parties, instead of relying upon affidavits.<sup>21</sup>

4. If the State does not file any return to a Rule *nisi* for *habeas corpus*, the convict must be released.<sup>21</sup>

### Power of Court to cross-examine deponent of affidavit.

1. Sitting under Art. 226, the High Court has ample power to order the attendance of a deponent of affidavit in Court for being cross-examined, where it is not possible for the Court to come to a definite conclusion on the affidavits.<sup>22-23</sup>

2. The Court would not, however, exercise its discretion to use this power where the Petitioner has not furnished sufficient particulars in support of his allegation in question.<sup>23</sup>

### Application where and when to be presented.

1. An application is to be presented before a Judge of the High Court at the place where the High Court has its official seat.<sup>24</sup> If an application is presented to a Judge at any other place, it may be irregular, but the irregularity may be cured if the application is thereafter sent to the High Court at its seat.<sup>24</sup>

2. The Court may receive a petition even on a Sunday, if justice demands.<sup>25</sup>

### Who may apply under Art. 226.

1. The rights that can be enforced, under Art. 226, must ordinarily be the rights of the Petitioner himself,<sup>1</sup> except in the case of *habeas corpus*<sup>2</sup> and *quo warranto*<sup>3</sup> [see *post*].

In other words, the right which is the foundation of an application under Art. 226 is a personal and individual right.<sup>4</sup> Hence, the nomination made by the Governor under Art. 171 (3) (e) and (5) cannot be challenged under Art. 226 by an elected member of the Legislative Assembly on the ground that it is unconstitutional, for it cannot be said that any personal right of the applicant has been infringed even indirectly, by the nomination.<sup>5</sup>

19. *Kapur v. Pratap Singh*, A. 1961 S.C. 1117 (1125): (1961) 2 S.C.R. 143.

19a. *Ishwarlal v. State of Gujarat*, A. 1968 S.C. 870.

20. *Pratap Singh v. State of Punjab*, A. 1964 S.C. 72; *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1047).

21. *Ram Saran v. State of Punjab*, (1963) S.C. [C.A. 36/63, d. 18-9-63].

22. *APSRTC v. Satyanarayan*, A. 1965 S.C. 1303 (1307).

23. *Barium Chemicals v. Company Law Bd.*, A. 1967 S.C. 295 (319).

24. *Alok Kumar v. S. N. Sarma*, A. 1968 S.C. 454 (455).

25. *Principal, Patna College v. Raman*, (1966) S.C. [C.A. 743/65].

1. *State of Orissa v. Ramchandra*, A. 1964 S.C. 686.

2. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869; (1950-51) C.C. 10.

3. *In re Ramamoorthi*, (1952) 11 M.L.J. 671; A. 1963 Mad. 94. [In this case, however, relief was barred by Art. 361].

4. *Pratap Singh v. State of Punjab*, A. 1964 S.C. 72; *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1047).

## 2. Hence,—

(a) The person who complains of the infringement of a fundamental right must show that the alleged fundamental right belongs to him.<sup>2</sup> A non-citizen cannot apply for the enforcement of a fundamental right which has been conferred by the Constitution only upon citizens, *e.g.*, a right under Art. 19.<sup>3</sup> Where the title of the applicant to a property is disputed and it cannot be established from the record, he cannot maintain an application on the ground that his fundamental right under Art. 19 (1) (f) has been infringed.<sup>4</sup>

(b) The existence of the legal right which is alleged to have been infringed is similarly a condition precedent to the maintenance of an application under Art. 226 where the application has been brought for the enforcement of a non-fundamental right.<sup>5,7</sup> Such legal right may be a statutory right<sup>6</sup> or other right or interest recognised by the law, such as that of a trustee<sup>8</sup> but not a bare personal right by contract.<sup>10</sup> In other words, the legal right of the Petitioner need not be a proprietary interest<sup>9</sup>

(c) Anybody who has been prejudicially affected by the act or omission complained of can apply for a writ, even though he may not have a proprietary or even a fiduciary interest in the subject-matter.<sup>11</sup>

A permit holder under the Motor Vehicles Act cannot complain of enhanced competition by the issue of other permits, but may complain if such permits are issued in contravention of the law.<sup>12</sup>

(d) Though an application under Art. 226 is not maintainable for the enforcement of a contractual right against a party to the contract, whether such party is a private individual or the State,<sup>13</sup> because such dispute involves questions of fact which can be investigated in a suit<sup>14</sup> rather than in a proceeding for a writ, there is nothing to bar a person to maintain an application against the State on the ground that his rights under a contract with a third party have been infringed by the State,<sup>15</sup> or that a statute, which affects the rights arising out of a contract, is unconstitutional.<sup>12</sup>

(e) It must be an *existing* legal right.<sup>16,17</sup>

(i) Where the Petitioner's title to property, in respect of which he seeks to enforce a fundamental right against the State, has been negatived by a final decision of a competent court, he can no longer maintain an application under Art. 32 or 226.<sup>18</sup>

(ii) Similar is the situation where the contractual interest, upon which the Petitioner claims *locus standi*, has not accrued because the contract is not yet concluded.<sup>19</sup>

(iii) No order can be made in favour of a person whose permit has validly

5. *Sharma v. Srikrishna*, A. 1969 S.C. 395 (402).

6. *Bokaro v. State of Bihar*, A. 1963 S.C. 516.

7. *Madan Gopal v. State of Orissa*, (1952) S.C.R. 28; A. 1952 S.C. 12.

8. *State of Punjab v. Suraj*, A. 1963 S.C. 507 (509).

9. *Venkateswara v. Govt. of A. P.*, A. 1966 S.C. 828 (833).

10. *Mahadeo v. State of Bombay*, (1959) Supp. (2) S.C.R. 339 (343); *Anwar Mehboob v. State of M. P.*, A. 1966 S.C. 1637.

11. *Venkateswara v. Govt. of A. P.*, A. 1966 S.C. 828 (833).

12. *Pazhantimala v. State*, A. 1969 Ker. 154 (159).

13. *Achutan v. State*, A. 1969 S.C. 490; *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919; A. 1966 S.C. 17.

14. *Purushottam v. State of U. P.*, A. 1955 All. 106.

15. *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 329.

16. *State of Punjab v. Suraj Prakash*, A. 1963 S.C. 507.

17. *State of Orissa v. Ram Chandra*, A. 1964 S.C. 685.

18. *Joseph v. State of Kerala*, A. 1965 S.C. 1514 (1515).

19. *Vishwanathadas v. State of Mysore*, (1969) S.C. [C.A. 1852/69, d. 6-2-69].



terminated before the date of order of the Court, even though it subsisted at the time of the petition.<sup>20</sup>

(f) The Petitioner must be a person prejudicially affected by the act or omission of the authority which is challenged<sup>21</sup> and not a mere busy-body who seeks to interfere in things which do not concern him.<sup>22</sup>

3. Where a statute affects the rights arising under a contract, either party to the contract may challenge its constitutionality.<sup>23</sup>

4. An application under Art. 226 can be presented not only after the the applicant's legal rights have been invaded already but also when they have been threatened with an immediate peril.<sup>24-26</sup>

### Whether and when an association can apply.

1. When a number of individuals are affected by an official act, they can, ordinarily, bring a legal proceeding to challenge that only if all such persons join in the proceedings by name, except where the law confers upon them a legal personality as a collective body.<sup>25</sup>

2. Such legal personality the law confers upon an association which is incorporated by statute; such corporate body acquires a legal personality of its own and is as such entitled to maintain legal proceedings in its collective capacity.<sup>26</sup>

3. There are certain unincorporated associations which, though they do not constitute a legal person, are permitted, by specific statutory provisions, to sue or be sued in their collective capacity. Thus,

A Society registered under the Societies Registration Act, 1860 is a legal entity apart from its members and can, therefore, such and be sued in its own name, in accordance with the provisions of the Act.<sup>1</sup> Conversely, it has been held that a writ under Art 226 would lie against a co-operative society, governed by the Bengal Co-operative Societies Act, 1940,<sup>2</sup> because it is a public body constituted by statute.<sup>3</sup> Similarly, a Trade Union registered under the Trade Unions Act, can sue and be sued in its own name.<sup>4</sup> Under s. 47 of the Motor Vehicles Act, even an unincorporated association can make a representation in the matter of grant of a permit and can pursue that right in a proceeding under Art. 226.<sup>5</sup> Under the Industrial Disputes Act, an association of workmen can raise industrial disputes and represent its members before the Industrial Tribunal,<sup>6</sup> consequently, it can move the High Court against an award made by the Tribunal.<sup>6-6</sup>

On the other hand, a share holder or office-bearer of a company may apply under Art. 226, where his personal rights have been affected by a law or order relating to the company.<sup>7a</sup>

20. *Kalvan Singh v State of U. P.*, A. 1962 S.C. 1183.

21. *Pazhanimala v State*, A. 1969 Ker. 154 (159).

22. *Bombay Dyeing Co. v Govt of Bombay*, A. 1958 S.C. 329.

23. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603; A. 1955 SC. 661.

24. *Kochummi v State of Madras*, A. 1959 S.C. 725.

25. *D. G. O. F. Employees' Assocn. v. Union of India*, A. 1969 Cal. 149 (151).

1. *Satyavart v Arya Samaj*, A. 1946 Bom. 516.

2. *Madon Mohan v. State*, A. 1966 Cal. 23.

3. *D. G. O. F. Employees' Assocn. v. Union of India*, A. 1969 Cal. 149 (151).

4. *Ramprasad v. Industrial Tribunal*, A. 1961 S.C. 857.

5. *W. B. P. W. Union v. A. U. P. Works*, A. 1962 Cal. 648.

6. By reason of s. 69 (1) of the Partnership Act, 1932, only registered firms can sue in their firm names; otherwise all partners must join individually.

6a. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044; (1962) Supp. (1).

4. But, apart from such statutory exceptions, *unincorporated* associations cannot sue or be sued in their own name. Only the members of such society, jointly, can bring a legal proceeding.<sup>7, 8</sup>

5. It follows that an association of Government employees, which does not come under any of the excepted categories mentioned above, is not entitled to bring an application under Art. 226, even though it may be an association 'recognised' by the Government, because recognition only gives an employees' association a status in its dealings with the employer, i.e., the Government, but not a juristic personality which alone can enable it to bring a legal proceeding before the Court in its collective capacity.<sup>9</sup>

6. Even where an association is permitted by law to bring a legal proceeding, it can bring an application under Art. 226 only when its rights as a collective body, as distinguished from the aggregate rights of its members are affected by the act challenged in such proceedings.<sup>10, 11</sup>

### Parties.

1. A writ under Art. 226 cannot be issued against a person who is not impleaded as an opposite party to the proceeding<sup>12</sup> and none other than those who are parties would be bound by an order made in the proceeding.<sup>13</sup> The principle applies also to appeal.<sup>13a</sup>

2. An application under Art. 226 is not a regular suit and only persons or bodies against whom relief is sought are necessary parties.<sup>14</sup> Merely because certain question will have to be determined *incidentally* in giving or not giving the reliefs asked for in the application it does not make each and every person interested in such questions necessary parties to such proceeding.<sup>14</sup> Thus, a landlord whose property has been notified under an Estates Abolition Act may apply for a writ against the Government on the ground that the property is not an 'estate', without impleading the ryots even though they would be indirectly affected by the decision.<sup>15</sup>

3. But where the relief sought cannot be granted without making a person party to the application, he is a necessary party.<sup>16</sup>

Thus,—

(a) When an order of a tribunal or other authority is sought to be set aside, such tribunal or authority as well as the person who is interested in the order or in whose favour it was made should be impleaded.<sup>17, 18, 17</sup> Where the original order has become merged in the order of an Appellate Authority, the latter should be impleaded.<sup>19</sup>

(b) When an order which is sought to be quashed was confirmed by an appellate authority, the latter must be joined.<sup>18</sup> Where, however, the order of the original authority is a nullity on the ground of want of jurisdiction, non-joinder of the appellate authority would not be a bar to relief.<sup>19</sup>

7. *Indian Sugar Mills Assn. v. U. P. Govt.*, A. 1951 All (F.B.)
8. *Kalani & Co. v. Iron & Steel Controller*, A. 1969 M 25 [Joint Plant Committee].
9. *D. G. O. F. Employees' Assn.*, A. 1939 Cal 149 (150).
10. *Chiranilal Lal v. Union of India*, A. 1951 S.C. 41
11. *Govt Press Employees' Assn. v. Govt of Mysore*, A. 1962 Mys. 25
12. *Bimal Chandra v. Chairman*, A. 1954 Cal. 285.
13. *Rashikari v. State of Orissa*, A. 1969 S.C. 1081 (1088).
- 13a. *Cumbum Roadways v. Somu Transport*, (1965) S.C. [C.A. 907/64, d. 10-12-65].
14. *Samarendra v. Calcutta University*, A. 1953 Cal. 172; *Vinod v. State of M. P.*, A. 1966 M.P. 134 (136).
15. *Rajagopalrao v. State of Orissa*, A. 1956 Orissa 214.
16. *Udit Narain v. Board of Revenue*, A. 1963 S.C. 786.
17. *Yakoob v. Radhakrishnan*, A. 1964 S.C. 477.
18. *Nasiruddin v. Lawala*, A. 1956 Nag. 65
19. *Badrul v. Custodian of Evacuee Property*, A. 1957 M.P. 32.

(c) Where the writ relates to a right, title or interest in real property, all persons owning or claiming the same should be joined as parties.<sup>20</sup>

(d) In a proceeding for mandamus, all persons, who would be affected<sup>21, 22</sup> if the relief sought for were granted, should be impleaded, e.g., those employees who would be displaced from their existing position if the Petitioner's claim for seniority or promotion were allowed;<sup>23-25</sup> in a petition to quash an order of requisition of premises, the tenant who is benefitted by the order must be impleaded.<sup>24</sup>

4. On the other hand,—

(i) Where the validity of a tax imposed by a local Authority is challenged, the State is not a necessary party.<sup>25</sup>

(ii) The Election Commission is not a necessary party to quash the proceedings of an Election Tribunal. The Election Tribunal is the proper party to an application for *certiorari*, even where the Tribunal has become *functus officio*,<sup>1</sup> the object of the writ being merely to quash the offending order. Where, however, the writ sought is against the record, the authority who has the custody of the record should be impleaded.<sup>1</sup>

5 Where the relief sought for is against a statutory body bearing an official designation, the proper course is to implead the body in its official designation and not the members holding office for the time being, individually.<sup>2</sup>

### Addition of necessary parties.

1. It follows from the above, that a rule *nisi* may be amended with a view to adding a necessary party. Such amendment should ordinarily be allowed only upon notice to the party proposed to be added. There is, however, no bar to an *ex parte* order being made in proper cases. Upon such amendment being effected, directions should be given for the use of affidavits or additional affidavits.<sup>3</sup>

2 As a general rule, a defect of party is allowed to be removed at any time before the Rule is made absolute and the writ issued, in order to avoid multiplicity of proceedings. Thus, where the Petition was against the Secretary of the Secondary Education Board, but at the hearing the position of the Secretary appeared to be doubtful, the Court allowed the Board itself to be made a party, by amending the petition, on payment of costs and directed a copy of the Rule to be served on the Board itself.<sup>3</sup>

3 If a necessary party or party likely to be affected by a writ or a party whose presence may be necessary to make the writ effective is not before the Court, the Court may, either upon an application made for that purpose, or of its own motion direct that such a party be added and the rule *nisi* served upon him or simply that the rule *nisi* be served upon him or even that he may be allowed to be present at the hearing. In any such case, such party would be entitled to show cause or support or oppose a cause already shown.<sup>3</sup>

20. *Makhan v. Chatterjee*, A. 1964 Cal. 208 (210).

21. *State of Orissa v. Mahapatra* (1969) S.C. [C.A. 2162/68, d. 11-4-69]; *Padam Singh v. Union of India*, (1967) S.C. [C.A. 405/67, d. 14-8-67].

22. *A. P. S. E. Board v. Rao*, A. 1969 A.P. 328 (335); *Ram Narayan v. Union of India*, A. 1969 Cal. 576.

23. *Raghavendra v. Dy. Commr.*, A. 1965 S.C. 136.

24. *Hariram v. State of Bombay*, (1965) S.C. [C.A. 577/64, d. 25-10-65].

25. *Kandol v. Chief Officer*, A. 1964 Kutch 50.

<sup>1</sup> *Harl Vishnu v. Syed Ahmad*, (1952-54) 2 C.C. 480 (483).

<sup>2</sup> *Radha Films v. W. B. Board of Censors*, A. 1962 Cal. 653.

<sup>3</sup> *Makhan v. Chatterjee*, A. 1964 Cal. 208.

The Supreme Court directed a Labour Union to be made a party respondent (on its own application) to a petition under Art. 226 brought by an employer against the Industrial Tribunal and the Government for quashing an order of reference of a dispute to the Tribunal on the ground that the dispute referred to was covered by a pending award and that the order was vitiated by *mala fides*.<sup>4</sup>

4. On the failure to implead a necessary party, the petition should be rejected.<sup>5</sup>

### Court's power to add proper parties.

1. While a necessary party is one without whom no order can be made effectively, a proper party is one in whose absence an effective order can be made, but whose presence may be necessary for a complete and final decision on the question involved.<sup>6</sup>

2. Though a petition may not fail for omission to implead a 'proper party', the Court may, in its discretion, add or implead a proper party, either suo motu or on the application of a party to the writ or of such proper party himself.<sup>6</sup>

### Whether joint petition lies.

I. Some High Courts are of the view that—

1. The general rule is that two or more persons cannot join in a single petition for a writ to enforce separate claims. There must be separate applications for separate writs, even though the several applicants are successors in the office in respect of which claims arise, or that the petitioners are affected by orders of a similar nature. Separate applications must be made to quash separate orders.

2. The case would be different where injury to a class of persons is done by a common order or law, or their rights are inseparable.<sup>11</sup> But separate applications should be made if the interests of the applicants in the subject matter are different and distinct.<sup>12-14</sup>

According to this view, the provisions of O. 1, r. 1 of the C. P. Code are not applicable to proceedings under Art. 226 in the absence of Rules made under Art. 225 to that effect.<sup>1</sup>

II. There is, however, considerable force in the other point of view that once the proceeding under Art. 226 (subject to exceptions) is held to be a civil proceeding, s. 141 of the C. P. Code would be attracted so that the provisions of O. 1, r. 1 of the Code would *inter alia*, apply to such proceed-

4. *B. I. Corpn. v. Industrial Tribunal*, A. 1957 S.C. 354 (357).

5. *Udit Narain v. Board of Revenue*, A. 1963 S.C. 786 (790).

6. *Udit Narain v. Board of Revenue*, A. 1963 S.C. 786.

7. *Bhawanarayan v. R. K. Mission*, A. 1958 Pat. 653 (654).

8. *Ibrahim v. Dy. C. T. O.*, A. 1966 Mad. 626, *In re Gopalakrishnatarao*, A. 1957 Andhra 88; *Bankim v. Commr.*, A. 1958 Pat. 314 (319).

9. *Rainbow Dyeing v. Industrial Tribunal*, A. 1959 Mad. 173; *Uma Shankar v. Divisional Supdt.*, A. 1960 All. 366; *Khem Karan v. State of U. P.*, A. 1966 All. 255.

10. *United Motors v. State of Bombay*, (1952) 55 Bom. L.R. 246 [question not raised on appeal in *State of Bombay v. United Motors*, (1953) S.C.R. 1069].

11. *N. C. Upadhyaya v. State of U. P.*, A. 1965 All. 356 (360).

12. *Adinarayana v. State of A. P.*, A. 1958 A.P. 16; *Manindra v. Baranagore Municipality*, A. 1956 Cal. 291; *Quarabali v. Govt. of Rajasthan*, A. 1960 Raj. 152 (159).

13. *Mammi Corpn. v. Director*, A. 1965 Mys. 148.

14. *Shiv Singh v. S. T. A. T.*, A. 1969 All. 15.

15. *K. B. Mfg. Co. v. S. T. Commr.*, A. 1965 All. 517 (519).

ings unless excluded by specific rules framed by the High Court under Art. 226.<sup>16</sup>

### Applicability of the C. P. Code.

1. Once the proceeding under Art. 226 is held to be a civil proceeding,<sup>17</sup> s. 141 of the C. P. Code would be attracted to it.<sup>18,19</sup> In the result, the following provisions, *inter alia*, would be applicable:

(i) O. 1, r. 1 as to joinder of petitioners.<sup>19,20</sup>

But the mere fact that similar orders were passed in the case of other individuals also by the same authority does not mean that the injury caused is a common injury so as to justify a joint petition.<sup>21</sup>

(ii) O. 1, r. 8, so that the petition can be brought against some of the persons in their representative capacity, where the opposite parties are large in number.<sup>22,23</sup>

(iii) Orders 6-8, relating to pleadings,<sup>24</sup> including amendment.<sup>25</sup>

(iv) O. 9, r. 9,<sup>16</sup> r. 13.<sup>1</sup>

(v) Order 19, relating to affidavits.<sup>26</sup> (See, further, *below*).

(vi) As to the applicability of O. 47, r. 1, there has been some difference of opinion [see under 'Review', *post*].

2. On the other hand, the following provisions of the Code have been held to be *inapplicable* to proceedings under Art. 226—

(i) O. 2, r. 2.<sup>2</sup>

(ii) O. 2, r. 3.<sup>3</sup>

3. One writ petition would not lie for quashing assessment orders pertaining to two assessment years or two assessment orders under two different taxing statutes, even though the assessee and the assessing authority are the same.<sup>4</sup>

### No notice required under s. 80, C. P. Code.

A proceeding under Art. 226 not being a suit, the provision of s. 80, C. P. C. are not attracted to it.<sup>5</sup>

16. *Ramchand v Asandlal*, A. 1962 Guj 22 (24). [*Contra K B Mfg Co. v. S. T. Commr.*, A. 1965 All 517 (518)].

17. *Narayana v Ishwarlal*, A. 1965 SC 1818.

18. *Ramsingh v. State*, A. 1969 Raj 41 (47).

19. *Adinarayana v State of A. P.*, A. 1958 AP 16, *Manindra v. Baranagore Municipality*, A. 1956 Cal. 291, *Qurabali v. Govt. of Rajasthan*, A. 1950 Raj. 152 (159); *Sonaram v Central Govt.*, A. 1963 Punj 510.

20. The Allahabad High Court [*Uma Shankar v. Divisional Superintendent*, A. 1960 All. 366, *K. B. Mfg Co. v S T C.*, A. 1965 All. (518)], differs on the ground that the jurisdiction under Art. 226 is a special jurisdiction to which the technical rule of the C. P. C. should not be imported.

21. *Ibrahim v Dy. Commercial Tax Officer*, A. 1956 Mad. 626.

22. *Bijoy Ranjan v. Das Gupta*, A. 1953 Cal. 289; *Pramatha v. Chief Justice*, A. 1961 Cal. 545 (547).

23. The contrary decision in *Ibrahim v. Dy. Commercial Tax Officer*, A. 1956 Mad. 626, it is submitted, does not appear to be sound.

24. *Bazborua v. State*, A. 1955 Assam 161; *Joseph v. Excise Commr.*, A. 1953 T.C. 146.

25. *Manojkumar v. Collector of Customs*, A. 1953 Cal. 753.

1. *Taxi Assocn. v. Appellate Transport Authority*, A. 1963 Raj. 201.

2. *Devendra v. State of U. P.*, A. 1962 S.C. 1334; (1962) Supp. (1) S.C.R. 315.

3. *K. B. Mfg. Co. v. S. T. Commr.*, A. 1965 All. 517 (519).

4. *Cosmopolitan Club v. Deputy Commercial Tax Officer*, A. 1962 Mad. 914.

**Power to dismiss application in limine.**

(A) 1. Though the High Court possesses the power to dismiss an application under Art. 226 *in limine*, when it discloses no substance, the power should be cautiously used<sup>5</sup>

2. Dismissal *in limine* would not be justified—

(a) Where the Petition raises arguable issues or questions of importance,<sup>6</sup> particularly, constitutional questions.<sup>6a</sup>

The fact that one of the High Courts has taken a view in favour of the Petitioner indicates that the Petition raises an arguable question.<sup>7</sup>

(b) Where allegations of facts are made to establish *mala fides*<sup>8-9</sup> or want of jurisdiction,<sup>10</sup> which, unless controverted by the other side, would support the Petitioner's case, or where the Petitioner produces *prima facie* materials in support of his case, e.g., where he challenges an order of termination of his services on the ground that the post has been abolished, by producing the letter of appointment which shows that the post was permanent.<sup>11</sup>

(c) Where it *prima facie* appears that a fundamental right has been infringed, even though evidence has to be taken on some disputed question of fact.<sup>12</sup>

(d) Where it *prima facie* appears that action is being taken under an unconstitutional law, or arbitrarily without the sanction of law, even though the Petitioner has not availed of an alternative statutory remedy.<sup>13</sup>

3. Even where the affidavit filed by the Petitioner is defective, the Court should, instead of rejecting the Petition *in limine*, give the Petitioner a reasonable opportunity to file a better affidavit.<sup>7</sup>

4. Sometimes, instead of dismissing a petition under Art. 226 *in limine*, the Court issues the *Rule nisi* only on limited grounds, but in such a case, the Court hearing the case on the merits is not precluded from considering grounds other than those on which the *Rule nisi* was issued, provided they are in the Petition and proper opportunity is given to the other party for meeting those grounds.<sup>14,15</sup>

5. Appeal lies to the Supreme Court against an order of dismissal *in limine* under Art. 132, 133<sup>16</sup> or 136.<sup>17</sup>

6. In an appeal against an order of dismissal *in limine*, the jurisdiction of the appellate Court extends to and is limited to the grounds taken in the Petition under Art. 226.<sup>18</sup>

In other words, the appellate Court goes into the merits of the Petition and if the appellant fails to substantiate those grounds, the appeal is dismissed. If, on the other hand, the Court finds that there is a *prima facie* case, but further evidence has to be taken, the Court would remit the case

5. *Pratap v. Chief Commr.*, (1969) S.C. [C.A. 1097/66, A. 21 1-69].

6. *Himansu Kumar v. Jyoti Prakash*, A. 1964 S.C. 1936 (1961).

6a. *Hanif v. State of Assam*, (1969) 2 S.C.C. 782 (785).

7. *Dwarka v. P. T. O.*, (1965) 11 S.C.A. 868 (879).

8. *Ram Saran v. State of Punjab*, (1963) S.C. [C.A. 36 63, d. 16-9-63].

9. *B. I. Corp. v. Industrial Tribunal*, A. 1957 S.C. 354 (356); (1956) S.C.R. 154

10. *M. P. Industries v. I. T. O.*, (1965) 2 S.C.R. 241 [C.A. 161/64, d. 8-4-65].

11. *Saksena v. State of J. & K.*, (1969) S.C. [C.A. 873/65, d. 7-3-69].

12. *Cf. Kochunni v. State of Madras*, A. 1959 S.C. 725.

13. *Tata E. & L. Co. v. Asstt. Commr.*, A. 1967 S.C. 1401 (1403).

14. *Mahananda v. Umachetan*, (1964) 68 C.W.N. 179.

15. *E. R. E. Congress v. General Manager*, A. 1965 Cal. 389 (391).

16. *Cf. Sharma v. State Bank of India*, A. 1967 S.C. 985 (988); *Ramesh v. Gendalal*, A. 1966 S.C. 1445 (1448).

17. *B. I. Corp. v. Industrial Tribunal*, A. 1957 S.C. 354.

18. *Gurben v. State of Punjab*, A. 1967 S.C. 502.

to the trial Court for further consideration after issuing a Rule and allowing the parties to put in the evidence required.<sup>19-20</sup> But if no further evidence is required, the Supreme Court may itself allow the petition under Art. 226 on its merits, instead of remanding it for hearing.<sup>21</sup>

(B) On the other hand, a dismissal *in limine* would be justified—

Where the point raised in the Petition could be decided by the statutory appellate authority, and yet the Petitioner does not, in his Petition, give any explanation as to why he did not resort to the statutory remedy.<sup>22</sup>

### If any new point may be raised at the hearing.

1. The general rule is that a ground which has not been specifically taken in the application or the return shall not be allowed to be urged at the hearing.<sup>23-24</sup> A question of fact must be specifically pleaded, to enable the respondent to make a reply.<sup>25</sup>

To permit a party to make a new case, on facts, at the stage of arguments, without such amendment of pleading, causes injustice to the other party.<sup>26</sup>

2. To the above general rule, exception is made in respect of—

(i) Grounds based on facts which are clearly on the record.<sup>1</sup>

(ii) A plea going to the root of the jurisdiction of the inferior tribunal which is based on a decision of the High Court (or Supreme Court) which was delivered subsequent to the filing of the writ petition.<sup>2</sup>

(iii) A pure question of law.<sup>3</sup>

(iv) The State supporting the validity of a law on a new ground.<sup>4</sup>

3. Though ordinarily a Petitioner should not be permitted to raise a question which depends on facts which were not mentioned in his petition but were put forward in a rejoinder to which the respondents had no opportunity to reply,<sup>5-7</sup> the Court has, in some cases, directed that a plea of contravention of natural justice, which was taken in the affidavit in rejoinder, should have been entertained, because 'when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned order was that he had not been given a chance to show cause.....'.

4. Even where a ground was not taken initially or the Rule nisi was not issued on such ground, the Court is not powerless to entertain it at the hearing provided opportunity is offered to the other party to meet the new ground.<sup>8</sup>

19. *Tata E. & L. Co. v. Asst Commr.*, A. 1967 S.C. 1401 (1404).

20. *M. P. Industries v. I. T. O.*, (1961) 2 S.C.R. 241.

21. *Cj. Majallal v. Dist. Commr.*, (1966) 3 S.C.R. 40.

22. *Gita Devi v. C. I. T.*, (1969) S.C. [C.A. 1619/66, d. 31-7-69].

23. *Tropical Ins. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519), *Birajmohan v. State of Orissa*, (1962) S.C. [Petr. 117/61].

24. *Hamdard Dawakhana v. Union of India*, A. 1966 S.C. 1167 (1167).

25. *Municipal Corpn. v. State of M. P.*, (1962) S.C. [C.A. 212-62].

1. *Nagpur Corpn. v. N. E. L. & P. Co.*, A. 1958 Bom. 498 (506).

2. *Sharma v. Sri Krishna*, A. 1959 S.C. 396 (412).

3. *Arunachalam v. Southern Roadways*, A. 1960 S.C. 1191. [But even a point of law was not entertained in *Biraj Mohan v. State of Orissa*, (1962) 2 S.C.D. 546 (552)].

4. *Barrakar Coal Co. v. Union of India*, A. 1961 S.C. 954 (963).

5. *Subramania v. State of Madras*, A. 1965 S.C. 1578 (1582); *Barium Chemicals v. Company Law Board*, A. 1967 S.C. 295.

6. *Mohamada v. Law*, (1964) 68 C.W.N. 179; *Sheikh v. Collector of Customs*, A. 1966 Cal. 237.

### Whether evidence can be taken in a proceeding under Art. 226.

1. In a number of cases it has been held<sup>7,8</sup> that an application under Art. 226 is to be determined on admitted facts or on facts established by affidavits; and that the court may, in its discretion, refuse to take evidence to determine disputed questions of fact.

2. But the Supreme Court has held<sup>9</sup> that in a proceeding under Art. 32, the Court is not debarred from determining disputed questions of fact by taking evidence [p. 228, *ante*] inasmuch as fundamental rights are affected. It follows that the same principle should apply to those proceedings under Art. 226 where *fundamental rights* are involved.

In an appeal from a proceeding for *habeas corpus*, under Art. 226, thus, the Supreme Court has held that evidence can and should be taken, if required by the Court, e.g., in the case of private detention where the claim of the Petitioner that he is the husband of the woman to be recovered is disputed.<sup>10</sup>

The readiness of the Court to enter into a determination of disputed facts would not, however, go to the length of deciding a question as to title to property which can be investigated only in a regular suit or other proceeding authorised by the law.<sup>11</sup>

3. Outside the sphere of fundamental rights, it has been held that a suit and not an application under Art. 226 is the proper remedy to determine disputed facts such as—

Whether the Petitioner is a foreigner under the Foreigners Act, 1946<sup>7</sup>

The reluctance of the Court to receive evidence in a proceeding under Art. 226 is, however, a rule of practice and not of jurisdiction. In the words of the Supreme Court—

"All procedure is always open to a Court which is not expressly prohibited and no rule of the Court has laid down that evidence shall not be received, if the Court requires it".<sup>10</sup>

Though the foregoing observation was made in a proceeding for *habeas corpus*, there is no reason why it should not apply to proceedings for any other writ under Art. 226. Thus, the Court may take evidence in a proceeding for *mandamus*, where *mala fides* is alleged.<sup>12a</sup>

### How far finding of fact may be reviewed.

1. In a proceeding under Art. 226, the High Court cannot sit as a court of appeal over the findings recorded by a competent inferior tribunal to reappreciate the evidence for itself<sup>12</sup> or to correct an error of fact (not going to jurisdiction), however apparent it might be,<sup>13</sup> on the ground that the evidence on which it was based was *not satisfactory* or *sufficient*,<sup>15,17</sup> par-

7. *Sohan Lal v. Union of India*, A. 1957 S.C. 559, *Union of India v. Verma*, A. 1957 S.C. 883, *Thansingh v. Suddi of Taxes*, A. 1961 S.C. 1119 (1423); *Union of India v. Ghans*, A. 1961 S.C. 1526.

8. *Standard Mills v. Ramalingam*, (1964) S.C. [C.A. 21/64, 17-11-64]

9. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

10. *Ikram v. State of U. P.*, A. 1964 S.C. 1625 (1632).

11. *Bokaro v. State of Bihar*, A. 1963 S.C. 516.

11a. *B. J. Corpn. v. Industrial Tribunal*, A. 1957 S.C. 355.

12. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

13. *Ambica Mills v. Bhatt*, A. 1964 S.C. 970 (973).

14. *Yekood v. Radhakrishnan*, A. 1961 S.C. 477.

15. *State of Orissa v. Murlidhar*, A. 1963 S.C. 404 (406).

16. *State of Madras v. Sundaram*, A. 1965 S.C. 1103 (1105).

17. *State of A. P. v. Rama Rao*, A. 1963 S.C. 1723 (1726).



ticularly when the finding of the inferior authority is 'final' under the statute.<sup>17a</sup>

2. On the other hand,—

The High Court may interfere with a finding of fact—

(i) If it is on a 'jurisdictional fact'<sup>18</sup> to decide which it is not vested with final jurisdiction.<sup>19</sup>

If it is shown that the finding is not supported by any evidence;<sup>14, 17</sup> or that the Tribunal has refused to admit material evidence or has admitted inadmissible evidence which has influenced the impugned finding;<sup>14</sup> or that the finding is 'perverse' or based upon a view of facts which could never be reasonably entertained.<sup>18a</sup>

3 The only inquiry which the High Court can make under Art. 226, on the present point, therefore, is whether there was any evidence at all, which if believed, would sustain the charge before the Tribunal or the finding arrived at by it.<sup>20</sup>

### Reliefs not available in a proceeding under Art. 226.

1 Though the jurisdiction of *our* High Courts is not confined to issuing the Prerogative writs, there is a consensus of opinion that the Court will not permit this extraordinary jurisdiction to be converted into a suit<sup>21</sup> or criminal proceeding<sup>22</sup> under the ordinary law, so as to grant the following reliefs—

(i) A declaration of title to property.<sup>21, 21, 24</sup>

But the Court would enter into the question whether the State was entitled to resume the Petitioner's lands by virtue of a term in the lease granted by the Secretary of State, where important constitutional questions were raised.<sup>25</sup>

(ii) A petition under Art. 226 is not normally entertained to enforce a civil liability arising out of a breach of contract or a tort<sup>1</sup> to pay an amount due to the claimant.<sup>2</sup>

But an order for payment of money may sometimes be made on a petition under Art. 226 against the State or against an officer of the State to enforce a statutory obligation,<sup>2</sup> *e.g.* an order of refund of a tax illegally collected,<sup>2</sup> or penalty illegally realised<sup>3</sup> (see *below*).

Again, though normally a decree for money cannot be passed in a proceeding under Art. 226<sup>2</sup> the Court may issue a *direction* to the State to pay compensation to the Petitioner for goods requisitioned by the State under an unconstitutional statute and then disposed of,<sup>4</sup> or to pay full salary during a period of wrongful dismissal of a Government employee, but not in the absence of necessary pleading and prayer.<sup>2</sup>

17a. *Sri Krishna Mills v. Jt. Director*, (1965) S.C. [C.A. 1026/63, d. 27-1-65].

18. *State of M. P. v. Jagan, A.* 1968 S.C. 1186 (1190).

19. *Kamla Mills v. State of Bombay, A.* 1965 S.C. 1942.

19a. *Thansingh v. Supdt. of Taxes, A.* 1965 S.C. 1419 (1423).

20. *State of Madras v. Sundaram, A.* 1965 S.C. 1103 (1105).

21. *Sohan Lal v. Union of India, A.* 1957 S.C. 529 (531).

22. *Ram Singh v. State, A.* 1952 Pepsu 136.

23. *Rustomji v. Corpn. of Calcutta*, (1965) S.C. [C.A. 630/65, d. 23-11-65].

24. *State of Orissa v. Ram Chandra, A.* 1965 S.C. 685.

25. *Hamit v. State of Assam*, (1969) S.C. [C.A. 1378/66, d. 3-9-69].

1. *Kishore v. Dy. Commr.*, A. 1965 Awwam 183.

2. *Burmah Construction Co. v. State of Orissa, A.* 1962 S.C. 1320.

3. *Universal Imports Agency v. Chief Controller, A.* 1961 S.C. 41 (48).

4. *State of Rajasthan v. Nathmal*, (1954) S.C.R. 962, affirming *Nathmal v. Commr. of Civil Supplies, A.* 1952 Raj. 74.

(iii) A declaration that a contract of service with the Petitioner still subsisted will not be made in the sphere of an ordinary relationship of master and servant or of a contract of service, not protected by any statutory<sup>5a</sup> or constitutional provisions, because of the principle that Courts do not grant specific performance of contracts of service.<sup>5b</sup>

2. A judicial order cannot be set aside under Art. 226 on the ground that it affects a fundamental right.<sup>6</sup> A judicial order can be challenged in appeal but relief under Art. 32 or 226 cannot be had against it on the ground that it affects the fundamental rights of the Petitioner.<sup>6</sup>

The foregoing principle has been applied to quasi-judicial orders,<sup>7-9</sup> provided they are within jurisdiction,<sup>7-9</sup> or *intra vires*, substantively as well as procedurally.<sup>10</sup>

3. The Court will not enforce any administrative Manual or other administrative instructions, not having any statutory force.<sup>11</sup>

But the Court will interfere where the Government issues non-statutory instructions to interfere with the exercise of statutory powers by public officials.<sup>12</sup>

4. Where the Court holds that a petition under Art. 226 is not maintainable, it cannot grant any interim relief in the nature of an injunction for the purpose of enabling the applicant to bring a suit and to obtain similar order from the Civil Court.<sup>13</sup>

5. The Court will not sit as a court of appeal over the inferior tribunal and make an order of its own in substitution of the order complained of.<sup>14</sup>

### Appeal.

I. Appeal lies to a Division Bench from the order of a Single Judge in an application under Art. 226, provided such order constitutes a 'judgment' within the meaning of the Letters Patent.<sup>15</sup> For instance, an order dismissing an application for review of an order of dismissal of an application under Art. 226 has been held to be a 'judgment'.<sup>16</sup>

II. Art. 133 (3) bars an appeal to the Supreme Court direct under that Article, from the decision of a Single Judge so that a Single Judge cannot grant a certificate under Art. 133 (1) (c). But it is competent for a Single Judge to grant a certificate for appeal to the Supreme Court under Art. 132 (1) and the Supreme Court has entertained appeal on such certificate.<sup>17, 18</sup>

III. From the decision of a Division Bench, either original or appellate,

5a. *Tewari v. Dt. Board*, A. 1961 S.C. 1680.

5b. *Boal Chand v. Kurukshetra University*, A. 1968 S.C. 292 (196); *Praga Tools Corpn. v. Imanul*, A. 1969 S.C. (Notes 208).

6. *Narish v. State of Maharashtra*, A. 1967 S.C. 1 (11-12).

7. *Patbhani Transport Soc. v. R. T. A.*, A. 1960 S.C. 801.

8. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621.

9. *Kunhamina v. Min. of Rehabilitation*, A. 1962 S.C. 1616.

10. *Sinha Govindji v. Deputy Chief Controller* (1962) 1 S.C.R. 540.

11. *Routther v. S. T. A. T.*, A. 1959 S.C. 896 (899); *Joint Chief Controller v. Aminchand*, A. 1966 S.C. 478; *State of Assam v. Ajit Kumar*, A. 1965 S.C. 1196 (1200).

12. *State of Punjab v. Surai*, (1962) 2 S.C.R. 718.

13. *State of Orissa v. Madan Gopal*, (1962) S.C.R. 28; *State of Orissa v. Ramchandra*, A. 1964 S.C. 695.

14. *Veerappa v. Raman*, A. 1952 S.C. 192 (1956).

15. *Cf. Catter v. Fernandez*, A. 1957 S.C. 336 (328).

16. *Cf. N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232 (234).

17-18. *Cf. Election Commission v. Venkata*, (1953) S.C.R. 1144 (1149).

appeal lies to the Supreme Court under Art. 132 (1)<sup>1, 6</sup> (provided a question of constitutional interpretation is involved);<sup>7</sup> Art. 133 (1) (c);<sup>8</sup> Art. 134 (1) (c)<sup>9</sup> or Art. 136<sup>10</sup>

### Period of limitation for appeal from decision of Single Judge to Division Bench.

The period of limitation prescribed by Art. 117 of the Limitation Act, 1963, is thirty days from date of decree or order

### Review.

I Clerical errors may be removed from a judgment, whether in a civil [s 152, C P C] or in a criminal proceeding [s 369, Cr. P C]

II Apart from the above, a Court has no inherent power to review its own decisions. The power of review, like that of appeal, must be conferred by statute<sup>11, 12</sup>. This is why the Federal Court refused to review its judgments<sup>13</sup> and the framers of our Constitution had to insert a specific provision [Art 137, see *ante*] in order to enable the Supreme Court to review its judgments

There being no corresponding provision in the Constitution with respect to the High Court, it was held in some cases<sup>11, 14</sup> that the authority for a power of review for orders under Art. 226 must be drawn from statutory provision if any, and that since the Criminal Procedure Code does not contain any provision for review, in those proceedings under Art. 226 which are regarded as criminal proceedings, such as for *habeas corpus*, no review was available<sup>11, 14</sup>

As regards those proceedings such as *mandamus* or *certiorari*, which are of a civil nature there was a difference of opinion as to the availability of review under O 47, r 1 C P C. The Madhya Bharat High Court<sup>15</sup> held that s 141 only extends the procedural provisions of the Code to proceedings other than suits and does not confer a substantive right of review. On the other hand it was held by the Bombay<sup>16</sup> Calcutta<sup>17</sup> and Madras<sup>18</sup> High Courts that the proceedings for these writs being civil proceedings of original nature, O 47, r 1 would be attracted by the operation of s 141 of the Code

III. The controversy has since been settled by the Supreme Court,<sup>19</sup> holding that the High Court has, under Art 226, an inherent power of review, apart from statutory conditions,

"which inhere in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it"

1-6 *State of Rajasthan v. Pratap*, A. 1960 SC 1208; *Sudhanussekhar v. State of Orissa*, A. 1961 SC 196; *Kameshwar v. State of Bihar*, A. 1962 SC 1166

7 *B. B. L. & T. Merchants' Assocn v. State of Bombay*, A. 1962 SC 486 (488)

8 *Registrar v. Dharam Chand*, A. 1961 SC 1743; *Harish Chandra v. L. N. A. Officer*, A. 1961 SC 1500; *Dennagree Cotton Mill, v. Dy Commr.*, A. 1961 SC 1441; *Jaganmuth v. State of Orissa*, A. 1961 SC 1361

9 *Cf. State of Bihar v. Kameshwar*, A. 1965 SC. 575; *Madan v. State*, A. 1962 Cal. 122

10 *Sarupchand v. Union of India*, A. 1959 SC 1207; *Akshaihar v. Vice-Chancellor*, A. 1961 S.C. 619; *Chief Inspector v. Karam Chand*, 1961 S.C. 838 [to quash criminal proceedings on the ground that the Regulations for the breach of which the Petitioner has been prosecuted offended against Art. 20 (1)].

11-12. *Prahlad re.*, A. 1961 Bom. 25 (F.B.).

13. *Prithul Chand v. Sukhray*, A. 1941 F.C. 1.

14. *Venkatarama, in re.*, A. 1951 Mad. 611.

15. *Sulaiman v. Custodian*, A. 1955 M.B. 108.

16. *Awate v. Fernandez*, A. 1959 Bom. 486.

17. *Dilip v. Certificate Officer*, A. 1962 Cal. 346.

18. *Chenchamma v. P. S. T.*, A. 1963 Mad. 39.

19. *Shinde v. State of Punjab*, A. 1963 S.C. 1909 (1911).

The High Court may, accordingly, review its order under Art. 226 when it affected persons who were not parties to the proceeding.<sup>19</sup>

### Res Judicata: whether second application lies.

1. Where a petition under Article 226 is dismissed *on the merits* it operates as *res judicata* and bars a fresh petition under Article 226, even where it is passed without hearing the other party.<sup>20-24</sup>

2. But a second petition under Article 226 would be entertained—

- (a) If the petition is dismissed as withdrawn, because in such case there has been no decision on the merits;<sup>25</sup>
- (b) where the petition is dismissed in limine, without passing a speaking order that is to say without giving any reason whatsoever, or without making any pronouncement on the merits;<sup>26</sup>
- (c) where the petition has been rejected on the ground that the petitioner had no *locus standi*;<sup>27</sup>
- (d) where the petition has been rejected on the ground that it was *premature*;<sup>28</sup>
- (e) where the petition has been dismissed on the ground of *delay* or that there was an alternative remedy;<sup>29</sup>
- (f) where the petition has been dismissed on the ground that it involved questions which could properly be adjudicated in a suit;<sup>30</sup>
- (g) where the cause of action is different;
- (h) where the statute upon which the previous decision was based has been changed on the material point.<sup>31</sup>

3. In proceedings under Art. 226, the bar of *res judicata* applies only where there has been an actual decision on the merits. The doctrine of constructive *res judicata* is not an essential part of the doctrine of *res judicata*, but a technical content of s. 11 of the C. P. Code, which may not, in terms, extend to a proceeding under art. 226.<sup>32</sup>

It follows that the decision in an assessment proceeding for one period would not constitute *res judicata* in a proceeding for a different period.<sup>33</sup>

4. This does not mean, however, that a party is at liberty to bring more than one application under Art. 226 challenging an assessment order relating to the same period, including some additional grounds each time.<sup>34</sup>

Similarly, where a writ petition impugning the Petitioner's detention is dismissed, the Petitioner cannot be permitted to re-agitate the same contentions in a subsequent writ petition, when no new circumstances have arisen justifying their re-agitation.<sup>35</sup>

In short, where there has been a decision on the merits, the rule of constructive *res judicata* will be applicable to bar a second application founded on the *same cause of action*.<sup>36</sup>

20. *Daryao v. State of U. P.*, A. 1961 SC 1457.

21. *Makhanlal v. State of W. B.* A. 1963 Cal. 6.

22. *Bhagwati v. Government of U. P.*, A. 1959 All. 589-592.

23. *Sural Kumar v. Chauri*, A. 1966 Punj. 157.

24. *Joseph v. State of Kerala*, A. 1965 SC 1514 (1515).

25. *Anwar v. State of M. P.*, (1965) SC [WP 38, 65].

25a. *Amritsar Municipality v. State of Punjab*, A. 1969 SC 1100 (1104).

1. This broad statement seems to have been limited by *Devilal v. S. T. O.*, A. 1966 SC 1150.

2. *Amalgamated Coalfields v. Janapada Sabha*, A. 1964 SC 1013 (1963) Supp. (1) SC.R. 172.

3. *Devilal v. S. T. O.*, A. 1965 SC 1150.

4. *Lakhanpal v. Union of India*, A. 1967 SC 908 (915).

5. *Gulabchand v. State of Gujarat*, A. 1965 SC 1153 (1166). [See, however,

*Kapurchand v. Tax Recovery Officer*, (1968) SC. [C.A. 1318/66, d. 14-8-68].

### Whether judgment of High Court under other jurisdiction bars application under Art. 226.

The Supreme Court has held that when a question has been agitated before the High Court in other jurisdiction, e.g., in a reference under the Income-Tax Act,<sup>6</sup> or in exercise of its revisional jurisdiction under the C. P. Code,<sup>7</sup> it cannot be re-agitated in a petition under Art. 226.

### Whether judgment under Art. 226 bars application under Art. 32.

1. The Supreme Court has held that where an application under Art. 226 has been disposed of on the merits, the decision would operate as *res judicata*, so as to bar even an application on the same grounds to the Supreme Court, under Art. 32.<sup>8</sup>

2. This would be the result also where the High Court has dismissed the application *in limine*, without issuing notice on the opposite party, provided the order of the Court is a speaking order on the merits.<sup>9</sup> The Petitioner's only proper remedy, in such a case, would be to come to the Supreme Court in appeal.<sup>10</sup>

### Whether decision under Art. 226 bars appeal under Art. 136.

The Supreme Court has held that, in the exercise of its discretion, the Court would refuse to entertain an appeal by special leave under Art. 136 against the order of an inferior tribunal where the High Court has refused to interfere with that order under Art. 226, after a hearing on the merits, and the Petitioner has allowed that decision to be final as between the parties, by not preferring an appeal against that decision of the High Court.<sup>11</sup>

### Whether a decision under Art. 226 will bar a suit by *res judicata*.

1. The Supreme Court has held<sup>12, 13</sup> that when a question has been decided on the merits in a proceeding under Art. 226, the same question cannot be agitated in a suit even though the *reliefs* sought for in the suit must necessarily be different. Thus,

Where appropriate writs were prayed for in an application under Art. 226 on the finding that the petitioner's liability as surety stood discharged on account of the State's interference with the liability of the principal debtor, and there has been a decision on the merits, a suit will be barred to obtain a declaration to the same effect.<sup>14</sup>

2. But no *res judicata* would arise if the issues are different.<sup>15</sup>

### Non compliance with writ.

Non-compliance with a writ or order issued under Art. 226 constitutes contempt<sup>16</sup> of Court.

But a violation of the Court's order, in order to constitute contempt, must be wilful<sup>17</sup> as distinguished from being 'casual, accidental or unintentional'.

6. *I. T. O. v. Fillaiah*, A. 1968 S.C. 260 (261).

6a. *Shankar v. Krishnaji*, A. 1970 S.C. 1 (4).

7. *Daryao v. State of U. P.*, A. 1961 S.C. 1457 (1464).

8. *Virudhachari Mills v. Madras Govt.*, A. 1968 S.C. 1196 (1198).

9. *Phool Chand v. Chandra Shankar*, A. 1965 S.C. 782 (784).

10. *Northern Ry. Co-operative Soc. v. Industrial Tribunal*, (1967) 11 L.L.J. 46 (51) S.C.

11. *Gulabchand v. State of Gujarat*, A. 1965 S.C. 1153 (1159), per Raghubar Dayal, Sarkar, Ayyangar & Mudholkar J.J. (Subba Rao J., dissenting).

12. *Union of India v. Nanak Singh*, A. 1968 S.C. 1370 (1372).

13. *Cf. Desai J. in Ram Kumar v. Baldev*, A. 1965 All. 572 (586); *Nowah Hussain v. State*, A. 1969 All. 466.

14. *Venkatamurthy, in re*, A. 1951 Mad. 611; *Mohichandra v. Secy., Local Self-Govt.*, A. 1953 Assam 61.

15. *R. K. Roy v. Chief Justice*, A. 1961 S.C. 1367 (1370).

tional.<sup>16</sup> Thus, there is no contempt if the person who has violated the order had no knowledge of it.<sup>15</sup>

If, however, the alleged contemner had knowledge of the order, it is no defence to say that "the act was not contumacious in the sense that there was *no direct intention* to disobey the order".<sup>17,18</sup> Hence, the mere fact that the allegation of contempt involves an interpretation of the relevant order of the Court does not excuse the disobedience, and the Court can punish for contempt, after a proper interpretation of the order.<sup>19</sup> If the administrative authority has any doubt as to the order of the Court or the injunction, it should ask for directions or a clarification from the Court itself,<sup>18</sup> instead of disregarding the order, after putting its own interpretation on it.<sup>20</sup>

It follows that even when an injunction has been improperly obtained<sup>21</sup> or is subsequently discharged,<sup>22</sup> it must be obeyed *while it lasts*.

#### Cl. (1): 'Including writs . . . . .'

1. These words in Art. 32 (2) and in Art. 226 (1), indicate that the powers of the Supreme Court or the High Court under these articles are not confined to issuing prerogative writs only. The present Article, thus, vests the High Courts with all the powers of the English High Court of justice to issue the prerogative writs under the Common Law<sup>23,24</sup> and something more,<sup>1,7</sup> irrespective of what is laid down in s. 491 of the Cr. P. Code or s. 45 of the Sp. Rel. Act.

2. The words 'directions, orders . . . .' in Arts 32 (1) and 226 (1) empower the supreme Courts as well as the High Courts to issue directions or orders in the nature of *habeas corpus* etc., even though such direction may not strictly conform to any of the writs as they are known at English common law, provided the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law are observed.<sup>8</sup> Thus—

(i) Though a writ of Prohibition will not issue against an executive authority, a prohibitory order would be issued where the action of the executive authority is *ultra vires*.<sup>2</sup>

(ii) When fundamental rights are affected, the Court can even make a declaratory order if that is the proper relief to be given to the aggrieved party.<sup>9</sup> [See also p. 407, *ante*.]

#### 'Throughout the territories in relation to which it exercises jurisdiction'.

The present Article confers power to issue the writs,—irrespective of what powers the High Court had prior to the Constitution,—throughout the limits of the entire territory over which the High Court exercises its jurisdiction,—*original or appellate*.<sup>11</sup> In short, the object of Art. 226 is to

16. *Fairclough v. Manchester Canal Co.*, (1897) W.N. 7 (C.A.).

17. *Stancomb v. Trowbridge U. D. C.*, (1910) 2 Ch. 190 (94).

18. *Hudkinson v. Hudkinson*, (1952) 2 All E.R. 567 (569).

19. *Lyon v. Goddard*, (1850) 3 Mac. & G. 104 (117); *Lenton v. Tregoning*, (1960) 1 All E.R. 717 (C.A.).

20. *Eastern Trust Co. v. McKenzie, Mann & Co.*, (1915) A.C. 750 (759).

21. *Drewry v. Thacker*, (1819) 3 Swan. 529 (546); *Chuck v. Gremer*, (1846) 47 E.R. 820.

22. *Eastern Trust Co. v. McKenzie, Mann & Co.*, (1915) A.C. 750 (759).

23-25. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372; *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 (572); (1950-1) C.C. 61 (63).

1-7. *Walker v. Kshitish*, (1952) 55 C.W.N. 423 (627).

8. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

8a. *Carl Stull v. State of Bihar*, A. 1961 S.C. 1615.

9. *Kochuni v. State of Madras*, A. 1959 S.C. 725.

10. *Rashid Ahmad v. Municipal Board*, 250; A. 1954 S.C. S.C. 440; *Satyanarayan v. Malabarjan*, A. 1960 S.C. 133 (138).

remove the fetters that were imposed by such legislation as s. 491 of the Cr. P. C. and s. 45 of the Specific Relief Act upon the power of the High Courts to issue the prerogative writs and to place all the High Courts of India at par with one another.<sup>10</sup>

But wide as are the powers thus conferred, a two-fold limitation is placed upon its exercise—(a) the power is to be exercised 'throughout the territories' that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction; (b) the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories', which clearly implies that they must be amenable to its jurisdiction either by *residence* or *location* within those territories,<sup>11</sup> or the cause of action arises, wholly or in part, within those territories, as provided for in cl. (1A), [p. 403, *ante*].

### 'To any person.'

1. These words mean to any person to whom according to well-established principles, the writs lay.<sup>12-13</sup>

2. When a person's fundamental right is infringed by a private person, his remedy lies by an action under the ordinary law and not by a writ<sup>14</sup> [see p. 220, *ante*].

3. 'Person' includes any company or association or body of individuals, whether 'incorporated or not [s. 3 (39), General Clauses Act, 1897]. Hence, a writ under Art. 226 can be issued against bodies like a State Medical Faculty,<sup>15</sup> the Syndicate of a University or the University itself.<sup>16</sup> Arbitrator appointed under s. 10A of the Industrial Disputes Act.<sup>17</sup>

### 'Any person or authority.'

This expression is wide enough to include (a) all Courts and tribunals situated within the territorial jurisdiction of the High Court, whether such Courts or tribunals are subject to the *appellate jurisdiction* of the High Court or not;<sup>18</sup>

(b) Other authorities even though they may not be 'tribunal' under Art. 136.<sup>17</sup>

### Whether writ lies against the High Court itself.

1. The High Court, acting in its *judicial capacity*, cannot be said to be an authority subject to the jurisdiction of the High Court itself under Art. 226.<sup>19</sup> This immunity has been extended to a Judge acting as an arbitrator in a suit, where the parties authorise him to act as the sole arbitrator on all questions involved in the suit.<sup>20a</sup>

2. But when the High Court or any of its Judges<sup>20</sup> acts in an *administrative capacity*, a writ under Art. 226 shall lie against such decision or order, e.g.,—

(a) When the High Court takes disciplinary proceedings against a member of its staff.<sup>21</sup>

11. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

12. *Carlsbad Co. v. Jagtani*, A. 1952 Cal. 315 (218).

13. *Indian Tobacco Corp. v. State of Madras*, A. 165 Mad. 549.

14. *Shamdasani v. Central Bank*, A. 1952 S.C. 59.

15. *B. C. Dasgupta v. Bejoy*, (1952) 56 C.W.N. 861.

16. *Jagdish v. University of Punjab*, A. 1952 Punj. 396; *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 861.

17. *Engineering Mazdoor Sabha v. Hind Cycles*, A. 1963 S.C. 874 (881).

18. *Motilal v. State*, A. 1952 All. 963 (966).

19. *Devasahayam v. State of Madras*, A. 1958 Mad. 53 (68).

20a. *Arali v. Registrar, O.S.*, (1959) 2 S.C.C. 756.

20. *Hingman v. Jyoti Prakash*, A. 1964 S.C. 1636.

21. *Cl. Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1352) [*obiter*].

(b) Where the High Court refixes the seniority of subordinate judicial officers.<sup>22</sup>

(c) Where a High Court Judge acts as Industrial Tribunal.<sup>23</sup>

(d) Where the High Court settles its holidays and days of sitting.<sup>24</sup>

(e) Where the Chief Justice refuses to allow a sitting Judge to function.<sup>25</sup>

### 'Any Government within those territories.'

1. The word 'Government' has been specifically mentioned in order to obviate any controversy as to whether it would be covered by the preceding words 'person' or 'authority'.

2. In some cases,<sup>26</sup> it has been suggested that where the right which is asserted by the Government in making the impugned order is not a right following from its sovereign powers, such as Eminent Domain Taxation or the like, but is a right founded on the general law, e.g. a contractual right or a right following from a lease to which the Government is a party, the High Court cannot interfere with such private rights of the Government, under Art. 226.

It is submitted that the above approach is not sound. Under modern conditions, when Government is entering into business like a private trader and also undertaking public utility services, many of its acts may be non-governmental, in the strict sense; but its action would nevertheless, be a 'State action' against which the individual should have his remedy, by way of a writ under Art. 226, provided of course that remedy is not excluded by other principles. The true principle of exclusion in cases of contract or lease is that in such cases determination of questions of facts on evidence is necessary<sup>26a</sup> and, therefore a suit or other proceeding under the general law would be an appropriate remedy, so that the Court would normally, refuse to exercise its discretionary jurisdiction under Art. 226. But even in such cases, the jurisdiction of the High Court to give relief in proper cases is not excluded.

### Whether writ lies against the Legislature.

The majority in the Reference Case<sup>27</sup> has held that--

(a) The jurisdiction under Art. 226 can in a proper case be exercised against the Legislature, e.g. where the detention by the order of a Legislature for contempt contravenes the fundamental right of a citizen (who is not a member of the House) under Art. 20 or 21.<sup>28</sup>

(b) A Legislature in India, cannot claim immunity from the preceding jurisdiction of a High Court by issuing a general warrant, i.e. a warrant which does not specify the cause of arrest or detention.<sup>29</sup>

(c) A Judge cannot be proceeded against for contempt of a Legislature for having exercised his jurisdiction under Art. 228 against a warrant issued by a Legislature or a conviction made by it, in the exercise of its privileges.<sup>30</sup>

22. *In re Hayles*, A. 1955 Mad. 1 (F.B.); *Gordon v Venugopal*, 1958 1 L.L.J. 300 (Mad.).

23. *Pramatha v. Chief Justice*, A. 1961 Cal. 545.

24. *Dhirendra v. State of W. B.*, A. 1956 Cal. 437; *Hanif v. State of Assam*, A. 1961 Assam 20 (22).

26a. *Burmah Construction Co. v. Orissa*, A. 1962 S.C. 1330; *Thansingh v. Supdt. of Taxes*, A. 1964 S.C. 1419 (1423); *Sohan Lal v. Union of India*, A. 1957 S.C. 558.

28. Ref. under Art. 143, A. 1955 S.C. (767; 788; 791).



**Jurisdiction extends over final as well as interlocutory orders.**

Art. 226, unlike Arts. 132-6, is not limited to 'final orders'. It extends to interlocutory orders also.<sup>1</sup> Of course, whether the High Court would interfere at the interlocutory stage has to be considered by the Court according to the circumstances of each case, before exercising its discretionary power.<sup>2</sup>

**'For any other purpose'.**

1. These words make the jurisdiction of the High Court to issue the writs more extensive than that of the Supreme Court inasmuch as these words are absent from Art. 32, and the Supreme Court may have the power for 'other purpose' only if such power is conferred by legislation (Art. 139). But Art. 226 confers upon the High Court power to issue the writs for the enforcement of Fundamental Rights as well as for 'other purposes'.

2. 'Other purpose' means any purpose other than enforcement of Fundamental Rights, i.e., the enforcement of some other *legal* right or the performance of some *legal* duty.<sup>3</sup> It thus *includes* the other purposes for which such writs or orders were available before the commencement of the Constitution or at English Common law.<sup>4</sup> Where the Court refuses to enter into the question whether there is any right, it cannot issue a writ under Art. 226.<sup>5</sup> Art. 226 does not authorise the Court to interfere in the matter of purely *political* rights.<sup>6</sup> It also follows that no writ under Art. 226 is, available where the Petitioner fails to establish a legal right belonging to himself.<sup>7</sup>

3. 'Any other purpose' means a purpose for which any of the writs could, according to well-established principles, issue. The words can hardly mean that the High Court can issue the writs for any purpose it pleases.<sup>8</sup> The object of including the power to issue the writs 'for any other purpose' is to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.<sup>9</sup>

4. The object of Art. 226 is not to supplant the ordinary right of action or the remedy prescribed by the ordinary law of the land.<sup>7</sup>

5. On the other hand, it would appear from the observations of the Supreme Court in *Kochunni v. State of Madras*<sup>8-25</sup> that where fundamental rights have been affected, the High Court, like the Supreme Court, would not be lacking in power to decide disputed facts on taking evidence, as in an original action, and even make a declaratory order, where that is the proper relief to be given to the aggrieved party.

**Proclamation of Emergency and Jurisdiction under Art. 226.**— See Art. 359, *post*

**HABEAS CORPUS****Habeas Corpus, nature of.**

1. It is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let

1. *Muthiah v. Ganesan*, (1958) M.L.J. 110.

2. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1047).

3. *Election Commn. v. Saka Venkata*, (1953) S.C.R. 1144.

4. *State of Orissa v. Madan Gopal*, A. 1952 S.C. 12.

5. *In re Ramamoorthi A.* 1953 Mad. 94.

6. *Sawarth Transport Co. v. R. T. A.*, A. 1961 S.C. 93 (95).

7. *Cf. Sohan Lal v. Union of India*, (1957) S.C.R. 738.

8-25. *Kochunni v. State of Madras*, A. 1969 S.C. 735.

the Court know on what ground he has been confined and to set him free if there is no legal jurisdiction for the imprisonment<sup>1</sup>

2. It is available for release from detention of an individual not only by the State but also by another private individual.<sup>2</sup>

### When habeas corpus does not lie.

1. If it appears on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for *habeas corpus*. Assuming that in such cases it is open to investigate the jurisdiction of the Court which convicted the Petitioner, the mere fact that the trial Court had acted without jurisdiction would not justify interference by *habeas corpus*, if the conviction had been upheld on appeal by a Court of competent jurisdiction; for, the appellate court is fully competent to decide whether the trial was with or without jurisdiction and it has jurisdiction to decide that question rightly as well as wrongly. Where the appellate court wrongly holds that the trial Court had jurisdiction, it cannot be said to have acted without jurisdiction and the order of the appellate court cannot be treated as a nullity.<sup>3</sup>

2. In *habeas corpus* proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceeding. Hence, if a fresh and valid order justifying the detention is made by the time of the return to the writ the Court cannot release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.<sup>4,5</sup>

3. When physical restraint is put upon a person under a law there is no right to *habeas corpus* unless the law is unconstitutional<sup>6</sup> or the order is *ultra vires* the statute.<sup>7</sup> But the Petitioner is entitled to challenge the constitutionality of the law in the *habeas corpus* proceeding and the Court is bound to release him if the law is held to be unconstitutional.<sup>8</sup>

4. Under Art. 226 a petition for *habeas corpus* would lie not only when a person is detained by the State but also when he is detained by another private individual, but no petition under Art. 32 would lie in the latter case, because Art. 32 does not apply unless a 'fundamental right' has been infringed<sup>9</sup> (see p. 222, *ante*).

### Whether a person released on bail is entitled to habeas corpus.

1. It was held by a Single Judge of the Allahabad High Court<sup>11</sup> that where the remedy of bail was available remedy under s. 491 of the C. P. C. should be refused. This proposition is no longer good in view of the Supreme Court decision in *Gohar v. State*.<sup>12</sup>

2. Even where an arrested person has been granted bail he is entitled to apply for *habeas corpus* to have the cause for his arrest inquired into.<sup>13,14</sup>

1. *State of Bihar v. Kameswar A.* 1956 SC 575, 577
2. *Ikram v. State of U. P.* A. 1964 SC 1525 (1621)
3. *Janardhan v. State of Hyderabad* (1951) SCR 311
- 4-6. *Naranjan v. State of Punjab*, (1932) SCR 395 (401); *Gobal v. Govt of India*, A. 1966 SC. 816 (818)
7. *State of Punjab v. Atal Singh*, (1953) SCR 254
8. *Makhan Singh v. State of Punjab* (1950) SCR 88
9. *Cf. Gopalan v. State of Madras*, (1950) SCR. 88.
10. *Vidya Verma v. Shrinarain*, (1956) SCA. 357.
11. *Mool Chand v. Emp. A.* 1948 All. 281
12. *Gohar v. Sugri*, A. 1960 SC. 93.
13. *Zahir v. Ganga*, A. 1963 All. 4.
14. *Zakural v. State*, A. 1960 M.B. 17.

The reason is that actual physical confinement or confinement in jail is not necessary for the issue of *habeas corpus*. It lies not only where there is an actual confinement but also where there is a present means of enforcing it. Where bail is granted, the person is not set at liberty. He remains in the custody of the Court through the agency of the sureties.<sup>15</sup>

### When habeas corpus is refused.

1 The writ of *habeas corpus* can be issued by a High Court, under Art. 226 only if the person or authority against whom the writ is sought is within the territorial jurisdiction of that High Court, at the date of the application,<sup>16</sup> as well as at the time when the writ is sought to be issued.<sup>16</sup>

2 A writ of *habeas corpus* cannot be issued —

(a) Where the prisoner is detained in a place outside the jurisdiction of the High Court to which the application is made<sup>16</sup>. The Court has no jurisdiction to issue the writ if the person in whose custody the prisoner was has removed the prisoner outside the jurisdiction of the Court before the date of issue of the writ, whether deliberately or not<sup>16</sup>. But proceedings in contempt may lie in case of a deliberate removal to avoid the writ.

(b) There is no occasion for *habeas corpus* unless the Petitioner is in custody or detention,<sup>16</sup> which includes internment<sup>17</sup>.

(c) Where the effect of granting the writ would be to review the judgment of a court which is open to appeal or to falsify the record of a court which shows jurisdiction on its face<sup>18</sup>.

3 A rule for *habeas corpus* must be discharged where the Petitioner has been released by the person or authority who had kept him in detention<sup>19</sup>.

On the same principle where during the pendency of an appeal against an order refusing an application for *habeas corpus* the appellant is released from custody the appeal must be dismissed and the appellate Court cannot be asked to pronounce upon the correctness of the judgment by which *habeas corpus* had been refused<sup>20</sup>. But a temporary release on bail does not bar an application for *habeas corpus* to test the legality of the arrest.<sup>21</sup>

Conversely, it has been held that in *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceeding. Hence, if a fresh and valid order justifying the detention is made by the time of the return to the writ or at any time before the order of release is made, the Court cannot release the detainee whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.<sup>22 23</sup>

15 *Sarangapani v. Emperor* II R. (1945) Nag 862; 1946 Nag 20.

16 *Leo Zehant v. Emperor* A 1944 Cal 76; *Vishambhar v. U.P. Govt.*, 1945 Oudh 117.

17 *Ismail v. State of Orissa* A 1951 Orissa 86. [The contrary view, as regards internment in *Girindra v. Burendra* 31 CWN 593 proceeds upon the word 'detained' in s. 491 (1) (b) of the Cr. P. C. It may not be used to fetter the common law writ of *habeas corpus* which is available in the case of any 'imprisonment' in the Blackstonian sense. Some Canadian statutes use the words 'confined or restrained of his liberty' (Cf. *De Bernonville v. Langlois*, (1951) Quebec Sup. Court 277).]

18 *R. v. Bonomally*, (1916) 44 Cal. 723 (733).

19 *Amarendra v. Garrison Engineer*, A 1945 Cal 430.

20 *Keshav v. Emp.*, A 1944 F.C. 24.

21 *Siddhi v. Di. Magistrate*, 56 All. 408.

22 *Basanta v. Emperor*, (1945) F.L.J. 40; A. 1945 F.C. 18.

23 *Narandjan v. State of Punjab*, (1952) S.C.R. 395 (401); *Ramnatayan v. State of Delhi*, A. 1953 S.C. 277 (278).

### I. Civil or revenue law, arrest under.

Where a civil or revenue law provides for arrest or detention for any civil debt or revenue dues, an application for *habeas corpus* lies on the ground that the requirements of the law have not been complied with,<sup>24,25</sup> though not on the ground of contravention of Art. 22 (1) (2),<sup>26,27</sup> or on the ground that the Petitioner is not liable to be arrested under that law.<sup>28</sup>

### II. Court, pre-conviction detention by.

Various provisions of our Criminal Procedure Code empower a Court to detain or to continue the detention of a person for the purpose of further investigation or trial, e.g., ss 167, 344. In such cases, the person detained may obtain his release on *habeas corpus* if the provisions of the Code or other relevant law have not been complied with.<sup>29</sup>

But in the absence of any such illegality which makes the detention *ultra vires*, *habeas corpus* cannot be resorted to to inquire into the merits of the offence with which the prisoner has been charged, before a court of competent jurisdiction.<sup>30</sup>

But where there has been an undue delay in bringing a man to trial, the Court may, on an application for *habeas corpus*, release the prisoner on bail.<sup>31</sup>

Where a person has been arrested under warrant of a Court, the arrest cannot be challenged on the ground of contravention of Art. 22 (1)-(2).<sup>32</sup>

### III. Court, detention under conviction by.

The decision of our Supreme Court in *Janardan's case*,<sup>33</sup> it is submitted, must now be read in the light of the later English decision in *R. v. Board of Control*.<sup>34</sup> Hence, though the superior Court, in a proceeding for *habeas corpus*, will neither question the correctness of the recital in a return to the writ that the prisoner is in detention in execution of a sentence of a court (though the truth of the return may be impeached in a proceeding for contempt for making a false return), nor question the correctness of the sentence, it will be open to the superior Court to inquire whether the court which ordered the detention had jurisdiction to do so, and this extraordinary power of the superior Court in a proceeding for *habeas corpus* cannot be barred by the finding of an appellate court (having jurisdiction) that the inferior court which ordered the detention had jurisdiction. Where the sentence is illegal, the detention is without jurisdiction.<sup>35</sup>

But where there is no question of jurisdiction, the legality of the detention under a sentence of court cannot be questioned in a *habeas corpus* proceeding, unless further detention has become unlawful owing to the subsequent circumstances,<sup>36</sup> e.g., where the prisoner has earned a remission of sentence.<sup>37</sup>

### IV. Criminal law, arrest under.

The Criminal Procedure Code and similar laws empower the Police to arrest a person in certain circumstances. In such a case, *habeas corpus* would lie for the release of such person on the following grounds *inter alia*—

(i) That the arrest and detention is in violation of Art. 22 (1).<sup>38</sup>

24. *Collector of Malabar v. Ibrahim* (1957) S.C.R. 970

25. *Purshottam v. Desai*, (1955) 2 S.C.R. 887.

1. *State of Punjab v. Azab*, (1953) S.C.R. 254

2. *Kapurchand v. Tax Recovery Officer*, A. 1969 S.C. 682

3. *Ram Narayan v. State of Delhi* (1953) S.C.R. 652, *Jagannath v. State*, A. 1969 Orissa 296.

4. *R. v. Depot Battalion*, (1919) 1 All E.R. 373 (378-9)

5. *Janardan v. State of Hyderabad*, (1951) S.C.R. 341 (360)

6. *R. v. Board of Control*, (1956) 1 All E.R. 769.

7. *Arjun v. State of Rajasthan*, A. 1955 Raj. 161.

8. *Cf. Godse v. State of Maharashtra*, A. 1961 S.C. 600

9. *Madhus Limaye*, in the matter of, (1968) S.C. [W.P. 355/68, d 18-12-68].

(11) That the arrest violates the procedural provisions of the law which authorised it, or is substantively *ultra vires*.

## V. Extradition.

*Habeas corpus* has been granted in cases under the Indian Extradition Act, 1903 (now replaced by the Act of 1962)—

(1) Where the detention is *ultra vires*, e.g.,—(a) Where there are defects in the warrant<sup>9</sup> or other formal defects not affecting its legality.<sup>10</sup> (b) Where the police has arrested a person without either a requisition from the State where the offence is said to have been committed or a warrant under S 10 of the Act.<sup>11</sup> (c) Where the detention is in excess of the period prescribed by S 10.<sup>12</sup> (d) Where the authority under which a person is being detained is on the face of it illegal.<sup>13</sup> (e) Where the person was not given a hearing.<sup>14</sup>

(ii) Where the extradition treaty has not been incorporated in the municipal law of the land, by legislation,<sup>1</sup> for municipal courts cannot enforce the treaty as such,<sup>15</sup> or, the extradition treaty having come to an end, there is no independent legislative authority for the extradition.<sup>16</sup>

Conversely, it has been held that even where there is a treaty providing for extradition for certain offences enumerated therein, it is not incompetent for the Legislature to provide for extradition on *additional* grounds and the municipal courts are bound to give effect to such provision.<sup>17</sup>

The Patna<sup>1</sup> High Court held that where the evidence taken by the Magistrate discloses *prima facie* that the offence committed by the prisoner is an extraditable offence, the High Court should not interfere on the ground that the extradition was being sought for to take action against the prisoner for his *political* activities. This decision is of questionable authority in view of the latter English decision of *Koussor's case*.<sup>1</sup>

The Extradition Act, 1962 not only contains provisions for extradition to countries with which there are extradition arrangements but also for surrender of fugitive criminals to countries with whom there are no such arrangements.

It is to be noted that s 7 (3) of this Act provides—

If the magistrate is of opinion that a *prima facie* case is not made out in support of the requisition of the foreign state, he shall discharge the fugitive criminal.

It is, therefore, clear that an application for *habeas corpus* will be to determine whether there is a *prima facie* case and that the Magistrate's determination on this question will not be final. The questions specified in s. 31 of the Act shall also be open in a proceeding for *habeas corpus*.

## VI. Infant, custody of.

Prior to the Constitution, there was a controversy as to whether the remedy under s 491, Cr. P. C. was barred by the statutory remedy under the Guardians and Wards Act.

9a *Israr v Dt Magistrate, Basti*, A 1940 All 23.

10. *Mulhen v Dt, Magistrate, Tirunelveli*, A 1939 P.C. 213 (218).

11. *Santabar v. Emperor*, (1934) 39 C.W.N 285.

12. *Suraj v. Emperor*, A 1935 Pat. 419.

13. *Roshan Lal v. Supdt. Central Jail*, A 1950 M.B. 83.

14. *In re Rudolf Stailman* (1911) 39 Cal 164.

15. *Brima v. State*, A 1951 Raj. 127.

16. *C. Babu Ram v. State*, (1950) S.C.R. 573.

17. *Adhibandhu v. Emp.*, A 1946 Pat. 196.

18. *Kolesynski re*, (1955) 1 All E.R. 31 (36).

This controversy should not continue under the Constitution inasmuch as so long as the right to *habeas corpus* was embodied in a general statute, such as the Cr. P. C., it was legitimate to inquire whether that general right had been excluded by the special right conferred by the Guardians and Wards Act. But now that the right to *habeas corpus* is secured by the Constitution and the writ of *habeas corpus* is a writ of right, the writ cannot be denied simply on the ground that the Petitioner has an alternative remedy. The Supreme Court has taken this view even with respect to the statutory right under s. 491, Cr. P. C.<sup>19</sup>

The writ should, therefore issue whenever the release of the minor from detention is necessary for the protection of his health, safety or morals.<sup>21</sup>

### \* VII. Member of Parliament, arrest of.

*Habeas corpus* lies to obtain the release of a member of Parliament who has been arrested in breach of the privilege not to be arrested,<sup>22</sup> which extends only to arrest under civil process.<sup>2</sup>

### VIII. Preventive Detention.

1. Preventive detention being obviously a restraint of personal liberty by the Executive, *habeas corpus* would lie, on twofold grounds—(i) Non-constitutional; (ii) Constitutional.

#### I. Non constitutional

(a) Where an order of detention is *ultra vires* the provisions of the Preventive Detention Act, the order becomes a nullity and the detenu is entitled to obtain his release by *habeas corpus*. In India, this common law right to the restoration of liberty where it has been violated without authority of law has also been given a constitutional support by Art. 21, so that in every case where a person has been detained without the authority of law or under an order which is *ultra vires*, there is a violation of the constitutional guarantee under Art. 21, and, consequently, on this ground an application under *habeas corpus* would lie.

(b) Apart from a plain transgression of the terms of the statute authorising the detention, the detention may be illegal by reason of an abuse of the statutory power or a *malafides* use of it and in such cases the detenu is entitled to obtain his release by *habeas corpus*.

[As to *malafides*, see pp. 162-3, *ante*.]

But the Court will not inquire into the sufficiency of the materials justifying the making of the order.<sup>2</sup>

19-20. *Gohar v. Suggi*, A. 1960 S.C. 93.

21. *Bhagwati v. Yadav*, A. 1969 M.P. 23.

22. *Ansumali v. State of W. B.*, (1952) 56 C.W.N. 711 (720); *Venkateswarlu v. D. M.*, A. 1961 Mad. 269.

23. *Ram Krishan v. State of Delhi*, (1953) S.C.R. 712; *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418; *Makhan Singh v. State of Punjab*, (1950-51) C.C. 180 (181); *Dharam Singh v. State of Punjab*, (1958) S.C.R. 996.

24. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387); *Dworkadas v. State of J. & K.*, A. 1957 S.C. 164.

25. *Puranlal v. Union of India*, A. 1958 S.C. 163; *Naranjan v. State of Punjab*, A. 1952 S.C. 106.

1. *Gopalan v. Govt. of India*, A. 1966 S.C. 816; *Jagannath v. State of Orissa*, A. 1966 S.C. 1140; *Godavari v. State of Maharashtra*, A. 1966 S.C. 1404.

2. *Lakhampal v. Union of India*, A. 1967 S.C. 908 (915); *Sadhu Singh v. Delhi Administration*, A. 1966 S.C. 91.

## II. Constitutional.

The constitutional invalidity of the detention may be due either to the unconstitutionality of the statute under which the order has been made or of the order itself.

(a) The unconstitutionality of the statute may be due to—

- (i) want of legislative competence,<sup>3</sup> or
- (ii) contravention of Art. 22 of the Constitution.<sup>4</sup>

(b) Though the statute may be quite valid, the order itself may be unconstitutional if it violates the provisions of Art. 22(5),<sup>5-6</sup> directly or indirectly.<sup>3</sup>

(c) The detention will be invalid if the grounds of detention or some of them are irrelevant to the grounds for which a law of preventive detention can be made.<sup>6-7</sup>

2. From the observations in *State of Maharashtra v. Probhakar*,<sup>8</sup> it seems that *habeas corpus* is available also against orders issued under the Defence of India Rules if the defence succeeds in showing that the detention is in contravention of the provisions of the Act or the Rules made thereunder.

## IX. Private person, detention by.

Since a Fundamental right is levelled against State action and not against the acts of private individuals, neither Art 21 nor Art. 32 is attracted where a person has been unlawfully detained by a private individual.<sup>9</sup>

But since Art 226 is available not only for the enforcement of a Fundamental right but also for other purposes, a High Court is competent to issue *habeas corpus* against detention by a private individual in like cases as in England.<sup>9</sup> The jurisdiction under Art 226 is certainly not narrower than that under s 491, C. P. C.<sup>10</sup>

### Who may apply.

1. The Supreme Court has ruled<sup>11</sup> that where the person detained is, owing to the restraint, unable to make the affidavit, the application shall be accompanied by an affidavit of *some other person, stating the reason why the person restrained is unable to make the affidavit himself*. Thus, a mere friend<sup>12</sup> may, in such circumstances, make the application, but not an advocate, as such, without a power of attorney from the prisoner.<sup>13</sup>

2. But where the affidavit of the stranger does not indicate why an affidavit from the prisoner himself could not be filed, the application would not be entertained.

3. In the case of detention of a *child* or *minor*, the English principles have been followed<sup>14</sup> to hold that—

(a) The only person who is competent to move the Court in *habeas*

3. *Gopalan v State of Madras*, (1950) S.C.R. 88.

4. *State of Bombay v. Almaram*, (1951) S.C.R. 167; *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418; *Hansikan v State of Maharashtra*, A. 1962 S.C. 911.

5. *Abdul Karim v. State of W. B.*, (1968) S.C. [W.P. 327/68, d. 31-1-69].

6. *Dwarkanadas v. State of J. & K.*, (1956) S.C.R. 945.

7. *Pushkar v. State of W. B.*, (1968) S.C. [W.P. 179/68, d. 7-11-68].

8. *State of Maharashtra v. Probhakar*, A. 1966 S.C. 424 (426).

9. *Vidya Verma v. Shamaram*, (1955) 2 S.C.R. 983 (986).

10. *Cf. Gohar v. Saggi*, A. 1960 S.C. 93.

11. O. XXXV, r. 1 of the Supreme Court Rules.

12. *In re Rajadkar*, A. 1948 Bom. 334.

13. *Vidya Verma v. Shiv Narain*, (1955) 2 S.C.R. 983.

14. *Ikram v. State of U. P.*, A. 1964 S.C. 1625 (1630-1).

*corpus* is one who is entitled to the custody of the child or to represent the child legally.

(b) If, however, such a person is shown to be incapable of making, or unable to make, the application, or where no such person exists, a friend of the child is entitled to make an application, provided he satisfies the Court by an affidavit as to the aforesaid circumstances and also that he himself is *interested in the welfare* of the child. In no circumstances would the Court issue the writ at the instances of a person whose interest is adverse to that of the minor.<sup>14</sup>

### X. Wife, custody of.

*Habeas corpus* is available to husband to regain the custody of his wife, but—

(a) It would not ordinarily issue where issues of fact have to be established, there being alternative remedies by civil suit or by a proceeding under s. 100 of the Cr. P. C., where issues of fact can be tried,<sup>14</sup> but the High Court has the power to make an inquiry into facts in a proceeding for *habeas corpus*.<sup>14</sup>

(b) It would not issue unless the Petitioner satisfies the Court, at least *prima facie*, that the person claiming the writ is the husband and that a valid marriage between him and the woman could have taken place.<sup>14</sup>

(c) The writ would not issue where the Petitioner is himself charged with a criminal offence in respect of the very woman for whose custody he demands the writ.<sup>14</sup>

### Whether interim bail is available.

1. The High Court has jurisdiction to grant interim bail pending disposal of a proceeding for *habeas corpus*.<sup>15</sup>

2. This jurisdiction extends even where the Petitioner has been detained under the Detention of India Rules.<sup>15</sup>

### Return to the Rule nisi.

1. Inasmuch as the return has to rebut the allegations of *fact* made in the application it should be supported by an affidavit of the person against whom the Rule has been issued.<sup>16</sup> But an affidavit may not be necessary if the person has been detained under orders of a Court.<sup>16</sup>

2. A return by an officer other than the respondent in the proceeding is not a compliance with the writ.<sup>17</sup>

3. Where there is no return to the Rule nisi the prisoner is entitled to be released forthwith.<sup>18</sup>

4. Any assertion in the Petition which is not controverted in the return shall be treated as admitted.<sup>19</sup>

### Date which is material.

When detention is challenged in a petition for *habeas corpus*, the Court has to examine the legality of the detention on the date of the petition, if nothing more has happened between that date and the date of hearing.<sup>20</sup>

15. *State of Bihar v. Ram Balak Singh* (1966) S.C. [Statesman 18-1-66, p. 5].

16. *Ranjit v. State of Punjab*, A. 1959 S.C. 843 (846).

17. *Kidar Nath v. State of Punjab*, A. 1950 P.M.J. 122 (124).

18. *State of Bihar v. Kameswar, A.* 1965 S.C. 575 (577).

19. *In the matter of Madhu Limaye*, (1968) S.C. [W.P. 355/68, d. 18-12-68].

20. *Gopalan v. Govt. of India*, A. 1966 S.C. 816 (818).



### Scope of order.

The only object of the writ of *habeas corpus* is to release a person from illegal detention. It cannot be used either to punish the respondent or to afford reparation to the person wronged.<sup>21</sup>

### Costs in a proceeding for habeas corpus.

Under the Constitution, the remedy of *habeas corpus* being no longer confined within the bounds of s. 491, Cr. P. Code, there is no bar to awarding costs in a proceeding for *habeas corpus* as in England.

The Madras High Court has, however, held<sup>22</sup> that pending the framing of rules under Art. 226, the High Courts have no inherent jurisdiction to grant costs in criminal proceedings for *habeas corpus*.

Costs may be disallowed to the Petitioner where he fails on the merits but succeeds on a preliminary point.<sup>23</sup>

### Appeal from orders for habeas corpus.

1. The absolute immunity, which exists in England,<sup>24</sup> from appealability in the case of an order of release (*i.e.*, an order allowing an application for *habeas corpus*) does not exist in India.<sup>25</sup>

2. Under the Constitution of India, an appeal will lie against an order whether allowing or refusing the application for *habeas corpus*, as follows:

(1) If the case involves a constitutional question, there will lie, an appeal to the Supreme Court, upon a certificate of the High Court to that effect under Art. 132 (1) of the Constitution.<sup>26</sup>

(2) Even where there is no constitutional question involved appeal would lie under Art. 134 (1) (c), upon the certificate of the High Court.

But the certificate cannot be granted as a matter of course to imperil the liberty of a subject who has obtained an order of release from the High Court.<sup>27</sup> This can be done only if there is a substantial question of law of paramount public importance involved in the case.<sup>28</sup>

(3) If the proceeding is treated as of a civil nature, appeal will similarly lie under Art. 133 (1) (c).<sup>29</sup>

(4) The Supreme Court may grant special leave under Art. 136, to appeal from orders either refusing or allowing application for *habeas corpus*.<sup>3</sup>

### Res Judicata.

1. An order rejecting an application for *habeas corpus* operates as *res judicata*.<sup>30</sup> Hence, a fresh application does not lie, in the absence of new circumstances arising in the meantime.<sup>2</sup>

2. But an order of the High Court rejecting *habeas corpus* will not bar a petition to the Supreme Court under Art. 32 on the same grounds.<sup>3</sup>

### Refusal to give effect to order of habeas corpus.

1. To decline to give effect to an order of release passed on an appli-

21. *In re Venkataraman*, (1950) 2 M.L.J. 186.

22. *State of Punjab v. Ajaib*, A. 1954 S.C. 10 (16).

23. Cf. C5, Vol. III, p. 472.

24. *Punjab Prosecutor v. Gopalan*, A. 1953 Mad. 66 (70).

25. *Tanupada v. State of West Bengal*, (1951) S.C.R. 212.

1. *State of Bombay v. Atmaram*, (1961) S.C.R. 167.

2. *Bakharwal v. Union of India*, A. 1967 S.C. 908 (910, 916).

3. *Ghulam Sarwar v. Union of India*, A. 1967 S.C. 1335 (1337).

cation for *habeas corpus* amounts to contempt of court, punishable by attachment and imprisonment.<sup>4</sup>

2. Not only the refusal to give effect to an order of release, but any wilful interference with the exercise of the powers of the High Court under its *habeas corpus* jurisdiction amounts to contempt. Thus, where an application by a detenu to the High Court in respect of the withdrawal of certain privileges by the Government is withheld, the officer responsible for the impediment or unreasonable delay, must be liable for contempt.<sup>5-6</sup>

3. Any attempt to circumvent the order by resorting to *fraudulent* proceedings, would constitute contempt. But if an authority, after the order of release, detains the prisoner by issuing an order of detention under the Preventive Detention Act, giving additional grounds, he cannot be held liable for contempt in the absence of a finding that the order of detention was *malafide*.<sup>7-25</sup>

6. It is a valid defence to a proceeding for contempt for refusal to comply with a writ of *habeas corpus* that it is impossible to obey the order.

**Proclamation of Emergency and Habeas Corpus.**—See under Art. 359, *post*.

## MANDAMUS

### Mandamus, nature and object of.

'Mandamus' literally means a command. It differs from the writs of prohibition or *certiorari* in its demand for some *activity* on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Court or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

### Mandamus, Prohibition, Certiorari, and Quo warranto, distinguished from each other.

1. Mandamus differs from certiorari and prohibition in that the latter writs are used wherever an inferior tribunal has *wrongly* exercised or *exceeded* its jurisdiction, while Mandamus is only used where the inferior tribunal has *declined jurisdiction*,—the object of Mandamus being not to review or control the action of the inferior tribunal, but merely to compel it to act.

2. While Mandamus demands some *activity*, on the part of the body or person to whom it is addressed, prohibition commands *inactivity*,—the object of prohibition being to prevent the inferior Court from usurping jurisdiction which is not legally vested in it or from exceeding the limits of its jurisdiction.

3. While Mandamus is available against any *public* authority including administrative and local bodies, prohibition and certiorari lie only against *judicial and quasi-judicial* authorities. Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act. If that person refrains from doing the act or refrains, from *wrong* motives, from exercising a power which it is his duty to exercise, the Court will by order of mandamus direct him to do what he should do.

4. *Ikram v. State of U. P.*, A. 1954 S.C. 1625 (1629).

5. *Ishtimay v. Govt. of West Bengal*, A. 1952 Cal. 562.

6. *Hani v. Baig*, A. 1944 Lah. 195.

7-25. *Sundaram v. Leisram*, (1958) S.C. [Cr. A. 181/56].

Mandamus may go to individuals or to corporations and it goes quite independently of whether the individual or body to which it is addressed is not a court, provided only such individual or body has some public duty to perform.

4. When it has been shown that a tribunal has declined to consider matters which it ought to have considered, or has not decided the case according to law, mandamus would be granted commanding the tribunal to proceed according to law. But *certiorari* will lie to quash or remove proceedings on the ground of want or excess of jurisdiction or of the order being bad on its face, but not on the ground that the tribunal (having jurisdiction) has not taken into consideration matters which it ought to have taken into consideration.

5. Broadly speaking, there is no difference in principle between the writ of *Certiorari* and that of Prohibition except that the latter may be issued at an earlier stage—the object of both being to control judicial or quasi-judicial bodies.

But though closely akin to each other, there are points of difference between Prohibition and *Certiorari*:

While *certiorari* lies to quash a proceeding after trial, prohibition would not be issued after trial except in a clear case, apparent on the face of the proceedings, that the Court or tribunal was acting without jurisdiction. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the Court to be sent up (to the superior Court), to have its legality inquired into, and, if necessary, to have the order quashed. The object of prohibition is prevention, while *certiorari* may serve the dual purpose of prevention and cure.

In short, Prohibition lies if the proceedings established that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision subject to be brought up and quashed on *certiorari*. *Certiorari* lies where the usurpation of jurisdiction is a *fait accompli*, while prohibition lies when usurpation of jurisdiction has not yet taken place, but it is merely proposed and there is still something to operate upon.

6. While *Mandamus* is a peremptory order of the Court commanding somebody to do that which he is under a clear legal duty to do, *Quo Warranto* lies against a person who has claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined.<sup>1</sup>

#### Conditions precedent to the issue of Mandamus.

In order to obtain a writ or order in the nature of Mandamus, the applicant must satisfy the following conditions:<sup>2</sup>

(i) The applicant must show that he<sup>3</sup> has a *legal right* to the performance of a *legal duty* (as distinguished from a discretion<sup>4</sup>), by the party against whom the mandamus is sought, and such right must be subsisting on the date of the petition.<sup>5</sup>

1. *Nesamony v. Varghese*, A. 1952 T.C. 66.

2. *Cf. Carlsbad Mineral Water Co. v. Jagtiani*, A. 1952 Cal. 315.

3. *State of Bombay v. Hospital Mazdoor Sabha*, (1960) 1 L.L.J. 251 (S.C.); *Vinod v. State of H. P.*, A. 1959 S.C. 223; *Kamal Singh v. State of U. P.*, (1966) S.C. [W.P. 237/62, d. 16-9-66].

4. *Bombay Union of Journalists v. State of Bombay*, A. 1964 S.C. 1617 (1964); *State of M. P. v. Mandwar*, A. 1954 S.C. 498; *Shivendra v. Nalanda College*, (1962) Supp. (2) S.C.R. 147.

5. *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1183.

(ii) The duty that may be enjoined by mandamus may be one imposed by the Constitution;<sup>6</sup> a statute;<sup>7</sup> common law<sup>8</sup> or by rules or orders having the force of law.<sup>9</sup>

Where Government has framed certain Rules under statutory power, laying down a procedure or conditions for doing a thing (*i.e.*, for holding a public auction) Government is not free to adopt *ad hoc* procedure in particular cases, departing from such rules.<sup>9</sup>

But—

(i) Mandamus does not lie to enforce departmental manuals or instructions not having any statutory force,<sup>10, 11</sup> or concessions,<sup>12</sup> which do not give use to any legal right in favour of the Petitioner.<sup>10</sup>

But in one case<sup>13</sup> the Supreme Court has held that where an individual has acted upon a representation or promise made by the Government, he can ask for *mandamus* to compel the Government to carry out that promise, even though it may be contained in non-statutory or executive instructions.

(ii) The writ of mandamus is only granted to compel performance of duties of a public nature<sup>14</sup> or to enforce private rights when duties of a public nature specially affect private rights<sup>11</sup> or when the private rights are withheld by public officers.<sup>16</sup>

(iii) *Mandamus* does not issue against a private individual, unless he was acting in collusion with a public authority.<sup>14</sup>

In order to be public body, it is not necessary that the body must be constituted by a statute.<sup>17</sup> The condition is satisfied whenever a statute appoints a person or body of persons to carry out measures of public benefit,<sup>18</sup> the receipt of enrolments by such person is not essential;<sup>19</sup> nor it is necessary that the body should be incorporated<sup>19</sup> or be a permanent body.

(iv) Mandamus or any other writ under Art. 226 would not issue against a company registered under the Companies Act, even though it may be a 'Government company' or against a statutory corporation, unless it is vested with statutory duties.<sup>14, 14a</sup>

(v) The legal right to compel performance of the public duty must reside in the applicant himself, either solely, or in common with others. It will not do to show merely that the applicant has an interest in the performance of the duty. The Petitioner must show that he himself has a legal right to insist on such performance.<sup>20</sup>

6. *Wazir Chand v. State of H. P.*, (1955) 1 S.C.R. 408; *Rashid Ahmad v. Municipal Board*, (1950) S.C.R. 566.

7. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

8. *Commr. of Police v. Gordhandas*, A. 1952 S.C. 16 (21); *State of Mysore v. Chandrasekhara*, A. 1965 S.C. 532 (537).

9. *Guruswamy v. State of Mysore*, A. 1954 S.C. 592.

10. *State of Assam v. Ajit Kumar*, A. 1965 S.C. 1196 (1200).

11. *Raman & Raman v. State of Madras*, A. 1959 S.C. 694; (1959) Supp. (2) S.C.R. 227; *Fernandez v. State of Mysore*, A. 1967 S.C. 1753 (1757).

12. *Rajalakshmi v. State of Mysore*, (1966) S.C. [CA 2174/65, d. 7-11-66].

13. *Union of India v. Anglo-Afghan Agencies*, A. 1968 S.C. 718 (727). [The question is debatable].

14. *Sohanlal v. Union of India*, A. 1957 S.C. 529; (1957) S.C.R. 738, *Praga Tools Corp'n. v. Emanuel*, (1969) 11 LLJ 749 (754) S.C.

14a. *Heavy Engineering Mazdoor Union v. State of Bihar*, (1969) 1 S.C.C. 765; *Samil v. State of W. B.*, (1970) 20 F.L.R. 49 (53) Cal., *Agarwal v. General Manager, Hindustan Steel*, (1970) U.J.S.C. 97 (100).

15. *Shankarlal v. Municipal Commr.*, A. 1939 Bom. 31.

16. *Surajmull v. Commr. of J. T.*, A. 1930 Pat. 538 (539).

17. *Singh v. Board of Secondary Education*, (1951) 55 C.W.N. 1132 (1135).

18. *Bijoy Ranjan v. Das Gupta*, A. 1953 Cal. 289.

19. *Samarendra v. University of Calcutta*, (1951) 55 C.W.N. 443; *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278.

20. *Chatter Farm v. Kaleswara*, A. 1957 Mad. 309 (312); *Satyamurayana v. State of A. P.*, A. 1959 A.P. 429.

On the other hand—

(a) Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for *Mandamus* if the officer acts in contravention of his statutory duty.<sup>21</sup> Thus,

An intending bidder at a public auction is entitled to apply if the authority holding the auction acts contrary to the statute under which the auction is held,<sup>22</sup> or fails to perform his statutory duties in connection with the auction,<sup>22-23</sup> even though the auction relates to a licence for business in liquor to which no person has an absolute right.<sup>1-17</sup>

(b) Even though the order of the Government or its officer is likely to be eventually held *ultra vires*, the person against whom it is issued can refuse to comply with it only at his peril. He is, accordingly, entitled to challenge its validity in Court by applying for *mandamus*,<sup>18</sup> though he has not yet been actually injured by the enforcement of the order.

(vi) The application must be made by the aggrieved party. The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the order was made.

(vii) The application must be made in *good faith* and not for an *indirect* purpose or on behalf of a third party.

(viii) The application must be preceded by a distinct *demand* for performance of the duty, in order to give the party an opportunity to consider whether he should comply or not, and such demand must be shown to have been met by a refusal either by words or conduct, so that the Court may be satisfied that the party complained of is determined not to do what is demanded.<sup>19</sup> The demand must be made *prior* to the application.<sup>20</sup>

But a demand is not required 'where it is manifest that it would be an idle ceremony',<sup>21</sup> i.e., where it is obvious that the respondent would not comply with the demand of the petitioner.<sup>22-23</sup> Thus, where the Government refers to an Industrial Tribunal a dispute which is not an 'industrial dispute', or where the authority making the impugned order referred the petitioner to the Government under whose orders he said he was acting,<sup>24</sup> the petition for *Mandamus* cannot be defeated by raising the objection that no demand for justice had been made.

Further, what the rule requires is that there must be a demand and a denial in *substance*, not in any particular form or words.<sup>21-24</sup> Thus, refusal may be inferred from conduct.<sup>25</sup> All that is necessary in order that *Mandamus* may issue is to satisfy the Court that the party complained of has distinctly determined not to do what was demanded.<sup>1</sup> Thus, where the Petitioner had previously brought a suit (asking for injunction) for the same relief which was contested by the respondents, a formality of demand and refusal before the petition for *Mandamus* is not necessary.<sup>25</sup>

In a case which went up to the Supreme Court on appeal, the condition

21. *Guruswami v. State of Bihar*, (1955) 1 S.C.R. 305.

22-25. *Rambharosa v. Govt. of Bihar*, A. 1953 Pat. 370.

1-17. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873; A. 1954 S.C. 220.

18. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

19. *Sondhi v. At. General*, A. 1952 Punj. 351.

20. *Ratan v. Adhar*, A. 1952 Cal. 72.

21. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (152); *Shambhu v. Pepsu*, A. 1952 Pepsu 152.

22. *Sheshankar v. State of M. P.*, A. 1951 Nag. 58.

23. *Narandra v. Corp. of Calcutta*, A. 1950 Cal. 102 (112).

24. *Bengal Chub v. Shantivanjan*, A. 1956 Cal. 545.

25. *Venugopalan v. Vijayawada Municipality*, A. 1956 Andhra 833 (837).

1. *Raman & Raman v. State of Madras*, A. 1957 Mad. 536 (541).

of demand and refusal was not insisted upon on the ground that fundamental right had been infringed.<sup>2</sup>

(ix) As a general rule, mandamus is not issued in *anticipation of injury*.

But there are important exceptions to the above rule:

(a) Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for *Mandamus* if the officer acts in contravention of his *statutory duty*.<sup>3</sup> Thus,

An intending bidder at a public auction is entitled to apply if the authority holding the auction acts contrary to the statute under which the auction is held, or fails to perform his statutory duties in connection with the auction.<sup>4</sup>

(b) A person against whom an illegal<sup>5</sup> or unconstitutional<sup>6</sup> order is made is entitled to apply to the Court for redress even before it is actually *enforced against* him or he does something to his detriment in pursuance of the order.<sup>7</sup> For, the issue of such order constitutes an immediate encroachment on his rights and he can refuse to comply with it only at his peril.<sup>8</sup>

### Grounds on which Mandamus may be refused.

Even though the foregoing conditions are satisfied, relief by way of Mandamus, which is discretionary and not 'of right',<sup>9</sup> may be refused on any of the following grounds:

(i) Where the act against which Mandamus is sought has been completed and the writ, if issued, will be *injunctious*.<sup>10</sup> On the same principle, the Court would refuse a writ of Mandamus where it would be *meaningless*, owing to lapse of time or otherwise.<sup>11</sup> Thus,—

Mandamus will not issue against an order refusing to grant a licence<sup>12</sup> or lease<sup>13</sup> or an order cancelling a licence,<sup>14</sup> after the period for which the licence was granted or applied for (as the case may be) has expired, or where there is no application pending before the licensing officer in respect of which the order of Mandamus may possibly operate.<sup>15</sup>

But even where the Court would not grant one relief on the ground that it would be short-lived, there is no bar to the grant of some other relief in the same proceeding.<sup>16a</sup>

(ii) Where the application is *premature*, for instance, where no action contrary to law has yet been done or proposed.<sup>17</sup>

(iii) A mandamus will not go when it appears that it would be futile in its results. Accordingly, the Court will not, by mandamus, order something which is *impossible of performance* because the party against whom

2. *Fram Nusserwanji v. State of Bombay*, A. 1951 Bom. 210 (225), on appeal, *State of Bombay v. Babara*, (1951) S.C.R. 682.
3. *Guruswami v. State of Mysore*, A. 1951 S.C. 532.
4. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (148-9); A. 1952 S.C. 16.
5. *Bengal Immunity Co. v. State of Bihar*, (1955) S.C.A. 1140 (1153); (1955) 2 S.C.R. 603; A. 1955 S.C. 661.
6. *Kshirode v. Dt. Magistrate*, (1955) 59 C.W.N. 373.
7. *Senarom v. I. T. Commr.*, A. 1955 Assam 201.
8. *Daya v. Joint Chief Controller*, A. 1952 S.C. 1796; (1963) 2 S.C.R. 73.
9. *Guruswami v. State of Mysore*, (1954) S.C. A. 993 (999); A. 1954 S.C. 592.
10. *A. N. Sinha v. Mukherjee*, A. 1956 Cal. 116.
11. *Cf. State of Assam v. Tulsi*, (1962) Supp 3 S.C.R. 508.
12. *Kshirode v. Dt. Magistrate*, A. 1956 Cal. 96.
13. *Amar Jyoti Stone Crushing Co. v. Union of India*, (1952) 3 S.C.R. 62.
- 13a. *Srinivasa v. State of Mysore*, A. 1960 S.C. 350 (353).
14. *F. I. Commercial Co. v. Collector*, A. 1957 Cal. 606 (613); *Nanda v. Board of Trustees*, A. 1957 Cal. 578 (582).

the order is prayed for does not, for some reason, possess the power to obey,<sup>15</sup> or where the office in respect of which the Petitioner seeks relief is held at will and can be terminated immediately on reinstatement;<sup>16-17</sup> or where the thing ordered cannot be legally given effect to by the party,<sup>18</sup> or will be rendered nugatory by another authority having jurisdiction in the matter who is not a party to the mandamus proceeding.<sup>18-19</sup>

(iv) The writ being discretionary, it may be refused on equitable grounds, such as suppression or misstatement of material facts in the application.<sup>20</sup>

(v) It may be refused on the ground of laches, or unexplained delay,<sup>21</sup> even where fundamental rights are affected.<sup>21-22</sup>

(vi) Mandamus is not an appropriate proceeding to decide questions of title to property<sup>23-24</sup> or complicated questions of fact.<sup>25</sup>

Where the High Court finds that the administrative authority or inferior tribunal has not come to a finding on a question of fact which it should have, the High Court cannot enter into that question of fact, like an original or appellate authority.<sup>1</sup> The proper order, in such a case, would be to quash the order complained of and to send the case back to the inferior authority to determine the question according to law.<sup>1</sup>

(vii) A Mandamus cannot issue against a public servant to enforce a contract, independently of any statutory duty or obligation to the applicant.<sup>2</sup>

(viii) Mandamus will not issue to compel a person to institute legal proceedings, even in cases of contravention of a statute.<sup>3</sup>

(ix) The object of Mandamus being simply to compel performance of a legal duty on the part of some person or body who is entrusted by law with that duty, the Court, in a proceeding for Mandamus, will never sit as a Court of appeal so as to examine facts or to substitute its own wisdom for the discretion vested by law in the person or body against whom the writ is sought.<sup>4</sup>

(x) It would not issue to correct a mere irregularity which has not affected the jurisdiction or resulted in a failure of justice.<sup>5</sup>

Though Mandamus is a discretionary remedy, our Supreme Court has held that in some cases it should issue *ex debito justitiæ*, namely, where an inferior tribunal has refused to carry out the *intra vires* order of its superior tribunal.<sup>6</sup>

(xi) Mandamus will not issue to perpetuate an illegality.<sup>7</sup>

15. *Amar v. Govt. of Pepsu*, A. 1953 F psu 58 (62).

16. *Balkrishnan v. State of Punjab*, A. 1956 Punj. 201.

17. *Kamala v. Calcutta University*, A. 1956 Cal. 563 (567).

18. *Lekhraj v. Mathur*, A. 1962 Ker. 152.

19. *Shankar v. Returning Officer*, A. 1953 Bom. 277 (281).

20. *Ibrahim v. High Commr.*, A. 1951 Nag. 38 (43).

21. *Durga Prasad v. Chief Controller*, (1969) 1 S.C.R. 185 (187-8).

22. *Narayani v. State of Bihar*, (1964) S.C. [C.A. 140/64, d. 22-9-64].

23. *Sohan Lal v. Union of India*, A. 1957 S.C. 529.

24-25. *Lilawati v. State of M. B.*, A. 1962 M.B. 103 (114); *Parraju v. B. N. Ry.*, A. 1952 Cal. 610.

1. *S. T. O. v. Shiv Rattan*, A. 1966 S.C. 142 (145).

2. *Calisbad Co. v. Jagtiani*, A. 1952 Cal. 315; *Dubai v. Union of India*, A. 1962 Cal. 496; *Actmutan v. State of Kerala*, A. 1959 S.C. 490.

3. *Nagpur Glass Works v. State of M. P.*, A. 1955 Nag. 32 (35).

4. *Vice-Chancellor v. S. K. Ghose*, A. 1964 S.C. 217 (220).

5. *Somabram v. I. T. Commr.*, A. 1955 Assam 183 (209).

6. *Himmatlal v. State of M. P.*, (1952-54) 2 C.C. 242; (1954) S.C.R. 1122; A. 1954 S.C. 403.

7. *Mami v. State Electricity Board*, A. 1968 Ker. 74 (79) F.B.

**How far existence of alternative remedy bars mandamus.**

A distinction has been made between the case where the writ or order is the nature of mandamus is sought for the enforcement of fundamental rights and where it is sought for 'other purposes':

(A) As regards *fundamental rights*,—it has been laid down that the enforcement of the fundamental rights being the *duty* of the Courts (under Art. 32<sup>7</sup> or 226<sup>8</sup>) and the powers of the Supreme Court or High Court under Arts. 32 or 226 not being confined to issuing 'prerogative writs' only:—

Though ordinarily an application for a writ is not an appropriate proceeding where a question of title is involved,—where goods are seized by the Police from the possession of a person *without any authority of law* in contravention of Art. 31 (1), *mandamus* should be issued to direct restoration of the goods to the possession of that person without entering into the question of title to the goods seized.<sup>9</sup>

But there are cases where though a fundamental right of the Petitioner has been affected, e.g., by the assessment of sales tax, which is alleged to be *ultra vires*, the Court has denied relief under Art. 226 on the ground that there is a statutory machinery provided in the Act which should be resorted to in the absence of exceptional circumstances, such as 'something going to the root of the jurisdiction' of the authority who made the order.<sup>9-10</sup> Thus, the Court would not, ordinarily proceed to ascertain the nature of the transaction which is sought to be taxed.<sup>11</sup> But there are cases where the infringement of fundamental rights has been acknowledged as an exception to the bar arising out of statutory remedy.<sup>12a</sup>

(B) As regards '*other purposes*'—the English rule has been applied.

Thus, mandamus will not issue—

(a) To correct an error or irregularity in the judgment of a Court which could be corrected by appeal or revision;<sup>12</sup>

(b) Where effective and convenient remedy is provided by the statute which created the right which has been infringed.<sup>10,13</sup>

(c) Where the aggrieved party would get an adequate remedy by an ordinary action<sup>12a</sup> in the Civil Court, e.g., where he has been dispossessed by another party in breach of an agreement under which he had entered into possession,<sup>1b</sup> to recover a debt which is recoverable by an ordinary suit,<sup>14</sup> to enforce or restrain the performance of a contractual obligation or to remedy a breach of contract,<sup>15</sup> except where a statutory authority, in doing so, abuses his statutory power.<sup>16</sup>

8. *Wazir Chand v. State of H. P.* (1955) S.C.R. 408.

9. *Than Singh v. Supdt. of Taxes*, A. 1964 S.C. 1419 (1432); *State of Madras v. Dunkerly*, (1959) S.C.R. 379.

10. *S. T. O. v. Shriratan* A. 1966 S.C. 142.

11. *Bhopal Sugar Industries v. Dube*, A. 1964 S.C. 1037; *Carl Stul v. State of Bihar*, A. 1961 S.C. 1615.

11a. *Shivram v. J. T. O.*, A. 1964 S.C. 1095; *State of Bombay v. United Motors*, (1953) S.C.R. 1069; *Kailash v. State of U. P.*, A. 1957 S.C. 790.

12. *Ramphal v. Dt. Magistrate*, (1959) S.C. ICA 536/58, d. 15-12-59].

13. *Rashid v. I. T. Investigation Commr.*, (1954) S.C.R. 738; (1952-54) C.C. 454; *Veerappa v. Ramon*, (1952) S.C.R. 583; (1952-54) C.C. 444.

13a. *Mati Lal v. Uttar Pradesh*, A. 1961 All. 257 (265) F.B.; *Shyamapada v. Abani*, A. 1961 Cal. 430.

13b. *B. B. Light Ry. v. State of Bihar*, A. 1951 Pat. 231 (234).

14. *In re Nagabhushana*, (1950) 2 M.L.J. 378 (379).

15. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919; A. 1956 S.C. 17; *Shantabai v. State of Bombay*, A. 1968 S.C. 532; *Burmah Construction Co. v. State of Orissa*, A. 1962 S.C. 1320.

16. *D. T. O. v. Sonali Singh*, (1970) 1 S.C.W.R. 194 (197).



In an earlier case,<sup>17</sup> where the State sought to interfere with vested contractual rights under a legislation which was not retrospective, the Supreme Court granted relief by an order in the nature of mandamus. But this decision has been explained away in two later cases<sup>18</sup> where it has been held that no relief under Art. 32 can be granted where a purely contractual right (unattended by any proprietary interest), e.g., where a contract to transfer interest in immovable property which is unregistered<sup>19</sup> is threatened by State action. The remedy, if any, is by a suit for specific performance or breach of contract.

(d) In the absence of a statutory right, Art. 226 cannot be availed of to claim any money in respect of a breach of contract or tort or otherwise.<sup>18</sup>

But the existence of an alternative remedy is no bar in the following cases:

(a) Where the applicant has no right to pursue the alternative remedy, i.e., where the statute simply gives power to the Government or any other authority to revise the order complained of, *suo motu*, and the applicant has no right to apply for such revision.<sup>19</sup>

(b) Where, owing to the delay involved in a suit, the remedy would be ineffective or inadequate.<sup>20</sup>

(c) Where the alternative remedy is of an *onerous character*, so that it can hardly be described as an adequate alternative remedy.<sup>21</sup>

(d) Where the question raised before the High Court could not be decided by the statutory authority.<sup>22</sup>

(e) 'Alternative remedy' does not bar the jurisdiction of the Court to interfere in proper cases but is a rule of discretion.<sup>23 25</sup>

### How far existence of the remedy of appeal bars mandamus.

1. *Appeal* is an 'alternative remedy' which bars the remedy of mandamus, provided it is not less convenient, beneficial and effective. Hence, if the person aggrieved has a right of appeal against the order complained of but he has made no attempt to avail himself of that remedy, he cannot claim relief under Art. 226 unless he can show that such alternative remedy would not be granted or that the conduct of the authorities is such that they are not likely to discharge their duties without the guidance of the Court.<sup>24</sup>

2. But the existence of the remedy of appeal cannot be said to be equally beneficial or convenient or effective in cases like the following, and in such cases mandamus would issue notwithstanding the right of appeal:

(i) Where it is *not possible* for the applicant to *file* an appeal, e.g., where the authority has simply refused his application without stating the reasons for such refusal,<sup>25</sup> or where the authority has made no 'order' under the statute against which an appeal could be preferred,<sup>1</sup> or where from the

17. *Chhotabhai v. State of M. P.*, A. 1953 S.C. 108.

18. *Burmah Construction v. State of Orissa*, A. 1962 S.C. 1320.

19. *Brij Kishore v. Rent Control Officer*, (1952) S.C.R. 135 (150).

20. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (150).

21. *S. T. O. v. Shivratn*, (1965) 16 S.T.C. 599; A. 1966 S.C. 142.

22. *Beharilal v. S.T.O.*, (1966) 17 S.T.C. 508.

23. *Venkateswaran v. Ram Chand*, A. 1961 S.C. 1506.

24. *Motilal v. Govt. of Uttar Pradesh*, A. 1951 A 257; *Larsen & Turbo v. Jt. O. T. O. A.* 1968 Mad.

25. *Mukund v. Municipal Committee*, A. 1953 Punj. 88.

1. *Mangru v. Commr. of Budge Budge Municipality*, (1951) 87 C.L.J. 389 (374).

order as it stood it was not clear whether an appeal lay or not<sup>2</sup> or where the matter has been simply kept pending by the authority, without passing any order at all.<sup>3</sup>

(ii) Where no appeal can be filed unless the amount of tax or penalty imposed is first deposited.<sup>4,5</sup>

(iii) Where the Petitioner would have no legs to fight the appeal, *e.g.*, where the authority has not allowed any opportunity to the Petitioner to place any materials in support of his objection;<sup>6</sup> or where evidently no adequate relief can be obtained by appeal, *e.g.*, where there was no bye-law authorising the issue of licence.<sup>7</sup>

(iv) Where the appellate authority has admitted an appeal, but fixed no date for hearing and it cannot be ascertained when the appeal is likely to be heard, while the Petitioner has been granted only 7 days' stay of execution of the order appealed against.<sup>8</sup>

(v) Where a fundamental right has been infringed.<sup>9</sup>

(vi) Where the Act which provides the alternative remedy is itself *ultra vires*.<sup>10</sup>

### Against whom mandamus will not issue.

Mandamus will not be granted against the following persons:

(i) The President, or the Governor of a State, for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties (Art. 301, *post*).

(ii) The High Court itself or any Judge thereof, acting in a judicial capacity,<sup>10a</sup> as distinguished from an administrative capacity.<sup>10a</sup>

(iii) An inferior or ministerial officer who is bound to obey the orders of his higher authority, to compel him to do something which is part of his duties in that capacity.<sup>11</sup> Thus, the Registrar of a High Court cannot be restrained from enforcing a judicial order.<sup>12a</sup>

(iv) Persons who are not holders of 'public' offices.<sup>12</sup> It cannot issue against a private organisation however powerful it may be,<sup>13</sup> or a private Trading Corporation, unless it is entrusted with any public duty,<sup>14</sup> in the discharge of which it has failed.<sup>14</sup>

(v) A private individual<sup>2</sup> or body whether incorporated or not, *e.g.*, a private school<sup>15</sup> except where the State is in collusion with such private party,<sup>13</sup> or the private individual is vested with a statutory or public duty.<sup>14</sup>

(vi) A company registered under the Companies Act, even though it is a 'Government company' for the purposes of that Act.<sup>14, 16</sup>

2. *Union of India v. Aundon Lal*, A. 1957 All. 363.

3. *Agarwal v. R. T. A.*, 1953 Raj. 1.

4. *Abrol v. Shantilal*, A. 1966 S.C. 197 (202).

5. *S. T. O. v. Shiv Ratan*, A. 1965 16 S.T.C. 599.

6. *Gayadinam v. A. D. Khan*, (1951) 35 C.W.N. 667.

7. *Rashid Ahmed v. Municipal Board* (1959) S.C.R. 566.

8. *Wanchoo v. Collector*, A. 1952 Punj. 268 (269).

9. *Himmat Lal v. State of M. P.*, A. 1954 S.C. 403.

10. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

10a. *Prabhakaran v. State*, A. 1970 Ker. 27.

11. *In re Bahadur Chandra*, A. 1952 Pat. 309 (311).

11a. *Arati v. Calcutta High Court*, A. 1969 S.C. 1133.

12. *Laxman v. Rajpramukh*, A. 1953 M.B. 54.

13. *In re Nagabhusanna*, A. 1950 Mad. 1119.

14. *Punga Tools Corpn. v. Immanuel*, (1969) 19 F.L.R. 140 (144); (1969) 1 S.C.C. 586; A. 1969 S.C. 1306.

15. *Jaswant Singh v. Bd. of Secondary Education*, (1964) C.I.J. 244.

16. *Heavy Engineering Machine Union v. State of Bihar*, (1969) S.C. (C.A. 1963/68, d. 12-3-69); (1969) 11 LLJ 549 (553) S.C.

(vii) Mandamus will not issue against the *Legislature*, even where it is going to enact a law which offends against fundamental rights.<sup>16a</sup>

### Who may apply for Mandamus.

1. It is only a person whose rights have been infringed who may apply for *mandamus*. Thus, in the case of an incorporated company, the application must be brought by the company itself; an individual share-holder may apply only if the infringement of the rights of the company constitutes an infraction of the share-holder's individual rights as well.<sup>16b</sup>

2. In the case of a company, the person signing and verifying the application must show that he is authorised to do so.<sup>17</sup>

3. Conversely, an association cannot complain where only the personal rights of individual members are affected.<sup>18</sup>

4. Where an individual seeks to enforce a right belonging to an institution, the petition must disclose the fact to show how he was entitled to act on behalf of the institution.<sup>19</sup>

5. The rule of infringement of a right belonging to the petitioner does not, however, mean that the right must belong to the petitioner alone and not to anybody else. He may have right in common with others. Thus, a rate-payer of a local body may apply for *mandamus* to prevent a misapplication or misappropriation of the public money entrusted with that body,<sup>20-22</sup> or to quash an election held contrary to the provisions of law.<sup>23-23a</sup>

6. The petitioner must have a *legal* right to enforce the performance of the alleged duty.<sup>24</sup> Thus, where the Petitioner has no legal right to be appointed to a post he cannot ask for the cancellation of an order appointing another person.<sup>24</sup>

7. Such right must be subsisting on the date of the petition.<sup>25</sup> If the interest of the Petitioner has been lawfully terminated before that date, he is not entitled to the writ.<sup>25</sup> Where such termination is due to the decision of a court<sup>1</sup> or other tribunal<sup>2-3</sup> of competent jurisdiction, no relief is available under Art. 32 or 226 so long as such decision is not set aside by appropriate proceeding.<sup>24</sup>

8. In the case of violation of a statutory duty or abuse of a statutory power, anybody who is affected by the illegal order is entitled to apply for *mandamus* to quash such order,<sup>4</sup> even though he may not have a substantive enforceable right, *e.g.*, in the case of a liquor licence. But a trespasser *ab initio* would not be allowed to complain about illegal eviction.<sup>5</sup>

16a. *Chotey Lal v. State of U. P.*, A. 1951 All. 328.

16b. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869; A. 1951 S.C. 41.

17. *Palravala v. Collector of Customs*, A. 1958 Cal. 232 (233).

18. *Indian Sugar Mills Association v. Government of Uttar Pradesh*, A. 1951 All. 1 (F.B.).

19. *Raj Rani v. U. P. Govt.*, A. 1954 All. 492.

20. *Venugopalan v. Vijawada Municipality*, A. 1956 Andhra 833 (837); *Rami Reddy v. State of A. P.*, A. 1963 A.P. 212.

21. *Narendra v. Corpn of Calcutta*, A. 1960 Cal. 102 (111).

22. *Municipal Corpn. v. Govind*, A. 1949 Bom 229.

23. *Venkateswara v. State of A. P.*, A. 1958 A.P. 458 (461).

23a. The Orissa High Court has held that a person who is not enrolled as a voter is not entitled to challenge an election to a local body [*Awadhesh v. Tarkeshwar*, A. 1966 Pat 23 (25)].

24. *Shivendra v. Nalanda College*, A. 1962 S.C. 1210.

25. *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1183.

1. *Cf. Sahibzada v. State of M. B.*, (1960) 3 S.C.R. 138.

2. *Aniyoth v. Ministry of Rehabilitation*, (1962) 1 S.C.R. 505 (511).

3. *Bhopal Sugar Mills v. Commr. of I. T.*, (1961) 1 S.C.R. 474.

4. *Ganagawani v. State of Mysore*, A. 1954 S.C. 592; *Sudha Devi v. State of Bihar*, A. 1956 Pat. 506 (510).

5. *Gurucharan v. Delhi Improvement Trust*, A. 1955 Punj. 34.

9. An unincorporated society is a judicial person<sup>6,7</sup> under s. 3 (42) of the General Clauses Act and may, accordingly, sue as a body through an office-bearer,<sup>8</sup> e.g., where the association has a statutory right which has been infringed<sup>9</sup> by the order complained of.

10. The legality or illegality of the order is not material. If the order is such that it compels obedience and that the Petitioner can ignore it only at his peril, he is entitled to apply under Art. 226.

### Parties to a proceeding for Mandamus.

1. Under Art. 226, Mandamus lies against any 'person' which term, according to the General Clauses Act, includes any company or association or body of individuals whether incorporated or not.<sup>10</sup> Hence, *mandamus* lies against an unincorporated body like the State Medical Faculty. It is not necessary that an unincorporated body should be proceeded against in the individual names of its members.<sup>10</sup>

2. All parties who are required to obey the directions of the writ or whose presence is necessary,<sup>11</sup> to make such directions effective must be before the Court.<sup>12</sup> Where the writ relates to a right, title or interest in real property, all persons owning or claiming the same should be joined as parties.<sup>13</sup>

### Form of Order.

1. The usual form of a writ of Mandamus is a command directing the respondent to act according to law<sup>14</sup> or to refrain from acting contrary to law.<sup>15</sup> Thus,

Where an administrative authority has the duty to exercise a discretion or power, but has failed to exercise it, the Court cannot by issuing a mandamus, either direct the authority in exercise of the discretion in any particular direction<sup>16</sup> nor can the Court make the administrative order itself.<sup>16</sup> The proper direction should be that the authority shall make a proper order after exercising his discretion according to the circumstances of the case.<sup>16</sup>

2. But since our Courts, under Arts. 32 and 226, are not fettered by the technicalities of the English writ, the Courts have sometimes gone beyond a mere order of cancellation of an alleged act or order to give effective relief to the Petitioner. Thus,

The Court has made an order not only in the positive form of directing the respondent to act according to law or to refrain from acting contrary to law,<sup>14</sup> but also gone further as to direct in detail what particular thing was to be done by the respondent in carrying out the law, e.g.,

(a) to restore possession of property to the applicant<sup>17a</sup> or to pay him compensation;<sup>17b</sup>

6. *B. C. Das Gupta v. Bejoyramjan*, (1952) 56 C.W.N. 861.

7. *Cf. Sabitri Motor Service v. Asansol Bus Assocn.*, A. 1951 Cal. 255 (S.B.).

8. The contrary decision in *Redha Shyam v. Patna Municipality*, A. 1956 Pat. 182 overlooks the definition in the General Clauses Act.

9. *Barrackpore Bus Service v. Serajuddin*, A. 1957 Cal. 444.

10. *B. C. Das Gupta v. Bejoyramjan*, (1952) 56 C.W.N. 861.

11. *Sri Krishna Rice Mills v. Dy. Director*, A. 1960 A.P. 431.

12. *Makhan v. Chatterjee*, A. 1954 Cal. 208 (210).

13. *Cf. Commr. of Police v. Gorkhandas*, (1952) S.C.R. 135 (152), see also *State of Madras v. Swadesamitran*, A. 1952 Mad. 297.

14. *Cf. State of Maharashtra v. Prabhakar*, A. 1966 S.C. 424.

15. *Cf. State of Assam v. Tuli*, (1962) Supp. 3 S.C.R. 508.

16. *State of Mysore v. Chandrasekhara*, A. 1965 S.C. 532 (537).

16a. *Raghuvir v. Court of Wards*, A. 1953 S.C. 373 (375); *Virendra v. State of U.P.*, (1955) 1 S.C.R. 415; *Union of India v. Ram Kanwar*, A. 1962 S.C. 247;

(1962) 2 S.C.D. 167; *Wastir v. State of H. P.*, (1964) S.C.A. 1257.

16b. *State of Rajasthan v. Nathmal*, (1964) S.C.R. 952.

- (b) to omit certain words from the licence granted to the application;<sup>17</sup>
- (c) to remove the ban against the Petitioner in respect of further employment under the Government;<sup>18</sup>
- (d) to make refund of tax illegally or unconstitutionally collected from the Petitioner;<sup>19, 20</sup>
- (e) to consider the applicant's case on the merits.<sup>21</sup>
- (f) The Court has also made a declaration that a statute is unconstitutional<sup>22</sup> or that a statutory instrument is unconstitutional<sup>23</sup> or *ultra vires*; and has struck it down by a direct order.<sup>24</sup>

3. But the Court cannot direct the Respondent to do something which he had no legal duty to do.<sup>25</sup>

### Costs in a proceeding for Mandamus.

1. Costs are usually awarded to a successful Petitioner,<sup>1, 2</sup> except when the success is divided.<sup>3</sup> Costs may be awarded even against an inferior Court when it has refused to exercise its jurisdiction or try a case on improper grounds.

2. The Court may award costs to a Petitioner even though he fails to obtain a writ of mandamus, *e.g.*, where he establishes that his legal right has been infringed, but the Court is unable to grant him relief because the writ would be ineffective, owing to delay for which the Petitioner is *not* responsible.<sup>26</sup>

3. On the other hand, the Court may refuse costs to a successful Petitioner where the success of the Petitioner is due to the invalidity of a law as distinguished from any unjustifiable conduct on the part of the Respondent.<sup>1</sup>

4. Where the Petitioner fails, costs are as a rule allowed to the Respondent.<sup>2</sup>

But costs may be refused to the Respondent—where there has been an irregularity in the proceedings challenged but it does not amount to such a violation of the law as would entitle the Petitioner to writ of Mandamus;<sup>3</sup> where the Petitioner has some real grievance, but he fails to establish that the impugned law is unconstitutional,<sup>4</sup> where, though the Petitioner has failed, there were important constitutional questions which needed clearing up in the proceeding.<sup>5</sup>

17. *Hamid v. State of M. P.*, A. 1959 S.C. 959.

18. *Krishan Chander v. Central Tractor Organisation*, A. 1962 S.C. 602.

19. *Mathra Prasad v. State of Punjab*, A. 1962 S.C. 745 (760).

20. *Universal Imports Agency v. Chief Controller*, A. 1961 S.C. 41 (48).

21. *Venkataramana v. State of Madras*, A. 1951 S.C. 229. (1950-51) C.C. 37.

22. *Abdul Kadir v. State of Kerala*, A. 1962 S.C. 922 (928).

23. *B. B. L. & T. Merchants' Assn. v. State of Bombay*, A. 1962 S.C. 486 (496); *Mathra Prasad v. State of Punjab*, A. 1962 S.C. 745 (760).

24. *Cf. Shivdev v. Krishan*, (1962) S.C. (Petn. 261/61).

25. *State of Mysore v. Chandrasekhara*, A. 1965 S.C. 532 (537).

1-23. *Cf. Ram Prasad v. State of Bihar*, A. 1953 S.C. 215 (220); *Raghunath v. Court of Wards*, A. 1953 S.C. 373 (375).

24. *State of Bombay v. United Motors*, A. 1953 S.C. 252 (263); *State of T. C. v. Cashewnut Factory*, A. 1953 S.C. (339).

25. *Gurunam v. State of Mysore*, (1955) 1 S.C.R. 305.

1. *Cf. Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 803.

2. *Cooverjee v. Excise Commr.*, (1954) S.C.A. 256; *Soma Singh v. State of Punjab*, (1954) S.C.A. 351; *Nain Sukh v. State of U. P.*, A. 1953 S.C. 384.

3. *Vice-Chancellor v. S. K. Ghose*, (1954) S.C.R. 883.

4. *Babu Khanna v. Patna High Court*, A. 1954 S.C. 524; *Sharma v. Sahib*, (1954) S.C.R. 1077.

5. *Gajapati v. State of Orissa*, A. 1953 S.C. 375 (384); (1954) S.C.R. 1.

5. The conduct of the Petitioner is an important factor to be taken into consideration in awarding costs. Thus,

In *Satischandra v. Union of India*,<sup>6</sup> where the Petitioner first argued his case personally but when the judgment was ready, he asked for a rehearing through a counsel which was granted and at the rehearing too he failed to succeed, the Court observed—

"When the matter was first argued we had decided not to make any order about costs but now that the petitioner has persisted in reopening the case and calling the learned Attorney-General here for a second time, we have no alternative but to dismiss the petition with costs."

### Effect of refusal to comply with a writ or order in the nature of Mandamus.

1. An *intentional* refusal to do the act at the time when it is required to be done by a writ of mandamus constitutes contempt of court.<sup>7</sup>

2. In order to punish a person for contempt of court, it must be established not merely that the order has been violated but also that such violation has been wilful.<sup>8</sup>

3. A proceeding in contempt is of a criminal nature, and the guilt of the person charged must be strictly established, both substantively and procedurally.<sup>9</sup>

4. It is, accordingly, open to the contemner to urge that the writ is not in conformity with or is in excess of the judgment, and he cannot be punished if he has complied with the judgment.<sup>9</sup>

### Particular cases where mandamus has been used.

#### I. Administrative Authorities.

1. Subject to the general principles to be discussed under 'public duties', *post*, mandamus lies against administrative authorities in a variety of cases, e.g.

(a) To compel public officials or bodies to perform their public duties,<sup>10-12a</sup> whether imposed by statute or common law.

(b) To direct a public authority to hold a fresh election where there has been an election which is void or colourable.<sup>11</sup>

(c) More numerous are the cases where mandamus is issued against an administrative authority to restrain it from committing an *ultra vires*<sup>12</sup> act or an act done without jurisdiction<sup>13</sup> or to restore what has been interfered with by an *ultra vires* action,<sup>14</sup> e.g.,

(i) to reinstate workmen retrenched in contravention of the provisions of the Industrial Disputes Act;<sup>15</sup>

(ii) to direct it not to enforce an *ultra vires*<sup>16</sup> (or unconstitutional)

6. *Satischandra v. Union of India*, (1952-54) 2 C.C. 587 (589): (1953) S.C.R. 655.

7. *Brijkishore v. Shrinastava*, A. 1956 All. 417.

8. *B. K. Kar v. Chief Justice*, A. 1961 S.C. 1367 (1370), *S. S. Roy v. State of Orissa*, A. 1960 S.C. 190.

9. *Aswini Kumar v. Mukherjee*, A. 1965 Cal. 484 (487).

10. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (148).

10a. *Bombay Union of Journalist v. State of Bombay*, (1964) 1 L.L.J. 351 (S.C.).

11. *Sohan Lal v. Union of India*, A. 1957 S.C. 529.

12. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018 (1026).

13. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372.

14. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

15. *Sherif v. T. A.*, A. 1960 S.C. 321.

order<sup>16</sup> or notification<sup>12</sup> or to hold an election on the basis of an *ultra vires* electoral roll;<sup>17</sup>

(iii) not to give effect to an executive order which seeks to effect what could be done only by legislation;<sup>18</sup>

(iv) not to enforce a subordinate legislation which is *ultra vires* (see *post*);

(v) to comply with the requirements of the law, in exercising statutory powers.<sup>19</sup> Thus,

Where, while granting the renewal of a permit, the Authority imposed *ultra vires* conditions, the Court directed the Authority 'to comply with the requirements of the law.....in the order of renewal made by them.....'.<sup>19</sup>

(vi) To forbear from imposing<sup>20</sup> or collecting<sup>21</sup> *ultra vires* or unconstitutional tax [see under 'Taxation, *post*], or public demand.<sup>22</sup>

2. But no mandamus will lie against an administrative authority in a matter which lies solely within his discretion, uncontrolled by any statutory obligation or limitation;<sup>23</sup> or to enforce mere administrative instructions which have no statutory force;<sup>24</sup> or on the ground that it has reviewed its previous order,<sup>25</sup> not being fettered by any statutory bar in that behalf. But a memorandum issued under statutory authority may be enforced.<sup>25a</sup>

## II. Collector.

[See 'Administrative authority', p. 461, *ante*].

Mandamus has been issued against the Collector and similar administrative officers—

(a) Where his act or order is *ultra vires*, *e.g.*—

(i) To quash the order or removal of a *sarpanch* which is not in terms of the relevant law.<sup>1</sup>

(ii) To quash an order of cancellation of citizenship registration certificate under s. 10 (2) (a) of the Citizenship Act, 1955, under which the power belonged to the Central Government and not the Collector.<sup>2</sup>

(b) To compel him to exercise his jurisdiction to make a reference to the High Court under statutory provisions, *e.g.*, under s. 18 of the Land Acquisition Act<sup>3</sup> (see under 'Revenue Authority', *post*).

## III. Commission of Enquiry.

Mandamus would lie to cancel an order to constitute a commission under the Commission of Inquiry Act, 1952, on the following grounds;

16. *Rashid Ahmad v. Municipal Board*, (1950) S.C.R. 566; *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 658.
17. *Chief Commr. v. Radhey Sham*, (1957) S.C.R. 67 (77).
18. *Madhavrao v. State of M. B.*, (1961) 1 S.C.R. 957 (970); *Promod v. State of Orissa*, A. 1962 S.C. 1288 (1304); *Wazir Chand v. State of H. P.*, (1955) 1 S.C.R. 406.
19. *Sheriff v. Mysore*, S. T. A. 1960 S.C. 321 (327); *State of Assam v. Tulai*, (1962) Supp. 3 S.C.R. 508.
20. *Diamond Sugar Mills v. State of U. P.*, (1961) 3 S.C.R. 242 (257).
21. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.
22. *Collector of Monghyr v. Keshav Prasad*, (1963) 1 S.C.R. 98.
23. *Cf. Guruswami v. State of Mysore*, (1955) 1 S.C.R. 305; *Om Prakash v. Commr. of Police*, (1960) 1 M.L.J. 22nd.; *Mallikar v. State of Mysore*, A. 1960 Mys. 345.
24. *Fernandez v. State of Mysore*, A. 1967 S.C. 1753 (1757).
25. *Rewa Coal Fields v. Central Govt. of India*, T. T. A. 1969 M.P. 174 (176).
- 25a. *Sabarna v. State of M. P.*, A. 1967 S.C. 1264.
1. *Babish v. State of M. P.*, A. 1959 M.P. 407.
2. *Chaurai v. State of Rajasthan*, (1961) S.C. [Petn. 60/56].
3. *Seenthale v. Dt. Collector*, A. 1967 Andhra 667.

(a) That the conditions specified in s. 3 (1) of the Act have not been fulfilled.<sup>4</sup>

(b) That the order is *mala fide*;<sup>4-6</sup> but mere existence of political rivalry is not enough.<sup>4-6</sup>

(c) That the order is unconstitutional, having violated Art. 14<sup>5</sup> of the Constitution.

(d) That the Act is itself unconstitutional.<sup>5</sup>

(e) That the order is *ultra vires*.<sup>5-6</sup>

(f) That the matter or allegation into which the inquiry is directed is *vague*.<sup>4</sup>

#### IV. Constitution, enforcement of mandatory provisions of.

In India, *mandamus* will issue not only where a fundamental right has been infringed<sup>7</sup> but also where the action of the public official or Government, or a law<sup>8</sup> violates a mandatory provision of the Constitution, so as to make it *ultra vires*, e.g., Art. 286<sup>9</sup>, 321,<sup>10</sup> or Art. 311.<sup>11, 25</sup>

#### V. Contract.

I. *Mandamus* will not issue to enforce a private contract and the remedy, if any, is in private law, e.g., a suit for damages or specific performance<sup>1, 2</sup>

II. Nor will *mandamus* lie against the Government for a breach of contract unless<sup>1, 2</sup>—

(a) the breach itself violates a fundamental right, e.g., under Art. 16 (1)<sup>1</sup> or 19 (1) (g);<sup>1</sup>

(b) in refusing to enter into a contract with the Petitioner, the State has violated a statutory provision.<sup>3</sup>

#### VI. Corporation [See 'Local Authority'].

#### VII. Courts [See 'Tribunals, quasi-judicial', *post*].

#### VIII. Court-martial, orders of.

*Mandamus* will issue to prevent Courts martial from exceeding their jurisdiction, but not to interfere with their proper jurisdiction, e.g., on issues of military discipline.

#### IX. Domestic body.

[See 'Educational Authorities', *below*]

I. *Mandamus* does not lie against a domestic body unless it has any statutory duty to perform or its constitution is regulated by statute.

II. Even where a domestic body, such as a University or other educational institution, is created by statute, the Court will not interfere by *mandamus* or any other judicial remedy, with the *internal* working of the domestic body, if a domestic forum has been provided; the matter is within the jurisdiction of the domestic authority and such jurisdiction is clear.<sup>4</sup>

4. Cf. *State of J & K v. Ghulam Mohammad*, A 1967 SC 122 (130).

5. *Ram Krishna v. Tendolkar*, A 1958 SC 538 (544; 553).

6. *Jagannath v. State of Orissa*, A 1969 SC 215 (224).

7. Cf. *Ram Prasad v. State of Bihar*, A 1953 SC 215.

8. *Yasin v. Town Area Committee*, A 1952 SC 115.

9. *Himmalal v. State of M. P.*, A. 1954 SC 403.

10. *Mira Chatterjee v. Public Service Commission*, A 1958 Cal 345 (349).

11-25. *Krishna Gopal v. Director of Telegraphs*, (1956) 60 CW.N. 692; *Venkateswar Rao v. State of Madras*, A. 1954 Mad. 1043.

1. Cf. *Achutan v. State of Kerala*, A 1967 SC 490 (492).

2. *Union Construction Co. v. Chief Engineer*, A. 1960 All. 72.

3. *State of Assam v. Tuli*, (1962) Supp. 3 S.C.R. 508.

4. *Ashe Lala v. Principal*, A. 1959 All. 224; *Anand v. Govt. of M. P.*, A. 1959 All. 265.



On this principle, mandamus does not issue to compel an educational institution or other society to admit a person as a student<sup>4</sup> or member thereof.<sup>4</sup>

III. Mandamus will, however, issue—

Where the decision of the statutory domestic body is *ultra vires* or violates the principles of natural justice.<sup>5-9</sup>

### X. Educational authorities.

I. (1) Where Universities and similar bodies are created by statute, their powers are limited by such statute and the rules and regulations validly made thereunder. Hence, the Court can issue mandamus against them in cases where it could be issued against other statutory bodies, *e.g.*, where the order or resolution of the University is *ultra vires*<sup>6a</sup>. Thus,—

Mandamus was issued against the University authorities—

(a) directing them not to give effect to an order cancelling the examination of a candidate and to reconsider her case according to law, when her examination had been cancelled on suspicion of unfair practice, but without complying with the rules and regulations of the University for proceeding against a candidate in such matters,<sup>7</sup> or

(b) directing them to announce the Petitioner as passed when such announcement had been withheld upon a wrong interpretation of its Regulations.<sup>8-9</sup>

(2) But where the breach alleged is procedural, the Court should distinguish an irregularity from an illegality. Thus, though want of notice to each member to hold a meeting renders the decision taken at the meeting *ultra vires*, the defect would be cured if all the members appear at the meeting and unanimously come to a decision.<sup>10</sup>

II. Mandamus would also issue where though the decision is *intra vires*, the authority has exercised his discretionary power unreasonably or without due care.<sup>10</sup>

But in determining whether the action of the authority was unreasonable the Court should not sit as a court of appeal<sup>10</sup> or judge by the standard as to how the Court would have acted if they were vested with the discretion.<sup>10</sup> The reasonableness has to be determined with reference to the circumstances.<sup>10</sup> Thus,

Where the situation was urgent, the Syndicate had to discuss the question of cancellation of an examination for unfair means or leakage of question papers, without issuing a notice of agenda that the matter would be discussed at that meeting, but the Syndicate came to a unanimous decision, in the presence of all the members, after hearing experts and other persons who could throw light on the incident, the Supreme Court refused to hold that the action of the Syndicate was unreasonable, having regard to the urgency of the situation.<sup>10</sup>

III. But in matters relating to the internal working of an educational institution (say, the matter of admission),<sup>11,12</sup> and academic matters<sup>13</sup> the

5. *Sudarsan v. Allahabad University*, A. 1953 All. 194; *Board of Education v. Ram Krishna*, A. 1959 All. 266.

6. *Annamunthodo v. Oilfield Workers' Union*, (1961) 3 All E.R. 621 (P.C.).

6a. *Cf. Kamala v. Calcutta University*, A. 1956 Cal. 563 (567); *Samarendra v. Calcutta University*, A. 1953 Cal. 172.

7. *University of Calcutta v. Dipa Pal*, (1952) 56 C.W.N. 730.

8. *Tapendra v. University of Calcutta*, A. 1954 Cal. 141.

9. *Hemendra v. Gauhati University*, (1953) 58 C.W.N. 54.

10. *Vice-Chancellor v. S. K. Ghosh*, (1954) S.C.R. 883 (889; 891).

11. *Asha Lata v. Principal*, A. 1969 All. 224.

12. *Agar v. Govt. of M. P.*, A. 1966 All. 265.

13. *University of Mysore v. Govinda*, A. 1965 S.C. 491 (494-7).

'Court will not interfere unless the act complained of is clearly beyond jurisdiction, or there is a statutory duty which the authority' has failed to perform.<sup>12-14</sup>

IV. Nor will the Court interfere where the matter is left to the discretion of the authorities,<sup>15</sup> e.g., in the matter of selection for admission<sup>16</sup> or as to the quantum of punishment,<sup>17</sup> or in the matter of appointment of a teacher,<sup>18</sup> there being no statutory rules governing the matter, unless some constitutional provision has been infringed.<sup>18a</sup>

V. Mandamus will not issue against an educational authority which does not hold a 'public office' nor has any statutory duty to perform, e.g., the manager or head of a private or aided institution.<sup>19</sup>

## XI. Election.

In this matter, a distinction should be made between elections held under the Constitution, to which the provisions of Art. 329 (b) are attracted, and those held under other laws:

### (A) Elections under the Constitution:

By reason of Art. 329 (b), as interpreted by the Supreme Court,<sup>20</sup> neither the Supreme Court nor a High Court has any power to interfere with the procedure of election. But when an 'election dispute' comes before the Election Tribunal, mandamus may issue if the Tribunal refuses to exercise its jurisdiction, as in the case of any other quasi-judicial Tribunal.

### (B) Elections under other laws:

I. The general rule is that the right of franchise created by a statute is governed by the provisions thereof, and, if the statute provides a remedy, e.g., by an election petition, that must be followed, at least in the first instance, before invoking the jurisdiction under Art. 226.<sup>21</sup>

II. But the existence of a statutory remedy is no bar to Mandamus—

Where the ground on which relief is sought is beyond the competence of the statutory tribunal to entertain.<sup>22</sup> e.g.,

That the entire Electoral Roll has been prepared in contravention of the statute or the rules made thereunder,<sup>21-23</sup> as distinguished from a technical defect.<sup>24-25</sup> In such a case, the Court may issue Mandamus directing the respondents not to give effect to the said Electoral Rolls i.e., not to hold an election on the basis thereof,<sup>26</sup> and also to draw up proper Rolls in conformity with the law.<sup>21</sup>

## XII. Fundamental rights, enforcement of.

In India, the writ is available under Arts 32 and 226 not only for the purposes for which it is available in England, but also for the enforcement of Fundamental Rights. It is obvious that the remedy by means of the

12. *Board of Education v. Ram Krishna*, A. 1959 All 226.
13. *Kamala v. Calcutta University*, A. 1956 Cal 563 (569).
14. *Anand v. Govt. of M. P.*, A. 1959 M.P. 265.
15. *Ranu Pratap v. Vice-Chancellor*, A. 1960 All 579.
16. *Shivendra & Nalanda College* (1962) Supp. (2) S.C.R. 147.
- 17a. *Umesh v. Principal*, I.L.R. 46 Pat 616.
18. *Sutaj v. Manager, A. R. H. S. School*, A. 1961 All 282; *Bangshidhar v. Director*, A. 1965 A. & N. 52.
19. *Ponnuswami v. Returning Officer*, (1952) S.C.R. 218 (230-2); *Hari Vishnu v. Ahmad*, A. 1955 S.C. 233; (1955) 1 S.C.R. 380.
20. *Hakur Prasad v. Mehta*, A. 1966 M.P. 258 (263); *Hari Prasad v. State of M. P.*, A. 343 (F.B.); *Amulya v. Basirhat Municipality*, A. 1959 Cal 548.
21. *Jayaragowda v. Lakkigowda*, A. 1958 Mys 78.
22. *Chief Commr. v. Radhey Shyam*, A. 1957 S.C. 304.
23. *Dev Prakash v. Babu Ram*, A. 1961 Punj. 429 (F.B.).
24. *Pratap Singh v. Sri Krishna*, A. 1956 S.C. 140.

writ being guaranteed by the Constitution for the enforcement of the Fundamental Rights, it becomes the *duty* of the Court to issue the writ of mandamus where a fundamental right has been infringed or is threatened<sup>1</sup> to be injured.

It will issue where a fundamental right is infringed by a statute,<sup>2</sup> statutory order or notification,<sup>3</sup> or a non-statutory administrative order.<sup>4</sup>

The same principle has been followed in issuing mandamus to direct the Government to continue payment of a maintenance allowance granted to the Petitioner by an ex-Ruler of an Indian State which had been stopped by Government by an executive order without the authority of law,<sup>5</sup> or to restore possession of goods seized without the authority of law, in contravention of Art 31 (1).<sup>6</sup>

### XIII. Government and its officers.

[Sec 'Administrative authority', p. 461, *ante*].

I Mandamus will issue when the appropriate Government or its officers either overstep the *limits* of their power conferred by statute<sup>7</sup> or fail to comply with the *conditions*<sup>8</sup> or the *procedure*<sup>9</sup> imposed by statute for the exercise of the power, or acts on extraneous considerations.<sup>8</sup>

In other words, it will issue to quash an *ultra vires* order.<sup>9</sup>

2 'Statute' in this context, of course, includes subordinate legislation<sup>11a</sup> which has the force of law. Where Government has framed certain Rules under statutory power, laying down a procedure or conditions for doing a thing (*e.g.*, for holding a public auction). Government is not free to adopt *ad hoc* procedure in particular cases, departing from such rules.<sup>10</sup>

Thus, after having provided in the Rules that the settlement of a public ferry may be made only by a public auction, that Government or the statutory authority cannot settle it for a new term or extend an existing term without holding a public auction.<sup>11</sup>

3. The power to issue mandamus against administrative orders is governed by the following principles:

*Mandamus* will issue—

(i) Where the law under which the order has been made *e.g.*, an order cancelling a licence<sup>12</sup> or a notice not to hold a market<sup>13</sup> or to pay or to submit return for payment of a tax<sup>13a</sup> is unconstitutional, or *ultra vires*.

1 *Himmatal v State of M. P.*, (1954) S.C.R. 1122

2 *Ram Prasad v State of Bihar*, A. 1953 S.C. 215

3. *Arakkamated Coalfields v. Janapada Sabha* A. 1961 S.C. 954

4 *Venkataramana v State of Madras* A. 1951 S.C. 229; *Heggade v State of Mysore* (1962) S.C. [Petn 130/62] *Balan v State of Mysore*, (1963) 2 S.C.A. 1

5 *Virendra v State of U. P.* (1955) 1 S.C.R. 415; see also *Hamdard Dawakhana v Union of India* A. 1960 S.C. 554 (569).

6 *Coimbatore v Excise Commr.* A. 1954 S.C. 220

7 *N. F. Ry. Mazdoor Union v. N. F. Ry.* A. 1969 A & N. 105 (109).

8. *State of Bombay v. Krishnan*, A. 1960 S.C. 1223; *Krishan Chand v. Commr. of Police* (1961) 3 S.C.R. 135.

9. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018; *Chief Commr. v. Radhey Shyam*, (1967) S.C.R. 67 (78); A. 1967 S.C. 304; *State of Bihar v. Ram Bhawan*, (1966) S.C.A. 762; A. 1966 S.C. 640.

10. *Guruswamy v. State of Mysore*, A. 1954 S.C. 582.

11. *State of Assam v. Keshab*, (1963) S.C.R. 865.

11a. *M. P. Mineral Industry v. Regional Lab. Commr.*, (1960) 2 L.L.J. 254 (S.C.).

12. *Tahir Hussain v. Dt. Bdard*, A. 1954 S.C. 130.

13 *Dwarika Prasad v. State of U. P.*, (1954) S.C.R. 808.

13a *Himmatal v. State of M. P.*, (1954) S.C.R. 1122.

But—

(a) *Mandamus* will not issue to enforce an executive notification or order which has no statutory force, a press notification;<sup>13b</sup> the rules of an administrative manual.<sup>13c</sup>

(b) *Mandamus* does not issue against ministerial officers.

(ii) Where the act of the Government itself contravenes a fundamental right or other mandatory provision of the Constitution (see p. 466, *ante*) or of law. Thus—

II. *Mandamus* will lie against the Government and administrative authorities to order them—

(a) To forbear from enforcing against the Petitioner an *unconstitutional statute*,<sup>14</sup> or other law<sup>15-16</sup> or administrative order<sup>17</sup> or tax.<sup>18</sup>

\* (b) To restrain the enforcement of an illegal executive order seeking to extinguish an existing law.<sup>19</sup> Thus,—

*Mandamus* will issue to direct the Government—

(i) to continue payment of a maintenance allowance granted to the Petitioner by an ex-Ruler of an Indian State which had been stopped by the Government by an executive order without the authority of law,<sup>20</sup> or to restore possession of goods seized without the authority of law, in contravention of Art. 31 (1);<sup>21</sup>

(ii) to reinstate workmen retrenched in contravention of the provisions of the Industrial Disputes Act;<sup>22</sup>

(iii) not to give effect to an executive order which seeks to effect what could be done only by legislation;<sup>23</sup>

(iv) to direct the Government to pay tolls to a lessee of a ferry from which the Government had claimed exemption under an *ultra vires* notification;<sup>24</sup>

(v) to restrain a State Government from giving effect to an order of deportation until it was determined by the Central Government that the deportee had acquired the citizenship of a foreign country.<sup>25</sup>

(c) To restrain *mala fide* or colourable exercise of power.<sup>1</sup>

(d) To direct a statutory authority to disclose the reasons for his order, where the statute specifies the conditions or grounds upon which only the power may be exercised.<sup>2</sup>

13b. *Ved Prakash v. I. T. Commr.*, A. 1956 All 711.

13c. *Rameshwar v. Pilbhit Municipality*, A. 1958 All. 941, *Nirankar v. Director of Industries*, A. 1959 All. 681.

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682; *Chintamanrao v. State of M. P.*, (1950) S.C.R. 759; *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (870).

15. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

16. *Ratilal v. State of Bombay*, A. 1954 S.C. 388; *Narendra v. Union of India*, A. 1960 S.C. 430.

17. *State of Madras v. Champakam*, (1951) S.C.R. 525.

18. *Himmallal v. State of M. P.*, A. (1952-54) 2 C.C. 242; *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661.

19. *Madheorao v. State of M. B.*, A. 1961 S.C. 298 (303).

20. *Promod v. State of Orissa*, A. 1962 S.C. 1288 (1304).

21. *Wazir Chand v. State of H. P.*, (1955) 1 S.C.R. 408.

22. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

23. *Madhwarao v. State of M. B.*, (1961) 1 S.C.R. (970).

24. *Satyamrao v. Dt. Engineer*, A. 1962 S.C. 1161.

25. *Gaut. of Andhra Pradesh v. Syed Mohd.*, A. 1962 S.C. 1778; (1963) 3 S.C.R.

1. *Parbat Singh v. State of Punjab*, A. 1964 S.C. 83.

2. *Krishan Chand v. Commr. of Police*, (1961) 3 S.C.R. 135.

III. In the absence of a law governing the matter,<sup>3</sup> the State cannot be compelled by any individual to do business with him.<sup>4</sup>

#### XIV. Income-tax.

1. The Income-tax Act provides a complete machinery for assessment of tax, and for relief in respect of improper or erroneous orders made by the Revenue Authorities.<sup>5-8</sup>

2. A person who is aggrieved by the order of the Revenue Authority cannot, therefore, be allowed to abandon resort to that machinery and to invoke the extra-ordinary jurisdiction of the High Court under Art. 226, unless—

(i) a question of infringement of a fundamental right arises;<sup>9</sup> or

(ii) on undisputed facts, the taxing authorities are shown to have assumed jurisdiction which they do not possess;<sup>9</sup> or acted without the authority of law;<sup>7</sup>

(iii) the authority has refused to perform his statutory duty,<sup>8</sup> e.g., to issue a demand notice in terms of s. 29 of the Income Tax Act, 1922;<sup>8</sup> or to carry out the unambiguous directions of a superior Tribunal.<sup>9</sup>

(iv) Where the order of the Revenue authority is not *bona fide*, e.g., where assessment of escaped income is sought to be made without even any *prima facie* grounds for thinking that there had been some non-disclosure of material facts.<sup>10</sup>

#### XV. Industrial Dispute.

I. Though s. 10 (1)<sup>11</sup> or s. 12 (5) of the Industrial Disputes Act confers a discretionary power upon the Government to refer an industrial dispute to a tribunal and the exercise of that direction is not subject to judicial review on the merits, *mandamus* will, nevertheless, issue to direct the Government to proceed according to law—

(i) Where the act of the Government is *ultra vires*, e.g., where a reference already made is cancelled or superseded without such authority having been conferred by the Act.<sup>11</sup>

(ii) Where in making the reference the Government violates any of the statutory provisions.<sup>12</sup>

(iii) Where the Government does not record the reasons and communicate the reasons to the parties concerned while it refuses to make a reference, as required by s. 12.<sup>12</sup>

But—

(a) The Government is not obliged to write an elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference.<sup>13</sup>

3. *State of Assam v. Keshab, A.* 1953 S.C. 309; *State of Assam v. Tulsi*, (1964) 1 S.C.J. 42.

4. *Punnen v. State*, A. 1969 Ker. 81 (84).

5. *Abraham v. I. T. O.*, A. 1961 S.C. 609; (1961) 2 S.C.R. 765.

6. *Sharma v. I. T. O.*, A. 1954 S.C. 1095 (1099).

7. *Cl. Gadgil v. Lal & Co.*, (1954) S.C. [C.A. 3422/53].

8. *Dwarha v. I. T. O.*, A. 1965 S.C. 81 (87).

9. *Bhopal Sugar Industries, A.* 1961 S.C. 182 (185); *Sarupchand v. Union of India*, (1959) Supp. (2) S.C.R. 986 (1001).

10. *Calcutta Diamond Co. v. C. I. T.*, A. 1961 S.C. 372 (382).

11. *State of Bihar v. Ganguly*, A. 1955 S.C. 1018.

12. *State of Bombay v. Krishnan*, A. 1960 S.C. 1223; (1961) 1 S.C.R. 227.

13. *Bombay Union of Journalists v. State of Bombay*, A. 1964 S.C. 1037 (1037).

(b) If some reasons are given, the Court cannot, under Art. 226, consider the propriety of those reasons as a court of appeal, nor can the Court issue mandamus to compel the Government to make a reference on the ground that the Government considered some of the pleas raised by the Petitioner for making a reference but not others.<sup>14</sup>

(iv) Where the refusal by the Government is not *bona fide*<sup>15,16</sup> or is based on extraneous or irrelevant considerations,<sup>14,15</sup> e.g., that the workmen had resorted to 'go-slow' tactics.<sup>14,16</sup>

2. But, in the absence of any such exceptional circumstances, the Court will not interfere with the discretion of the Government in exercising the power under s. 10,<sup>13</sup> as if sitting in appeal.<sup>12</sup>

3. The Court cannot compel the Government to make a reference.<sup>14,15</sup>

II. Mandamus has also been issued to direct reinstatement of workmen retrenched in contravention of the provisions of the Act.<sup>16</sup>

III. Mandamus will not be available to enforce an award of an Industrial Tribunal.<sup>17</sup> The remedy lies under the relevant law.<sup>17</sup>

IV. Nor will mandamus lie for enforcement of standing orders under the Industrial Employment (standing orders) Act, 1946.<sup>18</sup>

## XVI. Land Acquisition.

1. A notification under s. 4 of the Land Acquisition Act may be struck down by the Court—

(On the ground that the condition precedent to proceedings under the Act, namely, the public notice under this section has not been complied with.<sup>19</sup> This omission can be challenged by the aggrieved person even after issue of the award, provided it is done within a reasonable time after the Petitioner's knowledge of the same.<sup>19</sup>

But—

(1) There may be more than one notification under s. 4(1) in respect of different parcels of land in the same locality.<sup>20</sup>

(2) The satisfaction need not be the satisfaction of the Governor personally. The function of the Governor in this behalf may be delegated to a Minister and by the latter to the Secretaries, in accordance with the Rules of business.<sup>21</sup>

II. Though the public purpose behind an acquisition proceeding cannot be challenged after declaration under s. 6 has been made, it can still be questioned on the following grounds—

(a) That the requirements of subsecs (1)-(2) of s. 6 have not been complied with, for, the finality under subsec. (3) will be available only if sub-secs. (1)-(2) have been complied with.<sup>22</sup>

(b) That more than one declaration have been made on the basis of a single notification under s. 4, except where the notification under s. 4 is a composite one,—including lands to which s. 17(1) was applied, and others to which it was not sought to be applied.<sup>23</sup>

14-15. *State of Madras v. Sarathy*, (1963) S.C.R. 531. A 1963 S.C. 53.

16. *State of Bombay v. Hospital Management Board*, A. 1960 S.C. 610.

17. *K. M. Mukherjee v. State of W. B.*, A 1968 Cal. 59 (61).

18. *Abani Bhushan v. Hindusthan Cables*, A. 1968 Cal. 124.

19. *Khand Chand v. State of Rajasthan*, A. 1967 S.C. 1047 (173).

20. *State of M. P. v. Vishnu*, A. 1966 S.C. 1593 (1698).

21. *B. L. Cotton Mills v. State of W. B.*, A. 1967 S.C. 1145.

22. *Ganga Bishnu v. Col. Pinnapala Soc.*, A. 1968 S.C. 615 (619).

23. *State of M. P. v. Vishnu*, A. 1966 S.C. 1593 (1698). [This position is now altered by s. 5A (2), inserted by Act 13 of 1967].

(c) That there has been a *ma'a fide* or colourable use of the power<sup>24</sup> by the Government, by showing—

(i) That the real object was to acquire the lands for some private purpose,<sup>25</sup> or that there was no purpose at all.<sup>1</sup>

But *mala fides* cannot be established merely by showing—

(i) That Government was issuing one notification after cancelling a previous notification or notifications.<sup>2</sup>

(ii) That the party for whom the disputed lands are sought to be acquired already possesses other lands, if it is shown that the existing lands are unsuitable for the purpose.<sup>3</sup>

(iii) That no part of the compensation was payable out of the public revenues or from some fund of a local authority.<sup>2, 4</sup>

Where the compensation is entirely payable by a private party, the acquisition cannot be for a 'public purpose' even though the declaration uses that expression.<sup>4</sup>

(iv) That the expropriated owner himself intended to use the land for some public purpose.<sup>5</sup>

III. A notification, applying s. 17(4) of the Act can be challenged on the ground—

(a) that s. 17(1) was not applicable,—the land not being in 'waste' or 'arable',<sup>6</sup> or

(b) that the Government did not apply its mind to the question of urgency or that its action was *mala fide*.<sup>6, 7</sup>

(c) Whether a land is 'waste' or 'arable' is an objective question.<sup>8</sup>

Where some plots which are waste or arable are lumped together with other plots which are not so, it would show that the authority did not apply its mind to the question and the notification, dispensing with the inquiry under s. 5A, will be invalid *in toto*.<sup>8</sup> But where the notification divides the lands into two groups and dispenses with inquiry under s. 5A only in respect of one group, which is held to be bad, the notification with respect to the rest will remain valid.<sup>9</sup>

(d) The question whether a particular case is one of urgency is a subjective one.<sup>8</sup>

But—

(i) There is a presumption of regularity of official acts, and a bare denial that Government had not formed an opinion as to urgency does not raise any issue.<sup>10</sup>

(ii) The Court is not competent to enquire into the sufficiency of the grounds for forming such opinion.<sup>6</sup>

The Court can interfere with the determination as to urgency only on the ground of *mala fides* or that the Government did not apply its mind to the matter.<sup>7</sup>

24. *Somasant v. State of Punjab*, A. 1963 S.C. 151.

25. *Agarwala v. State of W. B.*, A. 1965 S.C. 996.

1. *Anand v. State of U. P.*, A. 1967 S.C. 1081.

2. *Abdul v. State of Gujarat*, A. 1969 S.C. 432 (437-8).

3. *Shyam Behari v. State of M. P.*, (1965) 1 S.C.A. 588 (591).

4. *Giridharilal v. State of Gujarat*, A. 1966 S.C. 1408 (1409).

5. *Arora v. State of U. P.*, A. 1964 S.C. 1230 (1241).

6. *Anand v. State of U. P.*, A. 1967 S.C. 1081 (1085).

7. *Jaichand v. State of W. B.*, A. 1967 S.C. 483.

8. *Saraj Prasad v. State of W. B.*, A. 1965 S.C. 1763.

9. *Nandeshwar v. U. P. Govt.*, A. 1964 S.C. 1217.

10. *Iskwarlal v. State of Gujarat*, A. 1968 S.C. 870 (876).

IV. S. 18 is mandatory. If, therefore, the Collector refuses to make reference on extraneous considerations, the application having been made within the period of limitation by a competent person, mandamus will issue to compel the Collector to make a reference.<sup>11</sup>

### XVII. Licensing Authority.

I. The general principle is that except where a statutory provision has been violated, the Court will not issue *mandamus* to interfere with the exercise of a discretionary power to grant or refuse a licence.<sup>12-25</sup>

But *mandamus* will lie, if a licence is revoked in violation of statutory conditions;<sup>1-7</sup> or *ultra vires*<sup>8</sup> or unconstitutional<sup>9</sup> conditions are imposed in a licence.<sup>8</sup>

II. In a case for *certiorari*, our Supreme Court observed that where an authority empowered to issue a licence or permit<sup>10</sup> has a *discretion* in the matter, no one is of right entitled to it even though he fulfils the conditions mentioned in the statute for the purpose of qualifying for the licence or permit and that, accordingly *certiorari* cannot issue on the ground that the exercise of the discretion was erroneous.

But even in such cases, *mandamus* will issue to direct the authority to determine the application according to law, where—

(i) It grants or refuses an application for licence or renewal of licence on irrelevant grounds, or extraneous considerations,<sup>11</sup> *e.g.*, where an application for renewal is refused or a restriction imposed in the absence of any change in the circumstances.

(ii) It refuses to specify the grounds for its determination where so required by the statute, expressly or by implication.

(iii) It refuses to exercise its discretion with reference to the merits of the *individual case* before it, *e.g.*, by acting according to pre-determined rules or its own order in previous cases or the directions or instructions of a superior or other authority.<sup>12</sup>

Even where the authority formulates a general policy, it must hear each particular case to see whether the general policy would be applicable to that case, and in case of refusal of such hearing, *mandamus* will lie.

(iv) Where the discretion is not absolute but is circumscribed by statutory conditions, *mandamus* will issue to direct the authority to exercise his discretion in conformity with the statutory conditions.<sup>13</sup>

III. Similarly, as regards the cancellation or revocation of a licence, already issued, where the discretion of the authority is unfettered by any statutory conditions, the Court cannot interfere if the licensing authority cancels it at any time, in the *bona fide* exercise of his discretion.

But even in this case, the Court may issue *mandamus* directing the licensing authority to exercise his discretion, taking into consideration relevant matters, where he has simply acted under the instructions or orders of

11. *Kajari v. Union of India*, A. 1966 S.C. 1538 (1541).

12-25. *Om Prakash v. Commr. of Police* (1960) 1 M.L.J. 22n.

1-7. *In re. State of Madras*, A. 1967 Mad. 692.

8. *Sheriff v. Mysore S. T. A.*, A. 1960 S.C. 321 (327).

9. *Seshadri v. Dt. Magistrate*, (1955) 1 S.C.R. 686.

10. *Venappa v. Raman*, (1952) S.C.R. 583 (595).

11. *Prem Sagar v. S. V. Oil Co.*, A. 1965 S.C. 107 (111).

12. *Commr. of Police v. Girdharadas*, (1952) S.C.R. 135 (147); *Marmola v. State*

*of Assam*, A. 1962 S.C. 386 (391).

13. *Sheriff v. S. T. A.*, A. 1960 S.C. 321 (327); *Dwarka Prasad v. State of U. P.*, (1964) S.C.R. 808.



another authority, without exercising the discretion which the statute has vested in himself.<sup>14</sup>

IV. There are certain statutes under which the authority has a duty to grant the licence if the statutory conditions are complied with by the applicant. In such cases, *mandamus* lies to compel the authority to grant a licence if he refuses to grant it notwithstanding the fulfilment of the statutory conditions, the Court being competent to inquire whether the statutory conditions have been fulfilled.

V. In India, *mandamus* would also go against a licensing authority where his order of refusal or cancellation has been made under a law which is unconstitutional,<sup>15</sup> or in disregard of the statutory conditions.<sup>16</sup>

### XVIII. Local Authority.

The Court can interfere with the action of a statutory local body in the following cases, *inter alia*—

(i) To prevent the public funds being diverted to purposes other than those authorised by the governing statute.<sup>17</sup>

(ii) To direct it not to impose or collect an *ultra vires*<sup>18, 19</sup> or unconstitutional bye-law against the Petitioner.

(iii) To direct it not to impose or collect an *ultra vires*<sup>20</sup> or unconstitutional<sup>21</sup> tax, and also to refund any sum illegally collected.<sup>22</sup>

(iv) To direct it to exercise a power involving a public duty,<sup>24</sup> e.g., to remove unauthorised constructions from footways.<sup>25</sup>

(v) Where the action of the local authority or its bye-law is *unconstitutional*.<sup>1</sup>

(vi) Where the action of the local authority is *ultra vires*, e.g.,

(a) To quash the order of removal of a member of a Municipal Board contrary to the statutory condition.<sup>2</sup>

(b) To direct it to proceed according to law, e.g., in the matter of election, and to hold a fresh election where so required by the law,<sup>3</sup> or in the matter of settlement of a public ferry.<sup>4</sup>

(c) To direct it to forbear from giving effect to a distress warrant which was issued in contravention of statutory provisions as well as to restore goods seized in execution of such unlawful warrant.<sup>5</sup>

14. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (144, 146).

15. *Dwarkanath Prasad v. State of U. P.*, (1954) S.C.R. 803; *Fedeo v. Bilgrami*, A. 1960 S.C. 415; *Ganapati v. State of Ajmer*, (1955) 1 S.C.R. 1065; *Pannalal v. Union of India*, A. 1957 S.C. 397 (410).

16. *C. J. Shanker Prasad v. State of M. P.*, A. 1965 M.P. 153 (158).

17. *Narendra v. Corpn. of Calcutta*, A. 1960 Cal. 102 (111); *Municipal Corpn. v. Govind*, A. 1949 Bom. 229.

18. *Yasin v. Town Area Committee* (1952) S.C.R. 572.

19. *Tahir Hussain v. Dt. Board*, A. 1954 S.C. 630.

20. *C. B. Batar Syadeshji Vanshpali v. Municipal Committee*, (1962) 1 S.C.R. 596.

21. *Yasin v. Town Area Committee*, (1952) S.C.R. 672; *Tahir v. Dt. Bd.*, A. 1954 S.C. 630.

22. *Batalhat City Municipality v. Batalhat Cement Co.*, (1952) S.C. [C.A. 328/52].

23. *Century Spinning Co. v. Dt. Magistrate*, A. 1958 S.C. 859.

24. *Rameswamyulu v. Villavandla Municipality*, A. 1959 A.P. 460.

25. *Sudhir v. Commr.*, (1980) 66 C.W.N. 133.

1. *Rashid Ahmed v. Municipal Board* (1950-51) C.C. 61 (63); (1950) S.C.R. 508.

2. *Swaminathan v. N. Sankar Ray*, A. 1946 Cal. 205.

3. *Bhat v. K. C. Sen*, A. 1955 Cal. 88.

4. *S. Singh v. Shoolie Zilla Parishad*, (1965) 69 C.W.N. 943.

5. *Meher Singh v. Bally Municipality*, A. (1954) Cal. 131.

(d) To prevent it from imposing or collecting an *ultra vires* tax or cess.<sup>6</sup>

(e) To direct it to sanction a building plan which was in accordance with the law, but was refused on an extraneous ground.<sup>7</sup>

(f) Where a local authority, having the power to approve or disapprove building plans, approves the plan subject to a condition it has no authority to impose, *mandamus* will issue, commanding it to approve the plan as submitted, *i.e.*, without the *ultra vires* condition.<sup>8</sup>

(vii) Though the Court would not interfere in matters appertaining to the domestic management of such bodies, it would interfere whenever the mandatory provisions are violated or going to be violated.<sup>9</sup>

Where the plea of *ultra vires* is founded upon the violation of a procedural requirement, the Court must ascertain whether the requirement is mandatory or directory.<sup>10</sup> If the requirement is mandatory, its breach will render the action void.<sup>11</sup> But if it is directory, a substantial compliance will uphold its validity.<sup>10</sup>

(viii) Where the act of the statutory authority, though apparently within the letters of the statute, constitutes a *mala fide* exercise of the power, *e.g.*, where it is sought to be exercised for a purpose other than that for which the power was intended.

But where there is nothing *ultra vires* in the action of the local authority and the authority has exercised its discretion in *good faith* and on reasonable grounds, *mandamus* will not issue on the ground that the decision is *erroneous*.

**XIX. Municipality.** [See 'Local Authority', p. 472, *ante*].

**XX. Penalty.**

*Mandamus* lies to direct refund of a penalty illegally imposed.<sup>12</sup> [See 'Taxation' *post*.]

**XXI. Permits** [see 'Transport Authority', *post*].

Where a permit is issued under a statute, *mandamus* lies against the authority granting, refusing or cancelling a permit on the same conditions as are applicable in the case of a statutory authority (p. 483, *post*) *e.g.*, where the renewal of a temporary permit is not authorised by the statute,<sup>13</sup> or the procedure prescribed by it is contravened.<sup>14</sup>

**XXII. Police.**

*Mandamus* may issue against Police authorities to compel them to perform their statutory duties.<sup>14, 15</sup>

**XXIII. Prison Authority.**

The reach of *mandamus* in India will be amply illustrated by the case

6. *Shyam Lal v. Municipal Bd.*, A. 1956 All. 185; *Kshtriya Khatik Samaj v. Corporation*, A. 1956 Nag. 152; *Arathoon v. Corpn. of Calcutta*, A. 1957 Cal. 79; *Raghubir v. Municipal Bd.*, A. 1956 All. 324.

7. *Municipal Corpn. v. Kishan Das*, (1968) S.C. [C.A. 1049/68, d. 19-9-68].

8. *Purushottam v. State of U. P.*, A. 1959 All. 26.

9. *V. P. Singh v. Metropolitan Council*, A. 1969 Delhi 295 (298).

10. *Pratap Singh v. Krishna*, (1956) S.C.A. 366.

11. *Rattan v. Atma Ram*, (1955) 1 S.C.R. 481.

12. *Universal Imports Agency v. Chief Controller*, A. 1961 S.C. 41.

13. *Gandhara Transport v. State of Punjab*, A. 1964 S.C. 1245.

14-15. *Mysore Machinery Manufacturers v. State*, A. 1969 Mys. 51 (59).

of *Ranbir v. State of Punjab*,<sup>11</sup> where the Supreme Court, on appeal, held that the Petitioner had been kept in solitary confinement in contravention of the Prisons Act and the Rules made thereunder and made the following order—

"We direct the respondent to confine the petitioner in the prison in strict compliance with the provisions of the Prisons Act and the rules made thereunder".<sup>11</sup>

#### XXIV. Property, restoration of.

\* Though a suit and not mandamus is the appropriate remedy where the plaintiff can have the property restored to him only upon the *establishment* of his title or right to possession which is disputed, mandamus will issue to restore possession to a person from whom the State has taken possession of the property without the authority of law, in contravention of the guarantee contained in Art. 31 (1),<sup>12</sup> or after the public purpose for which property was requisitioned has ceased to exist.<sup>13</sup>

#### XXV. Prosecution.

Mandamus has been issued directing a public authority to withdraw a prosecution where it has been initiated for the violation of an unconstitutional<sup>14</sup> law.

#### XXVI. Public auction.

1. When a public auction is held *under statutory provisions*, the auction must be held in conformity with the requirements laid down by such provisions.<sup>15</sup> In case of violation of such requirements *mandamus* will issue at the instance of anybody interested in the auction.<sup>15</sup>

2. *In the absence of a specific statutory provision—*

(a) The highest bidder has no legal right to have his bid accepted and it is at the discretion of the authorities to accept a lower bid,<sup>16, 18</sup> because it is open to the Government to enter into contracts with whomsoever they please.<sup>15</sup>

If, however, the statutory provisions require that in accepting a bid the authority shall have regard to certain conditions, a refusal to accept the highest bid on a ground *foreign* to the statutory conditions would be *ultra vires* and mandamus will issue directing the authority to make a fresh order 'in accordance with the law'.<sup>17</sup>

(b) (i) Though the State may impose reasonable conditions for being eligible to bid at an auction, the Executive can have no discretionary power to exclude any person from bidding at a public auction,<sup>16</sup> or to prevent him from continuing to bid at a particular stage.<sup>18</sup>

(ii) *Mandamus* will lie if any condition is *ultra vires* or without jurisdiction.<sup>18</sup>

1-11. *Ranbir v. State of Punjab*, A. 1962 S.C. 510 (515), reversing *Ranbir v. State of Punjab*, A. 1961 Punjab 524.

12. *Wazir Chand v. State of H. P.*, (1955) 1 S.C.R. 408; *Virendra v. State of U. P.*, (1965) 1 S.C.R. 415 (439); *Sohan Lal v. Union of India*, A. (1967 S.C. 529 (532).

13. *Union of India v. Ram Kanwar*, A. 1962 S.C. 247.

14. *Rashid Ahmad v. Municipal Board*, (1960) S.C.R. 566.

15. *Guruswamy v. State of Mysore*, (1952-54) 2 C.C. 466 (1955) 1 S.C.R. 305.

16. *Nand Kishore v. State of Rajasthan*, A. 1965 S.C. 1992 (1993).

17. *State of Assam v. Tulsi*, (1962) S.C. [C.A. 14/62].

18. *Vellayan v. Di. Forest Officer*, (1960) 1 M.L.J. 434 (438).

3. 'Where an auction is required by statute or the rules thereunder, the authority has no discretion to withdraw a particular ferry from public auction<sup>19</sup> or to extend the term of an existing lessee, without holding a fresh auction.<sup>20</sup>

### XXVII. Public documents, inspection and production of.

Mandamus will lie commanding the delivery up of *public* books and papers, *e.g.*, on the removal of the officer having custody of the books. It will also lie to compel production and to permit the inspection of public books or documents, provided that the party applying has a direct and tangible interest in the documents and shows reasonable grounds for requiring inspection.<sup>19a</sup> For the same reason, no mandamus may be had to have a *general* inspection of *all* papers in the possession of the respondent.<sup>20</sup> Pendency of a litigation between the parties is not necessary for the right to a writ for this purpose.<sup>20</sup>

But the writ is not available against a *private* trading corporation.

### XXVIII. Public duties, enforcement of [see 'Statutory Duties', *post*].

Under the present head we shall discuss the use of mandamus for the enforcement of a *public duty*, whether imposed by common law<sup>21</sup> or by statute or by any other law for the time being in force<sup>21</sup>. A duty imposed by statute, but relating to private rights will be dealt with under the head 'Statutory duties, enforcement of', *post*.

1. The writ of mandamus will lie to compel a *public official* or *body* to perform his official duty whether imposed by statute<sup>22</sup> or otherwise.<sup>23</sup>

Non-performance of the duty, in this context, includes performance in such an illegal or perfunctory manner that there is in fact no performance.

2. It will also lie against a private person or corporation if such person or persons are bound to perform some public or quasi-public function. It is not necessary that the body must be incorporated or constituted a body corporate; nor is it necessary that emoluments must be paid for the performance of the functions. What is essential is that the person or persons must be legally liable to perform *public duties*.<sup>24</sup>

3. Whenever a statute appoints a body of persons to carry out purposes of *public benefit* the persons constituting that body *ipso facto* become holders of a public office, for the purpose of Mandamus.<sup>24</sup>

#### A. Public authorities or offices having public duty, against whom Mandamus would issue:

(i) Universities and similar statutory educational bodies (see under 'Educational authorities', *ante*), *e.g.*,

(a) The Syndicate of a University.<sup>25</sup>

(b) State Medical Faculty.<sup>26</sup>

19. *State of Bihar v. Ram Bharosa*, A. 1956 S.C. 640.

19a. *Ganapathy v. B. A. & P. A.*, 1953 Mad. 556 (557).

20. *R. v. Merchant Tailor's Co.*, (1831) 2 B. & Ad. 115.

21. *Commr. of Police v. Gerdhandas*, A. 1952 S.C. 16 (21).

22. *J. T. Commr. v. Bombay Trust Corp.*, (1936) 63 I.A. 408.

23. *Natesan, in re*, (1918) 40 Mad. 125 (143).

24. *S. K. Ghose v. Vice Chancellor*, A. 1952 Orissa 1; *University of Calcutta v. Dipa Pal*, (1952) 56 C.W.N. 730; *Tapendra v. University of Calcutta*, A. 1954 Cal. 141.

25. *B. C. Das Gupta v. Bhojay Ranjan*, (1952) 56 C.W.N. 861.

(c) State Board constituted under the Assam Primary Education Act.<sup>1</sup>

(d) Public Service Commission.<sup>2</sup>

(ii) Municipal and similar local authorities, such as a City Improvement Trust.<sup>3</sup>

(iii) A statutory corporation,<sup>4</sup> such as the Road Transport Authority;<sup>5</sup> Life Insurance Corporation;<sup>6-7</sup> State Bank of India.<sup>8</sup>

(iv) An electricity company having statutory duties in the matters of supply of its energy to the public.<sup>4</sup>

### **B. Authorities against whom Mandamus will not issue, not being 'public bodies':**

*Mandamus* will not issue against the managing committee of a private school, not constituted by statute, even though it may be aided by Government,<sup>9</sup> or is governed by a School Code, not having statutory force;<sup>10</sup> or against a non-statutory company under the Companies Act, having no public duties imposed upon it.<sup>4</sup>

### **General principles relating to mandamus to enforce public duties.**

1. The considerations governing the issue of *mandamus* under the present head are—

(a) That the duty is *public*. In the absence of a statutory provision, *mandamus* will not issue to secure the performance of the obligations of a company to its members.<sup>4</sup>

(b) That it is a duty enforced by rules *having the force of law*. Thus,

(i) Where an administrative advisory body is set up (without the sanction of any statute), *mandamus* will not issue against such body even though the functions of the body relate to public matters.<sup>11</sup>

(ii) Though executive or administrative directions issued by a superior authority are enforceable against an inferior authority by departmental action, they have no force of law and are, accordingly, not enforceable by *mandamus*.<sup>12</sup>

(iii) A contractual obligation even though incurred by a public servant, cannot be enforced by *mandamus*.<sup>13</sup>

On the other hand,—

Where a University or other body has a duty under Rules having a statutory force to act towards the Petitioner in a particular manner and the body fails in that duty, *mandamus* will issue.

*Mandamus* has, thus, been issued—

(i) To direct a University to announce that the Petitioner has passed,

1. *Kripa Nath v. State*, A. 1956 Assam & Nagaland 101 (105).

2. *State of Mysore v. Chandrasekhar*, A. 1956 S.C. 532 (537).

3. *Badulal v. Collector*, A. 1956 M.B. 221.

4. *Praga Tools Corp. v. Imanuel*, (1969) 1 S.C.C. 585 (589-90).

5. *Sheriff v. S. T. A.*, A. 1960 S.C. 321.

6. *Menon v. Divl. Manager*, A. 1960 Mad. 333.

7. *Christopher v. L. I. Co.*, A. 1958 Bom. 451 (455).

8. *Ramiah v. State Bank of India*, A. 1956 Mad. 335 (344).

9. *Manmatha v. Diamond Harbour School*, (1957) 62 C.W.N. 384.

10. *Jaswant v. Bd. of Secondary Education*, (1961) 65 C.W.N. 113.

11. *Mand. ex parte*, (1916) 32 T.L.R. 479.

12. *C. K. Renukar v. S. T. A. Tribunal*, A. 1959 S.C. 896; *Nirankar v. Director of Industries*, A. 1959 All. (681); *Elayunni v. State of Kerala*, A. 1961 Ker. 52.

13. *Lalwaj v. Dy. Custodian*, A. 1966 S.C. 334 (337).

where, the University had refused so to declare though the Petitioner had obtained the Pass marks required by the statutory Rules of the University.<sup>14</sup>

(ii) To prevent the head of a *public* educational institution from expelling a student otherwise than in accordance with the statutory rules relating to the matter.<sup>15</sup> Where, however, there is no contravention of any rule, the Court will not interfere with the discretionary power vested in the educational authorities unless the power is exercised *mala fide*.

(c) An applicant for Mandamus must take the position that the person against whom an order is sought is holding a public office under some law, and his grievance is that he is acting contrary to the provisions of that law. If the applicant denies the right of the person to hold that office, he may get *Quo Warranto* but not *Mandamus*.<sup>16</sup>

(d) So long as public functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, the Court will not interfere. The Court will not interfere to see whether any regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.<sup>17</sup>

2. In short, mandamus will issue when the Government or its officers either overstep the limits of the power conferred by the statute or fail to comply with the conditions imposed by the statute for the exercise of the power.<sup>18</sup>

It follows, therefore, that the writ will not issue simply because there is an *irregularity* in its proceedings but there has been a substantial compliance with the law.<sup>19</sup> Nor can the Court enter into the merits or soundness of a decision made by such a body, as if sitting in appeal over it.<sup>20</sup>

### 3. But—

(i) Mandamus will not be granted against an *inferior or ministerial* officer, who is bound to obey the orders of a competent authority,—to compel him to do something which is part of his duty in that capacity.<sup>20</sup>

Thus, mandamus will not issue to a constable or other ministerial officer to execute a warrant directed to him. The reason behind this rule is that where the law imposes the duty on the superior officer, and the inferior officer simply carries out his orders, it is the superior officer alone who may be compelled to do his duty according to the general principle already discussed.

(ii) Mandamus will not issue against an officer, whose office and duty are prescribed by statute,—to compel him to do an act which is not *clearly* provided for by that statute; although it may be highly convenient and desirable that such an act should be done by him.<sup>21</sup>

(iii) Mandamus will not issue to direct an authority to exercise his

14. *Himendra v. Gauhati University*, (1953) 58 C.W.N. 54 (Assam) [Special leave to appeal was refused by the Supreme Court on 24-9-54]; *Tapendra v. University of Calcutta*, (1954) 58 C.W.N. 295.

15. *Sekilar v. Krishnamoorthy*, (1951) 2 M.L.J. 568.

16. *Suryaprabhash v. Industrial Court*, A. 1950 Bom. 206.

17. *Fraulin v. Lewis*, (1838) 4 My. & Cr. 249.

18. *State of Bombay v. Laxmidas*, A. 1952 Bom. 468.

19. *Vice-Chancellor v. S. K. Ghose*, (1964) S.C.R. 883.

20. *In re Babul Chandra*, A. 1952 Pat. 309 (311).

21. *Short & Mellor*, 2nd Ed., p. 205.

discretion in a particular manner,<sup>21a</sup> or to control the exercise of his discretion in the absence of *mala fides*.<sup>21b</sup>

### XXIX. Public office, admission, election and restoration, to.

A writ of *mandamus* lies to (i) command an election to an office of a public nature (e.g., a municipal election); (ii) admit to a public office a person who has been elected thereto, but has never been in possession; (iii) compel the restoration to a public office or franchise of which the holder has been wrongly dispossessed.<sup>22</sup>

But—

A *Mandamus* to restore, admit or elect to an office will not be granted unless the office is *vacant*. If the office be in fact full, proceedings must be taken by way of *Quo Warranto* or election petition to oust the party in possession. A *mandamus* will go only on the supposition that there is nobody holding the office in question.<sup>23</sup>

*Mandamus* will, however, be issued commanding election to an office when, though there has been an election to the office in question, yet such election is void or merely colourable.<sup>23</sup>

*Mandamus* will not, however, lie to reinstate a person who holds his office at pleasure<sup>24</sup> [see *below*]. (See, further, under Art. 311, *post*).

### XXX. Public Service Commission.

1. The Commission being a body set up by the Constitution and performing functions entrusted to it by Rules framed under Art. 309, *mandamus* may issue against the Commission to annul its order or act or proceeding if it is made in violation of the Rules.<sup>24</sup>

2. But—

The Court cannot direct the Commission to do something positive, e.g., to include the names of the Petitioners in a list of candidates recommended by the Commission, unless the Commission has a legal *duty* to do that act.<sup>24</sup>

### XXXI. Revenue Authority [see 'Taxation', *post*].

*Mandamus* may issue against a Revenue authority—

(a) to direct a reference to the High Court under s. 57 of the Stamp Act,<sup>25</sup> or under s. 51 of the Income Tax Act;<sup>1</sup> or under s. 18 of the Land Acquisition Act;<sup>2</sup>

(b) to direct such authority not to enforce an order which he has made in the exercise of his discretion but according to extraneous considerations or without taking into account relevant considerations.<sup>3</sup>

### XXXII. Service under Government.

I. *Appointment or promotion*.—Since appointment or promotion is at the discretion of the employer and no one has a legal right to be appointed

21a. *State of Mysore v. Chandrasekhara*, A. 1956 S.C. 532.

21b. *Tuharam v. Shukla*, A. 1968 S.C. 1050.

22. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

23. *Mohichandra v. Secy., Local Self-Gvt.*, A. 1953 Assam 12.

24. *State of Mysore v. Chandrasekhara*, A. 1956 S.C. 532 (537).

25. *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills*, (1950) S.C.R. 536.

1. *Aloock, Ashdown & Co. v. Chief Revenue Authority*, (1923) 50 I.A. 227; A. 1923 P.C. 138.

2. *Kashimovatham v. Sub-Collector*, A. 1961 Orissa 39.

3. *Dwarka v. Board of Revenue*, A. 1961 Pat. 328.

to an office under the Government, mandamus does not lie to compel an appointment or promotion of a person aggrieved unless in refusing appointment to the Petitioner, there has been a violation of a constitutional guarantee, e.g., Art. 14<sup>4</sup> or Art. 16 (1).<sup>5</sup> In case of such violation, the Petitioner may have a mandamus to direct the State to consider his application on the merits.<sup>5</sup>

The Court will not interfere with promotion to a selection post, on the ground that the Petitioner is a person better qualified, where the competent authority has arrived at a decision after considering all the possible candidates.<sup>6</sup>

## II. In the matter of *dismissal*—

(a) Mandamus will not lie to reinstate a dismissed employee where the service is held at the pleasure of the State,<sup>7</sup> or where his appointment was contractual and he had no statutory right to be reinstated.<sup>8</sup>

But an order of dismissal may be quashed by mandamus where it is in contravention of a statutory rule or regulation having the force of law.<sup>9</sup>

(b) To *direct* the Government to pay to the Petitioner his arrears of salary during the period intervening between the date of suspension and reinstatement, where it is found that the suspension or dismissal was without any lawful authority or justification, though, of course, a claim for recovery of such arrears can only be made by suit.<sup>10</sup>

## III. *Transfer*.

Transfer of a Government servant from one post to another is, as a general rule, a matter of discretion with the competent authorities, to be exercised in the interests of public service.<sup>10-11</sup>

But even in this sphere, *mandamus* may lie—

(i) Where the order violates a statutory rule;<sup>10</sup>

(ii) Where it is *mala fide*;<sup>10</sup>

(iii) Where the order is penal e.g., where it involves reduction in pay or grade of the Government servant.<sup>11</sup>

## IV. *Other conditions of service*

It is now settled<sup>12-21</sup> that *mandamus* will lie to quash an order of the Government or an administrative authority which is in contravention of a *mandatory*<sup>12-20</sup> Rule, relating to service conditions, which has been framed under statutory authority and has, therefore, the force of law. All the Rules and Regulations relating to Government servants are not, however, framed under statutory authority and some of them are merely administrative or Departmental instructions.<sup>1</sup> It is evident that *mandamus* will not lie to enforce non-statutory administrative instructions or orders.<sup>2</sup>

When, therefore, *mandamus* is sought to quash an order affecting a Government servant on the ground that the order is in contravention of a

4. Cf. *Benarasi v. State of U. P.*, (1956) S.C.R. 357 (361).

5. *Gazula Dasaratha v. State of A. P.*, (1961) 2 S.C.R. 391 (948).

6. *Hari Nandan v. Dikshit*, A. 1970 S.C. 40 (42).

7. *State of Bombay v. Hospital Mazoor Sabha*, A. 1960 S.C. 610.

8. *Lekhraj v. Shah*, A. 1966 S.C. 334.

9. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751, affirming *Babu Ram v. U. P. Govt.*, A. 1958 All. 584. [Order of dismissal quashed for contravention of Para. 477 of the U. P. Police Regulations.]

10. *Shyam Sundar v. Union of India*, A. 1965 Cal. 281 (282).

10. *Leckman Das v. Shiveswarar*, A. 1957 Punj. 76 (79).

11. *Kashinath v. Kopla*, A. 1952 Orissa 285.

12-25. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751.

1. Cf. *Niranjan Singh v. State of U. P.*, 1957 S.C. 142.

2. *Shayam v. State of Kerala*, A. 1961 Ker. 52 [relating to fixation of rank].



Service Rule, the first thing to be determined is whether the Rule in question has been framed under the authority of any statute.

A. The following are instances of statutory Rules—

(a) Rules made under s. 96B of the Government of India Act, 1919, (continued under Art. 313 of the Constitution)—

(i) The Fundamental Rules (1922).<sup>3</sup>

(ii) The Civil Services (Classification, Control and Appeal) Rules (1920).<sup>4,5</sup>

(iii) The Civil Service Regulations, which were made sometime prior to 1914, do not appear to have been made in exercise of any statutory powers,<sup>6</sup> but they subsequently acquired statutory authority under s. 96B (4) of the Government of India Act, 1919.<sup>7</sup>

(b) Rules made under s. 241 (2) of the Government of India Act, 1935:

(i) The Central Services (Temporary Service) Rules, 1949.<sup>8</sup>

(ii) Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948.<sup>9</sup>

(iii) The Railway Establishment Code.<sup>10</sup>

(iv) The Regulation made under s. 266 (3) of the Government of India Act, 1935, exempting certain cases from the requirement of consultation with the Public Service Commission.<sup>11-19</sup>

(c) Rules made under particular statutes—

(i) Rules framed under the Police Act, 1861, *e.g.*, Para. 477 of the U.P. Police Regulations.<sup>20</sup>

(ii) The Punjab Tehsildari Rules, 1932, framed under the Punjab Land Revenue Act, 1887.<sup>21</sup>

B. On the other hand, the following Rules or regulations have been held to have no force of law since they do not appear to have been made under any statutory authority:—

(a) The Army Instructions No. 212, dated 25-6-49 which were issued in pursuance of a Resolution of the Government of India (Military Department)—No. 2228, dated 22-12-17.<sup>22, 21</sup>

(b) Madras Public Service Commission Rules of Procedure.<sup>24</sup>

(c) The Manual of Government Orders.<sup>25</sup>

(d) Such of the Madras Police Standing Orders as are not marked with asterisks.<sup>26a</sup>

3. *Hirendra v State of W. Bengal* (1954) 59 C.W.N. 450 (454-5); *Baishnab v. State of Orissa*, A. 1957 Orissa 70 (72).

4. *Pradyat v. Chief Justice*, (1955) 2 SCR 1331 (143-4). *Venkataraman v Union of India*, A. 1954 SC 375.

5. *Shyam Lal v. State of U. P.*, (1955) SCR 26 (32, 34). \*

6. *Kamacharan v. P. M. G.*, A. 1955 Pat. 311.

7. *Ghouse v State of A. P.*, A. 1959 A.P. 457 (500).

8. *Shardaprasad v. Divisional Supdt.*, (1959) 61 Bom L.R. 1596.

9-19. *Karamdeo v State of Bihar*, A. 1956 Pat. 228 (232).

20. *State of U. P. v. Babu Ram*, A. 1961 SC 751 (761).

21. *Glen Singh v. State of Punjab*, A. 1962 S.C. 219.

22. *Alindra v. Gillot*, (1955) 59 C.W.N. 835 (842, 844).

23. *Chandra Bhan v Union*, A. 1966 Bom 601.

24. *State of Andhra v. Kamachwara*, A. 1957 Andhra 794 (804).

25. *Bhagdeo v. Civil Surgeon*, A. 1960 All. 353 (356).

26a. *State of A. P. v. Venugopal*, A. 1964 S.C. 33 (39). [See *State of Rajasthan v. Ram Jagan*, A. 1965 S.C. 1361 (1364), re. Rajasthan Police Standing Orders].

V. *Mandamus* will lie where the Government order has been issued under Rules which themselves are *ultra vires*—

Being in contravention of some mandatory provision of the Constitution, e.g., Art. 314.<sup>1</sup>

VI. *Mandamus* will also lie where an order, made to the prejudice of the Petitioner, itself contravenes some mandatory provision of the Constitution, e.g., Art. 16,<sup>2</sup> or is a nullity.<sup>3</sup>

VII. Pension being a matter of discretionary grant, a writ will not lie to enforce its payment at a particular rate, except when there has been breach of some mandatory rule relating to it.<sup>4,5</sup>

### XXXIII. Service under statutory authority.

1. Though outside the sphere where Art. 311 of the Constitution is attracted, the principle that a contract to render personal service cannot be specifically enforced applies,<sup>6,8</sup> nevertheless, the Court, under Art. 226 of the Constitution, can issue *mandamus* to quash an *ultra vires* order of termination of service under a non-Government authority,<sup>9,9</sup> e.g.—

(i) Where the employee has a *statutory right* to be reinstated], e.g., in case of a retrenchment in contravention of the provisions of the Industrial Disputes Act.<sup>10</sup>

(ii) Where the authority, in making the order of dismissal, has violated a mandatory obligation imposed by statute.<sup>6, 11</sup>

2. But *mandamus* would not lie to order reinstatement of a *contractual* appointment under a statutory authority.<sup>12</sup>

### XXIV. Statute, constitutionality of.

1. *Mandamus* will issue to prevent the enforcement of a statute which is—

(a) made by a Legislature not properly constituted under the Constitution;<sup>13 28</sup> or

(b) violative of a fundamental right;<sup>1,7</sup> or other mandatory provision of the Constitution;<sup>8</sup> or

1. *Accountant-General v. Bakshi*, A. 1962 S.C. 505 (507) [*mandamus* issued directing the Accountant-General to pay the Appellant the Overseas Passage money which had been sought to be cancelled by the All India Services (Overseas Pay, Passage & Leave Salary) Rules, 1957, which contravened Art. 314].
2. *Krishan Chander v. Tractor Organisation*, A. 1962 S.C. 602 [directing respondent to remove the ban arbitrarily imposed against the Petitioner, at the time of termination of his temporary service by notice against further employment under the Government].
3. *State of Assam v. Padma Ram*, A. 1965 S.C. 473 (476).
4. *Gurdip v. Union of India*, A. 1962 Punj. 8.
5. *Munilal v. State*, A. 1969 Ori. 283.
6. *Tewari v. Dt. Board*, A. 1964 S.C. 1680.
7. *Shivendra v. Nalanda College*, (1962) Supp. (2) S.C.R. 117; *Boorchand v. Kurukshetra University*, A. 1968 S.C. 292 (298).
8. *Praga Tools Corpn v. Immanuel*, A. 1969 S.C. Notes 209.
9. *S. Dutta v. University of Delhi*, A. 1958 S.C. 1950.
10. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.
11. *L. I. C. v. Santil*, A. 1964 S.C. 847.
12. *Prabhat v. State of Bihar*, (1969) S.C. [C.A. 2206/68, d. 23-4-69]; *Bank of Baroda v. Jivan Lal*, (1970) S.C. [C.A. 176/67, d. 9-3-70]; *U. P. State Warehousing Corpn. v. Chandra*, (1969) S.C. [C.A. 562/67, d. 8-9-69].
- 13-25. *Vinod v. State of H. P.*, A. 1969 S.C. 223.
- 1-7. *Chintamanrao v. State of M. P.*, A. 1951 S.C. 118; *Ratilal v. State of Bombay*, (1954) S.C.R. 1055; *Kochummi v. State of Madras* (No. 2), A. 1960 S.C. 1080; *Abdul Hakim v. State of Bihar*, (1961) 2 S.C.R. 610.
8. *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122 [Art. 286]; *Atiabari Tea Co. v. State of Assam*, (1961) 1 S.C.R. 809 (370) [Art. 304 (b)].

(c) *ultra vires* the legislative competence of the Legislature in question.<sup>9</sup>

2. The foregoing principles are applicable for striking down or preventing the enforcement of subordinate legislation which is unconstitutional<sup>10</sup> or *ultra vires*.<sup>11</sup>

**XXV. Statutory Authority** [See 'Statutory duties, enforcement of'].

I. *Mandamus* will issue against a statutory authority to *prevent* the enforcement of—

(i) an *ultra vires* order,<sup>12</sup> *e.g.*, where a Board of Religious Trusts called upon the trustees of a *private* trust to file statements of income and expenditure, under a law which did not apply to private trust,<sup>13</sup> or an *ultra vires*<sup>14</sup> or *mala fide* notification,<sup>14</sup>

(ii) an unconstitutional law,<sup>15</sup> *e.g.*, a law for setting up a scheme in regard to a religious institution which violates the rights of the head of the institution under Art. 19 (1) (f),<sup>15</sup> or subordinate legislation, such as a scheme or notification, contravening Art. 19 (1) (g):<sup>16</sup>

(iii) a valid statute, so long as the condition precedent for its application has not been fulfilled.<sup>17</sup>

Where the validity of a statutory order is challenged, the order is to be construed in the light of the language used in the order itself and not in the light of explanations subsequently given by the officer making the order.<sup>18</sup>

II. It will also issue to *compel* a statutory authority to proceed according to law *e.g.*—

(i) Where it has acted in breach of a *mandatory* obligation imposed by statute,<sup>19a</sup> *e.g.*—

Where the Income-tax Officer failed to modify the assessment, while acting under s. 23 (5) (b) of the Act,<sup>19</sup> or impounded books of account in contravention of the provisions of s. 37 (2);<sup>20</sup>

(ii) Where the statutory authority has acted otherwise than in accordance with the mandatory procedure prescribed by the law;<sup>21, 23</sup>

(iii) Where he has imposed an *ultra vires* condition while granting a licence or a permit.<sup>22</sup> The order in such a case may be in the direct form to omit the *ultra vires* condition from the licence already granted.<sup>23</sup>

9. *Bulkion & Grain Exchange v. State of Punjab*, (1961) 1 S.C.R. 668 (675); *Hinger-Rampur Coal Co. v. State of Orissa*, (1961) 2 S.C.R. 637 (543).

10. *State of Rajasthan v. Pratap Singh*, (1961) 1 S.C.R. 222 (226).

11. *State of Bihar v. Ganguly*, A. 1959 S.C. 1018 (1026).

12. *Ram Satoop v. Sahi*, A. 1059 S.C. 951 (960).

13. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018 (1026); *Ram Krishna v. Tendolkar*, A. 1958 S.C. 538 (545).

14. Cf. *Indramani v. Natu*, A. 1963 S.C. 274; *Prakash Cotton Mills v. State of Bombay*, (1962) 1 S.C.R. 105 (113).

15. *Jagamath v. State of Orissa*, (1954) S.C.R. 1046.

16. *Orissa Cement Ltd., v. Union of India*, A. 1962 S.C. 1402.

17. *Hustain v. State of Bombay*, A. 1962 S.C. 97 (106).

18. *Commr. of Police v. Gerdhandas*, (1962) S.C.R. 135.

19a. *Tewari v. Dt. Board*, A. 1964 S.C. 1680 (1682).

19. *Santap Chand v. Union of India*, A. 1959 S.C. 1207 (1214).

20. *Kanodia Bros. v. Seth*, A. 1959 A.L. 705.

21. *Ramphal v. Govt. of Bihar*, A. 1954 Pat. 235; *Ram Mohan v. State of W. B.*, (1957) 61 C.W.N. 279; *Ghatak v. State of Assam*, A. 1965 A. 92; *Vandevan v. State of Kerala*, A. 1960 Ker. 67.

22. *Shank v. Mysore S. T. A.*, A. 1960 S.C. 321 (327).

23. *Hamid v. State of M. P.*, A. 1959 S.C. 909.

III. Even where the order is *intra vires*, if the statutory power was exercised unreasonably or without applying its mind to the relevant circumstances, *mandamus* may issue, directing the authority to exercise its power in accordance with the law. But in determining the reasonableness of the exercise of the power, the Court should take into account the circumstances which called for the exercise of the power<sup>23</sup> and uphold the order if there was *anything* upon which the authority could have reasonably come to that conclusion. The Court, in a proceeding for *mandamus*, cannot sit as a court of appeal or substitute its own discretion for that of the authority in which the statute has vested the discretion.<sup>24</sup>

IV. *Mandamus* also lies to compel a statutory authority to hear and determine or dispose of a matter which he is empowered to determine by the statute, within a *reasonable* time, even where the statute does not prescribe any time limit for such disposal.<sup>25, 26</sup>

### **XXXVI. Statutory duties, enforcement of.**

While under the previous head we have considered the case of an authority *constituted* by statute, under the present we are discussing a broader head of statutory duties in general, whether they are imposed upon a statutory body or upon public officers or upon private persons.

I. In the case of a statutory duty, *mandamus* will issue even though the person against whom the duty is imposed be a *private* party or a company.<sup>1</sup> Thus, the writ will issue to an official of a society to compel him to perform the terms of the statute by which the society is controlled. The only condition in the case of statutory duty is that the duty must be imperative and not discretionary.

II. In the case of a public officer, too, it is only where a *duty* has been imposed by statute, as distinguished from a discretion or a power, that a *mandamus* will issue. A writ of *mandamus* will be granted to compel the performance of a *duty* laid down by a statute,<sup>2</sup> as distinguished from a merely discretionary or permissive authority.<sup>3</sup>

Where a public officer has refused to perform his statutory duties, *mandamus* would issue to compel him to perform those *duties*. Before issuing *mandamus* for this purpose, the Court will ascertain (a) what the statutory obligations are and (b) whether the officer has failed to discharge them.<sup>4</sup>

III. *Mandamus* may issue for the performance of statutory duties even *after* the time for the performance of the duty has expired, as the fixing of the time is held to be directory. Even though the statutory time for performing a duty has passed, the Court may direct the successor-in-office to perform the duty which his predecessor has omitted to do.

IV. On the other hand, where no time is prescribed by a statute for performance of a duty imposed by it and the authority takes inordinate delay, the aggrieved party may ask for a *mandamus* to direct the authority to perform it within a reasonable time.<sup>5, 6</sup>

23. *Vice-Chancellor v. S. K. Ghosh*, (1954) S.C.R. 883.

24. *Barium Chemicals v. Company Law Board*, A. 1967 S.C. 295.

25. *Cf. Samarth Transport Co. v. R. T. A.*, A. 1961 S.C. 93 (96).

1. *R. v. British Dock Co.*, (1841) 2 Q.B. 64.

2. *Burmah Construction Co. v. State of Orissa*, (1962) 1 S.C.R. 242.

3. *In re Shammuga Mudaliar*, A. 1951 Mad. 276.

4. *Shankar v. Returning Officer*, A. 1952 Bom. 277.

5. *Samarth Transport Co. v. R. T. A.*, A. 1961 S.C. 93.

6. *Cf. Ambalel v. Ahmedabad Municipality*, A. 1968 S.C. 1223 (1227).

### Duty and Discretion.

Even though an authority may be under a *duty* to do an act, whether by common law or by statute, he may have a discretion as to the manner of performance, e.g., 'to act as it thinks fit'.<sup>7</sup> In such cases, though the Court may compel performance of the duty, it cannot compel the authority to perform the duty or to exercise the discretion in the manner directed by the Court.<sup>8</sup> The rules which come into operation in the sphere of discretion are:

I. Mandamus will not be issued to compel an authority to exercise a *discretion in a particular way*.<sup>9</sup> In other words, the Court cannot substitute its own view or discretion for the view taken or discretion exercised by the authority who is vested with a discretionary power.<sup>9</sup> The writ of mandamus can never be used as a substitute for appeal.<sup>9</sup>

II. Even though the Court will not interfere with the manner of exercise of a simple discretion,<sup>10</sup> it will interfere—(a) where the discretion is exercised to do an act which is *ultra vires* the statute which conferred the discretion; (b) where the exercise of the discretion is *mala fide*<sup>11</sup> or in contravention of the rules of natural justice, or unreasonable;<sup>10</sup> or (c) where a condition precedent to the exercise of the power has not been fulfilled.<sup>11</sup>

(a) If, by the omission of the requirements of *natural justice*, the authority has failed in the eye of law to exercise a discretion, it can be forced to exercise it properly.<sup>12</sup>

(b) The position will be similar if it has exercised its discretion *mala fide* or for a purpose other than that for which it was entrusted with the discretion. It is a *mala fide* exercise of the discretion if the authority is influenced by extraneous or irrelevant consideration, i.e., matters which are foreign to the statute under which the power is being exercised, or does not apply its mind to the relevant considerations.<sup>11</sup> Again, if the authority takes into consideration irrelevant matters together with relevant matters and they are inextricably mixed up, the decision would be regarded as bad.<sup>11</sup>

(c) The Court would also interfere where the authority has arrived at a conclusion which no reasonable man would have arrived at on the materials before it.<sup>11</sup>

III. But if the authority is under a *duty* to exercise a discretion, it may be compelled by *mandamus* to exercise that discretion *in one way or other*.

(a) There are circumstances in which the Court construes a *duty* to exercise a discretion. These will be discussed under the next head.

(b) If a statute itself prescribes a discretion to be exercised in a particular way or having regard to specified considerations, an exercise of the discretion in some other way or regardless of those considerations amounts to a *refusal* to exercise the discretion.<sup>7, 13</sup>

IV. In the absence of any such circumstances as above, *mandamus* cannot be used for correcting a mere *erroneous* exercise of discretion. Mandamus cannot be used as a substitute for appeal.<sup>14, 15</sup>

7. Cf. *Akshai Lal v. Vice-Chancellor*, A. 1961 S.C. 619 (626).

8. Cf. *State of Mysore v. Syed Md.*, A. 1968 S.C. 1113 (1114).

9. *Veerappa v. Ramon & Ramon Ltd.*, (1952) S.C.R. 583; *Vice-Chancellor v. S. K. Ghose*, (1954) S.C.R. 893.

10. *Gaoker v. Shukla*, A. 1968 S.C. 1050 (1053); *Jute & Gunny Brokers v. Union of India*, A. 1961 S.C. 1214.

11. *Barium Chemicals v. Company Law Board*, (1966) Supp. S.C.R. 311; *Rhetap Industries v. Agarwal*, (1969) 1 S.C.C. 325.

12. *University of Calcutta v. Dipa Pal*, (1952) 56 C.W.N. 730.

13. *Commr. of Police v. Gorkhandas*, (1962) S.C.R. 135.

14-15. *Khaton v. Union of India*, A. 1967 S.C. 676 (686).

Thus, where it is alleged that Government has made a *mala fide* use of its statutory power to make an appointment, the court cannot test the appointment from the standpoint of suitability; it can interfere only if the appointment was made for an *ulterior* purpose, that is, for an object other than that for which the law, under which the appointment was made, had been enacted.<sup>14-20</sup>

### Duty distinguished from Power.

I. The general rule is that while *mandamus* will issue to compel the performance of a public duty, it will not issue to compel authority to exercise a *power* which is merely *permissive* and does not impose any obligation.

II. Whether a statute is merely permissive or obligatory, that is to say, whether it confers a power or imposes a duty is itself a vexed question and no rigid formula to distinguish between the two has yet been invented. But certain standards have been laid down by judicial decisions:

(i) Though a power is usually conferred by words such as 'it shall be lawful', language is not conclusive and the Court may infer a duty to exercise a power from various circumstances. Thus,

Even where a statute uses permissive language to confer a power, the Court would infer a power *coupled with a duty* and issue *mandamus* to compel its performance, where it appears that the power is conferred for the benefit of *specific* persons,<sup>1-12</sup> or for the advancement of public justice.

In such cases,—the public authority must exercise the power when the circumstances so demand; and the performance of it can be compelled by *mandamus*.<sup>1-12, 13</sup>

(ii) On the other hand, where a statute merely confers a *power* on a public authority to do some act for the public good, it being for the benefit of the *general public*, a particular individual cannot compel that authority to exercise that power unless he can show that the default of the authority constitutes a breach of duty owed to him as individual as distinguished from the general public.

III. (a) Where an authority as a discretionary *power* (as distinguished from a duty to exercise a discretion), nobody can complain of the *non-exercise* of the power.<sup>14-20</sup>

Where a statute confers upon an authority a *general* discretion to take an action if certain conditions as specified in the statute are fulfilled, in a permissive language, the authority is competent to refuse to exercise the discretionary power even though the statutory conditions are fulfilled. Thus,—

It has been held that a Transport Authority under the Motor Vehicles Act, 1969, has a general discretion to refuse a permit even where an applicant complies with the conditions specified in s. 42 of the Act.<sup>24</sup> and if his order is within jurisdiction, the Court would not interfere merely on the ground that it is erroneous.<sup>24</sup>

But in *India*, there is an additional consideration, namely, the impact of the exercise of such discretionary power on *fundamental rights*. As has been pointed out by the Allahabad High Court,<sup>25</sup> the question was not considered in the Supreme Court decision<sup>16</sup> with reference to Art. 19(1)(g) of the Constitution. According to this view, the granting of a licence with

1-12. *Commissioner of Police v. Gordhandas*, (1952) S.C.R. 135 (148).

13. *Chief Rev. Authority v. Maharashtra Sugar Mills*, (1950) S.C.R. 536 (544).

14. *Verrappa v. Ramon*, (1952) S.C.R. 583.

15. *Jehal v. Municipal Board*, A. 1959 All. 186 (189).

16. *Ch. Cooverjee v. Exche Commr.*, (1954) S.C.R. 873.

respect to a trade which is not inherently dangerous<sup>17</sup> cannot be regarded merely as a privilege. A citizen has the right to carry on such trade subject to such restrictions as may be imposed by the State, provided they are reasonable, and a law which empowers an administrative authority to refuse a licence, at his discretion, even though the applicant has complied with the conditions specified in the statute, must be regarded as unreasonable.<sup>17</sup> The power to decide whether the statutory conditions have been fulfilled must necessarily be given to that authority,<sup>18</sup> and this discretion is wider where (as in s. 47 of the Motor Vehicles Act) the authority is empowered to take into account certain administrative considerations, apart from certain specified conditions,—such as objections from a police or other local authority.<sup>19</sup> But, apart from this, if the licensing authority is guided by considerations extraneous to the statute, his action would be *ultra vires*,<sup>20</sup> in the same manner as it would be *ultra vires* if he acts in contravention of a statutory condition,<sup>21</sup> or without taking into consideration the conditions specified in s. 47.<sup>22, 23</sup>

IV. Even though *mandamus* is not available to compel the performance of a discretionary power, *mandamus* may lie to interfere with the exercise of such power if the authority does exercise it but such exercise is *ultra vires* the statute or the exercise of the power is not *bona fide* (which is also an ingredient of *ultra vires*).

(a) The exercise of a statutory power must not be *ultra vires*.

Thus,—

(i) Where the statute requires a power to be exercised in a certain form, the neglect of that form renders the exercise of the power *ultra vires*.

(ii) When the statute prescribes a mandatory procedure for the exercise of a power, the exercise of the power becomes *ultra vires* if that procedure is not followed.<sup>24, 25</sup>

(iii) If the statute prescribes that the power may be exercised only if certain prescribed conditions have been fulfilled, e.g., on giving notices, or after giving reasons,<sup>1</sup> the non-fulfilment of the conditions makes the exercise of the power *ultra vires*.

(iv) The power must not be exercised in excess of what has been authorised.

(b) A statutory power must be exercised *bona fide*.

(i) If the power is used for a purpose other than for what it was given by the Legislature, it is not *bona fide*, e.g., "if the power to make one kind of building was fraudulently used for the purpose of making another kind of building".<sup>2</sup> This is also known as 'colourable use' of a power.

(ii) Where the authority has not applied its mind to one of the essential matters which, according to the proper interpretation of the statute, should have been taken into consideration in exercising discretion, it cannot be said that the power conferred on the authority has been exercised *bona fide*.

17. This aspect, it is submitted, was overlooked by the majority but emphasised by (Sinha C.J. & Subba Rao J.) the minority in *Kishan Chand v. Commr. of Police*, A. 1961 S.C. 705 (714).

18. Cf. *Dwarika Prasad v. State of U. P.*, (1954) S.C.R. 803 (811).

19. The observations of the Supreme Court in *Veerappa v. Ramar*, (1952) S.C.R. 583, appear to have been made in view of the above provisions in the statute.

20. Cf. *R. K. V. Motors v. R. T. A.*, A. 1960 Ker. 35 (37); *Shridhar v. R. T. A.*, A. 1960 Mys. 120 (122).

21. *Srinivas v. State of Mysore*, A. 1960 S.C. 321 (326).

22. *Sheriff v. S. T. A.*, A. 1960 S.C. 321 (326).

23. *Ramappa v. State of Madras*, A. 1952 Mad. 300.

24. *Ganapathi v. State of Mysore*, (1955) 1 S.C.R. 305.

25. *Rampal v. State of Bihar*, A. 1954 Pat. 235.

1. *Samaratunga v. Basu*, A. 1955 Cal. 899.

2. *Nalini Mahan v. Dist. Magistrate*, (1960) 55 C.W.N. 297.

(c) A statutory power must be exercised reasonably.

V. It follows from the above that when a statute vests a discretionary power in a particular authority, the discretion must be exercised by that very authority without interference by some other person or authority.<sup>3</sup> If there is such interference, there is no proper exercise of discretion by the authority in whom the power has been vested by the Legislature and so his order or act would be quashed by the Court.

VI. Where a *quasi-judicial tribunal* acts upon extraneous considerations or refuses to take into account relevant considerations, it is deemed to have declined jurisdiction and mandamus will issue to hear and determine according to law. [See under "Tribunals, quasi-judicial", *post*].

### Where exercise of power is conditional upon subjective satisfaction.

1. Where the exercise of a power is subject to prescribed conditions, the non-fulfilment of such conditions renders the exercise of the power *ultra vires*.<sup>4-6</sup>

The applicability of this principle to cases where the exercise of the power is made conditional upon the subjective satisfaction of the statutory authority as to the existence of specified circumstances is not so clear.

In *India*, in the non-emergency sphere, the Supreme Court has allowed evidence to be given that the condition had not been fulfilled and granted *mandamus* to quash the exercise of the power.<sup>4</sup> Thus—

S 10 (2) (a) empowers the Central Government to deprive a person of his Indian citizenship "if it is satisfied" that the registration was obtained "by means of fraud, false representation or the concealment of any material fact".

The plea of the Government was that the cancellation of registration was made on the ground that the Petitioner had obtained registration by concealing the fact that his earlier application for permanent settlement in India had been refused. The Petitioner established from his original application for registration that the fact alleged to have been suppressed had been in fact mentioned therein. The Court held the cancellation to be *ultra vires* and set it aside.<sup>7</sup>

It may be noted that in the foregoing case,<sup>7</sup> though the satisfaction was to be that of the Government, it related to facts such as fraud or concealment which were capable of being proved *objectively*.

But where the condition imposed by the statute is vague, the Court is inclined to revert to its general attitude of non interference with subjective satisfaction.<sup>8</sup>

2. The Court will also interfere where the exercise of the statutory power has been *malafide*,<sup>9</sup> or where the opinion of the authority as to the existence of the condition precedent was formed on extraneous considerations or without applying its mind to the relevant considerations,<sup>10</sup> or where the order is based on a ground which has no rational connection with the object of the statutory power.<sup>11</sup>

3. In the absence of the foregoing grounds, the subjective satisfaction

3. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135

4. *Roberts v. Hopwood*, (1925) A.C. 578; *Ross Clunis v. Papadapoulos*, (1958) 2 All E.R. 23 (P.C.); *Ridge v. Baldwin*, (1963) 2 All E.R. 66 (H.L.).

5. *Barium Chemicals v. Company Law Board*, (1965) Supp. S.C.R. 311.

6. *Rohas Industries v. Agarwal*, (1969) 1 S.C.C. 325=A. 1969 S.C. 630. [Order under s. 237 (b) (i) of the Companies Act, 1956].

7. *Ghaural v. State of Rajasthan*, (1961) 1 S.C.D. 796.

8. *Rameshkrishna v. Tendolkar*, A. 1958 S.C. 538 551).

9. *Ct. Shinder v. Krishan*, A. 1962 S.C. 365.

10. *Rohas Industries v. Agarwal*, (1969) 1 S.C.C. 325 (313, 341, 347).

11. *Barium Chemicals v. Company Law Board*, A. 1967 S.C. 295 (321).



of an authority cannot be questioned,<sup>12</sup> e.g., as to the propriety of the opinion formed by the authority.<sup>10</sup>

### XXXVII. Statutory instruments or subordinate legislation.

Mandamus lies to quash a notification, order, rule scheme or other form of subordinate legislation where it is *ultra vires*<sup>5</sup> or unconstitutional (*see ante*).

### XXXVIII. Taxation.

1. *Mandamus* lies for directing a revenue authority not to levy or collect an *ultra vires*<sup>13-15</sup> or unconstitutional tax,<sup>16</sup> or a tax which the authority has no jurisdiction to collect<sup>17</sup> or which is a colourable use of the taxing power,<sup>18</sup> even though the assessment has become 'final' under the statute.<sup>19</sup>

2. It also lies for directing a taxing authority not to make<sup>20</sup> or give effect to an *ultra vires*<sup>20, 21</sup> or unconstitutional assessment,<sup>22-24</sup> e.g., where an assessment was made giving retrospective effect to a law which was not, in fact, retrospective.<sup>22</sup>

### XXXIX. Refund, claim for."

(I) A refund of tax already collected may be ordered in a proceeding for mandamus<sup>1-2</sup> as a consequential relief for the enforcement of fundamental rights<sup>2</sup>—

(a) Where it is established that the tax was unconstitutional<sup>3-5</sup> or *ultra vires*<sup>3-4, 6</sup> e.g., that the recovery was not in accordance with law<sup>7</sup> or if it had been imposed upon goods exempted by the statute.<sup>8</sup>

(b) Where the money was kept with the State as a deposit and subsequently the tax is held to be illegal or unconstitutional.<sup>9</sup>

(c) Where there was a right to refund under the statute itself, subject to the limitations imposed by the statute itself, if any.<sup>10</sup>

(II) But relief under Art. 226 being discretionary, the Court may refuse to direct refund in such proceeding and direct the party to a civil suit—

(i) Where disputed questions of fact have to be decided before giving this relief;<sup>4</sup> or

12. *Gunny Brokers v. Union of India*, A. 1961 S.C. 1214 (order of requisition).
13. *Shinde Bros. v. Dy Commr.*, A. 1967 S.C. 1512.
14. *State of J & K v. Caltax*, A. 1966 S.C. 1350; *Tata Engineering Co. v. Asstt. Commr.*, A. 1967 S.C. 1401.
15. *State of Rajasthan v. Karam Chand*, A. 1969 S.C. 343.
16. *Chhotabhai v. State of U.P.*, A. 1962 S.C. 1614.
17. *Cf. Devnagree Cotton Mills v. Dy. Commr.*, A. 1961 S.C. 1441.
18. *Cf. Jagannath Baksh v. State of U.P.*, A. 1962 S.C. 1563.
19. *Cf. East India Tobacco Co. v. State of A.P.*, A. 1962 S.C. 1563.
20. *Union of India v. D.C.M.*, A. 1963 S.C. 1733.
21. *Zilla Parishad v. K. S. Milk*, A. 1968 S.C. 98 (100).
22. *Second Addl. I. T. O. v. Admala*, (1962) S.C. [C.A. 168/61].
23. *Bhopal Sugar Industries v. Dube*, A. 1964 S.C. 1037.
24. *Dy. Commercial Tax Officer v. Rayalaseema Constructions*, (1966) 17 S.T.C. 505 (S.C.).
25. As to claim by suit, see *State of Bombay v. Jagmohandas*, A. 1966 S.C. 1412.
1. *Burma Construction Co. v. State of Orissa*, A. 1962 S.C. 1320.
2. *State of Gujarat v. Ananta Mills*, A. 1966 S.C. 963.
3. *Mekhe v. State of Madras*, A. 1963 S.C. 928.
4. *State of M.P. v. Bhaiml*, A. 1964 S.C. 1006 (1011).
5. *Deputy C. T. O. v. Rayalaseema Constructions*, (1966) 17 S.T.C. 505 (S.C.).
6. *S. T. O. v. Kanhaiya Lal*, A. 1969 S.C. 135.
7. *State of Orissa v. Chakrabarti*, A. 1961 S.C. 284.
8. *Cf. Kanika Mills v. State of Punjab*, A. 1966 S.C. 1942; *State of M.P. v. Haim*, A. 1966 S.C. 905.
9. *Osant Paper Mills v. State of Orissa*, (1962) 1 S.C.R. 549.
10. *Burma Construction Co. v. State of Orissa*, A. 1962 S.C. 1320; *State of M.P. v. Haim*, A. 1966 S.C. 905.

(ii) Where a triable issue as to limitation, if the relief had been claimed in a suit, is raised by the Respondent.<sup>4</sup>

(iii) Relief, however, should be granted in the proceeding under Art. 226 if it is evident that the Petition has been brought within three years from the date when the mistake become known to the Petitioner.<sup>11-13</sup> When money is paid under a common mistake of law, it is ordinarily the *duty* of the State to refund the money, subject, of course to the provisions of any law in this behalf.<sup>11-14</sup>

(iv) Where the Petition under Art. 226 does not ask the Court to declare the invalidity of the assessment and to order refund as a consequential relief, but asks for refund as the *sole* relief, on the allegation that the assessment has been held to be illegal in another proceeding, without any order as to refund.<sup>15</sup>

## **XL. Transport Authority.**

1. Mandamus lies against the Transport Authority if an application for a permit under s. 57 of the Motor Vehicles Act is not disposed of within a reasonable time, or the order of renewal is not in accordance with the law,<sup>16</sup> or a permit is granted to the State Transport Undertaking where the application of the Undertaking has not complied with the statute;<sup>17</sup> or where the Authority has granted an application for renewal which was not maintainable in law.<sup>18</sup>

2. There has been some controversy as to what considerations would be relevant in dealing with an application for permit under s. 47(1).

(i) The expression 'interests of the public generally' in cl (a) has been liberally interpreted to include—

(a) whether the service offered by the individual applicant would be efficient and satisfactory,<sup>19-19</sup>

(b) whether the applicant would be in the position of a monopolist, if permit were granted to him.<sup>19</sup> Such consideration cannot be irrelevant merely because it has been incorporated in administrative instructions issued under s. 43A of the Act;<sup>20</sup>

(c) whether the applicant has his residence or place of business<sup>20</sup> or repairing or maintenance facilities<sup>21</sup> on the route or at the terminals;

(d) whether the applicant is guilty of any past misconduct<sup>21</sup> or whether he is a small operator as distinguished from a monopolist.<sup>21-22</sup>

(ii) If, however, in granting or refusing a permit under s. 47(1), the Authority acts on irrelevant considerations, the Court will interfere under Art. 226.<sup>19</sup> The result would be the same if he ignores a relevant consideration, in breach of s. 47, even though he may be acting in pursuance of a directive issued under s. 43A.<sup>20</sup>

11. *State of Kerala v Aluminium Industries*, (1965) 16 ST.C. 689 (692) S.C.

12. *Venkataraman v State of Madras*, A. 1966 SC 1089 (1101).

13. *Gill & Co v. C T O*, A. 1968 NSC 80.

14. *S. T O. v. Kanhaiya Lal*, A. 1969 SC. 135.

15. *Suganmal v. State of M. P.*, A. 1965 SC 1740 (1742).

16. *Mahabub v Mysore S. T. A.*, A. 1960 SC 321.

17. *Shrinivasa v. State of Mysore*, A. 1960 SC. 350 (352).

18. *Gandhara Transport Co v. State of Punjab*, A. 1964 SC. 1245 (1248).

19. *Ram Vilas Service v. Chandrasekhar*, A. 1965 SC. 107 (109): (1964) 5 S.C.R. 869.

20. *Sharmagan v. S. R V. S.*, (1964) 1 S.C.R. 809 (821, 829).

21. *Ayyaswami v. S. M. S.*, (1962) S.C. [C.A. 196/62, dated 17-9-62].

22. *Santhana v. Narayanaswami*, (1960) S.C. [C.A. 213/60, dated 19-10-60].

3. *Mandamus* may also lie against the State Government if, in confirming a Scheme under s. 68C, it is guided by extraneous consideration<sup>23</sup> or the scheme was framed by the State Transport Undertaking not after taking into consideration the conditions imposed by s. 68C, but at the direction of the Chief Minister who was actuated by malice<sup>24,25</sup> or on other considerations extraneous to the statute, or the scheme is *ultra vires* the statute or the Rules framed thereunder.<sup>24</sup>

### **XLI. Tribunal, quasi-judicial.**

1. When a Tribunal declines jurisdiction upon an erroneous view of a preliminary point, e.g., as to limitation, the Tribunal may be directed by *mandamus* to hear and determine according to law.<sup>1,28</sup>

2. When a tribunal acts upon extraneous considerations or decides a point other than that brought before them, the tribunal is deemed to have declined jurisdiction and *mandamus* lies.<sup>34</sup>

But—

*Mandamus* cannot be used by way of appeal to correct erroneous decisions within jurisdiction, whether of law or of fact. It can be used only in case of non-performance of their duty, to compel performance.<sup>15</sup>

3. Where an inferior tribunal has refused to carry out the *intra vires* directions of its superior tribunal<sup>16</sup> In such a case, the High Court cannot refuse to issue *mandamus* on the ground that no manifest injustice has been done by such refusal or that the order of the superior tribunal was erroneous (because the High Court cannot sit in appeal over the superior tribunal in a proceeding for *mandamus* against the inferior tribunal).<sup>16</sup>

But when a statute vests a discretionary power in a particular authority, the discretion must be exercised by that very authority without interference by some other person or authority. If there is such interference, there is no proper exercise of discretion by the authority in whom the power has been vested by the Legislature and so his order or act would be quashed by the Court.<sup>17</sup>

### **When can a tribunal be said to have refused to exercise jurisdiction.**

A tribunal may refuse to exercise its jurisdiction either expressly or by conduct. Thus,—

(i) When the tribunal acts upon extraneous considerations or decides a point other than that brought before them, the tribunal is deemed to have declined jurisdiction and *mandamus* lies.<sup>18</sup>

Even in the matter of a discretion, there may be a refusal to exercise jurisdiction if the tribunal refuses to exercise the discretion on an extraneous or irrelevant consideration, e.g., that it disapproves of the policy of the statute which conferred the jurisdiction or has omitted to consider such aspects of the question as would constitute no exercise of the discretion at all.<sup>19</sup>

23. *Samarth Transport v. R. T. A.*, A. 1961 S.C. 93 (96-7).

24. *Roujee v. State of A. P.*, A. 1964 S.C. 962 (973; 976).

25. But the opinion of the 'State Government' has been held to be the opinion of 'State Transport Undertaking' in *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1182—a view which may be debatable.

1-13. *Harish Chandra v. Dy. Land Acquisition Officer*, (1962) 1 S.C.R. 676 (687).

14. *Bharat Bank v. Employees of Bharat Bank*, A. 1960 S.C. 188.

15. *Jagannath v. D. M.*, A. 1951 AIL 716.

16. *Bhopal Sugar Industries v. I. T. O.*, A. 1961 S.C. 182.

17. *Quinn v. Police v. Gordhondas*, (1952) S.C.R. 135 (148).

18. *Bharat Bank v. Employees*, A. 1960 S.C. 188.

19. *K. D. Co. v. K. N. Singh*, A. 1966 S.C. 446 (452).

(ii) If a Court of law refuses to exercise jurisdiction owing to an erroneous decision upon a plea of *law in bar*, e.g., upon a question of *res judicata*<sup>20</sup> or as to the applicability of an Act<sup>21</sup> or *locus standi*<sup>22</sup> or defect of parties or notice which would give jurisdiction to the Court, there is a non-exercise of jurisdiction.<sup>23</sup>

(iii) Similarly *mandamus* will issue to direct a Court or a tribunal to state a case where it has refused to state a case on a wrong view of the law, *viz.*, that the question was concluded by a previous decision which, however, was not final; or wrongly declined to make a reference to the High Court on a question of law as required by a statute, e.g., under s. 57 of the (Indian) Stamp Act.<sup>24-25</sup>

(iv) An inferior tribunal refuses jurisdiction when it disregards the provisions of the statute giving it jurisdiction.

## PROHIBITION

### Prohibition, nature of.

Prohibition is a judicial writ, issuing out of a superior Court to an inferior Court, preventing the inferior Court from *usurping jurisdiction* with which it is not legally vested, or in other words, to compel Courts with judicial duties to keep within the limits of their jurisdiction.<sup>1</sup>

"The prohibition is an order.....directed to.....an inferior Court, which forbids that Court to *continue* proceedings therein in *excess* of its jurisdiction or in contravention of the laws of the land."<sup>2</sup>

### How far Prohibition is barred by alternative remedy.

I. The general principle is that where a statutory remedy is provided and that is adequate, the Court, in the exercise of its discretion, may refuse to interfere by prohibition or *certiorari*,<sup>3</sup> where the applicant approaches to the High Court without first resorting to the statutory remedy.<sup>4</sup>

II. The bar of 'alternative remedy' does not apply where -

The defect of jurisdiction is *patent*.<sup>5-6</sup>

III. Besides the above, there are some additional cases in *India*, in view of *our* written Constitution, where an application for prohibition cannot be refused on the ground that there is an alternative remedy available to the applicant:

(a) Where the law which gives jurisdiction to the tribunal is itself unconstitutional,<sup>7</sup> or *ultra vires*.<sup>10</sup>

(b) Where a fundamental right is infringed.<sup>8,9,11</sup>

20. *Secunderabad v. Indermull*, A. 1950 Hydr. 59.

21. *Joychandlal v. Kamalakshie*, A. 1919 P.C. 239.

22. *Bogner U. D. C. v. Boldero*, (1962) 3 W.L.R. 330.

23. *Jagamath v. Dt. Magistrate*, A. 1951 All. 710.

24-25. *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills*, (1950) S.C.R. 536.

1. *Shrirur Mutt v. Commr.*, A. 1952 Mad. 613 (631).

2. *East Indian Commercial Co. v. Collector of Customs*, A. 1962 S.C. 1893

3. *Abraham v. I. T. O.*, A. 1961 S.C. 609 (611).

4. *State of U. P. v. Nook*, A. 1958 S.C. 86.

5. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661 (726).

6. *Venkateswararam v. Ramchand*, A. 1961 S.C. 1506 (1510).

7. *State of U. P. v. Nook*, A. 1958 S.C. 86 (93).

8. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380)

9. *S. T. A. v. Budh Prakash*, (1955) 1 S.C.R. 243

10. *Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1621).

11. *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

### How far prohibition is a discretionary remedy.

(a) Where the defect of jurisdiction is *not apparent* on the face of the proceedings and depends on some fact in the knowledge of the applicant, the Court may, in the exercise of its discretion, refuse the writ on the ground of undue delay, insufficient materials, misconduct, laches or acquiescence.<sup>12-18</sup>

(b) But the Court will readily interfere where the defect of jurisdiction is *patent* on the face of the record.<sup>12-14</sup> In such a case, writ though not as of right, will be granted "almost as a matter of course, unless an irresistible case for withholding the writ is made out".<sup>14-16</sup> Thus, the High Court has no discretion to refuse prohibition where it is patent that an inferior appellate authority has entertained an appeal where no appeal lay under the statute.<sup>15a</sup> This rule applies even if the application is merely to avoid payment of the costs of the applicant's own vexatious suit.<sup>16</sup>

### Suppression or misrepresentation of facts.

An application would be refused<sup>17</sup> without a hearing on the merits or a rule *not discharged*, if it appears that the applicant has made a *deliberate* concealment or misstatement of *material* facts<sup>18</sup> with a view to mislead the Court.<sup>19</sup>

Before coming to this conclusion, however, a careful examination will be made of the facts as they have been made in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has been set in motion by means of a misleading affidavit.<sup>20</sup>

### Time for raising objection as to jurisdiction.

I. Where the defect of jurisdiction is *patent*, an application for prohibition lies at any stage before the completion of the proceedings before the inferior tribunal and it cannot be defeated on the ground that the objection as to jurisdiction was not raised before the tribunal itself.<sup>21,22</sup>

II. Where the Petitioner's grievance is that the inferior tribunal is *biased*, he must take this objection before the tribunal itself, as soon as he becomes *fully* aware of facts giving rise to the allegation and of his right to take the objection.<sup>23</sup> If he fails to do so, he cannot subsequently obtain either prohibition<sup>23</sup> or *certiorari*.<sup>24</sup>

This principle is applicable to all cases where the defect of jurisdiction is not patent but depends upon the allegation and proof of the facts consti-

12. *Prashar v. Dwarkadas*, A. 1956 Bom. 530.

13. *Tanmukhar v. I. T. O.*, A. 1961 Assam 35 (46) F.B.

14. *Chhanalal v. State of Gujarat*, A. 1961 Guj. 27.

15. *Bengal Immunity Co. v. State of Bihar*, A. 1965 S.C. 661.

15a. *Khageshwar v. Hoshram*, A. 1966 All. 191 (197).

16. Halsbury, 3rd. Ed., Vol. II, para 220.

17. *Deptylal v. Collector*, A. 1969 Mad. 460.

18. *Ratan v. Adhar*, (1951) 56 C.W.N. 303 (304).

19. *Ibrahim v. High Commr.*, A. 1951 Nag. 38 (43); *Rekhi v. I. T. Officer*, A. 1951

Simla 1; *Ariatic Engineering v. Acharya Ram*, A. 1951 All. 756 R.B.

20. *Marappa v. C. R. T. Board*, (1966) 1 M.L.J. 324.

21. *Srinivas v. S. D. O.*, A. 1962 All. 590 (603).

22. *United Commercial Bank v. Workmen*, A. 1951 S.C. 230 (237).

23. *Manoh Lal v. Prem Chand*, A. 1957 S.C. 426 (431).

24. *Pandulal v. Union of India*, A. 1957 S.C. 397 (412).

tuting the defect of jurisdiction,<sup>25</sup> and matters of irregularity, such as relating to the sittings of tribunal, which do not go to the root of its jurisdiction.<sup>1</sup>

(i) No question of acquiescing in the jurisdiction of a quasi-judicial authority arises where the governing statute does not require a notice to be served upon the aggrieved person until the act affecting his rights is completed<sup>2</sup> and does not provide for any opportunity for making representation against to such person before making his decision.<sup>3</sup>

(ii) Nor does the taking part in the proceedings of the inferior tribunal after the objection to the jurisdiction has been raised and overruled, constitute acquiescence.<sup>1</sup>

### Cases in which Prohibition is issued.

Since both *certiorari* and prohibition have the same object in view, viz., the prevention of usurpation of jurisdiction by judicial<sup>4</sup> and quasi-judicial bodies, the primary difference between the two writs being as to the stage at which the writ is available, it follows that the grounds on which prohibition will issue are the same on which *certiorari* will issue (if the Petitioner comes to court after the tribunal has already made the order without jurisdiction). Thus, prohibition will issue to prevent the tribunal from proceeding further, when the tribunal—

- (a) proceeds to act without<sup>5</sup> or in excess of jurisdiction;<sup>6</sup>
- (b) proceeds to act in violation of the rules of natural justice;<sup>7</sup>
- (c) proceeds to act under a law which is itself *ultra vires* or unconstitutional;<sup>8, 10</sup>
- (d) proceeds to act in contravention of fundamental rights.<sup>10</sup>

### Limits to the writ of Prohibition.

1. Prohibition will lie only against judicial or quasi-judicial proceedings and not against the exercise of legislative or executive<sup>11-13a</sup> functions, or against private persons<sup>12</sup> or associations.<sup>3</sup> In short, a writ of prohibition is available only against such authorities as are amenable to the jurisdiction of *certiorari* [see further under '*certiorari*', *post*].

2. A writ of prohibition can be issued only so long as the proceedings are pending before the inferior court or tribunal and cannot issue after the court or tribunal has ceased to exist or become *functus officio*.<sup>14</sup>

3. Prohibition is not available where the inferior tribunal has jurisdiction but exercises it irregularly<sup>15</sup> or erroneously.<sup>16</sup>

25. *Dholpur Co-operative Union v. Appellate Authority*, A. 1953 Raj. 193.

1. *United Commercial Bank v. Workmen*, A. 1951 S.C. 230 (237).

2. As under s. 5A of the Bahai Private Irrigation Works Act, 1922 [*Collector of Monghyr v. Keshav*, A. 1952 S.C. 1694].

3. *Estate & Trust Agencies v. Singapore Improvement Trust*, A. 1937 P.C. 265.

4. *L. I. C. v. City Municipality*, (1969) 11 LL.J. 607 (611) (All.).

5. *East India Commercial Co. v. Collector of Customs*, A 1952 S.C. 1993 (1903).

6. *Sewpuranraj v. Collector of Customs*, A. 1958 S.C. 845 (835).

7. *C. I. Manak Lal v. Prem Chand*, A. 1957 S.C. 425 (431).

8. *Sales Tax Officer v. Badh Prakash*, (1955) 1 S.C.R. 243; *Commr. v. Lakshmindra*, (1954) S.C.R. 1005.

9. *Carl Stoll v. State of Bihar*, A. 1961 S.C. 1615 (1621).

10. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267 (277-8).

11. *Prov. of Bombay v. Khuzaldas*, (1950) S.C.R. 621 (631).

11a. *Radheshyam v. State of M. P.*, A. 1959 S.C. 107 (115).

12. *Hongkong Banking Corp. v. Bhaidas*, A. 1951 Bom. 158.

13. *Ibrahim v. A. I. S. Workers' Union*, A. 1955 Cal. 189.

14. *Hari Vishnu v. Syed*, (1955) 1 S.C.R. 1104 (1117).

15. *Narayana v. I. T. O.*, A. 1959 S.C. 213 (219).

16. *Afghan Commercial Co. v. Union of India*, A. 1953 Panj. 225.

**Availability of Prohibition against particular proceedings.**—See under '*certiorari*', *post*.

### **If Prohibition lies against Administrative authority.**

Though a writ of prohibition does not issue against an administrative authority, *our* Supreme Court has held that under Art. 226, the High Court has the power to issue an order prohibiting a statutory administrative authority from acting without jurisdiction where such act is likely to subject a person to lengthy proceedings and unnecessary harassment.<sup>17</sup>

### **Prohibition and certiorari.**

The difference between the scope of the two writs has been fully explained by the Supreme Court in *Hari Vishnu v. Syed Ahmad*,<sup>18</sup> as follows:

1. Both writs of prohibition and *certiorari* have for their object the restraining of inferior courts or tribunals from exceeding their jurisdiction and they could be issued not merely to courts but to all authorities exercising judicial or quasi-judicial functions. But there is one fundamental distinction between the two writs: They are issued at different stages of the proceedings. When an inferior court *takes up for hearing* a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue *forbidding* the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and *gives a decision*, the party aggrieved would have to move the superior court for a writ of *certiorari* and on that an order will be made *quashing* the decision on the ground of want of jurisdiction.

2. It might happen that in a proceeding before an inferior court a decision might have been passed which *does not completely* dispose of the matter, in which case it might be necessary to apply *both* for *certiorari* and prohibition—*certiorari* for quashing what had been decided and prohibition for arresting the further continuance of the proceeding.

3. Where a decision has been given, prohibition will not lie unless there are pending proceedings for *enforcement* of that decision or proceedings consequential on the decision, the continuance of which may be prohibited. But if there are no such proceedings pending, it is too late to issue prohibition and *certiorari* is the proper remedy to resort to.

### **Whether joint petition lies.**

When the right the violation of which is alleged is an individual right of each of several persons, they must bring separate applications for Prohibition, even though the proceedings sought to be restrained be the same, e.g., a proceeding relating to the same industrial dispute before an Industrial Tribunal.<sup>19</sup>

### **Parties.**

Where proceedings before a quasi-judicial tribunal are sought to be restrained by prohibition, it is obvious that the tribunal<sup>20</sup> whose proceedings are sought to be restrained must be impleaded. In India, the party who is interested<sup>21</sup> in the continuance of the proceedings, is also made a party respondent, e.g., where the Petitioner has been prosecuted at the complaint

17. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380).

18. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

19. *Ganapathi v. State of Madras*, (1957) 2 M.L.J. 54; *Raja of Ramnad v. State of Madras*, (1957) 2 M.L.J. 145.

20. *Tamukhrai v. I. T. O.*, A. 1961 Assam 35 (38) F.B.

21. *Ct. Mandir v. State*, A. 1955 Punjab 159.

of a private person, such person is impleaded together with the tribunal before which the case is pending.<sup>22</sup>

If follows that—

(a) Where the proceedings before the tribunal are restarted after an order of remand by an appellate authority, it is not necessary to implead the appellate authority if the proceedings before the inferior tribunal are challenged on the ground that they are *ultra vires* the statute which gives jurisdiction to the inferior tribunal.<sup>20</sup>

(b) The Government is not a necessary party where no relief is claimed against it.<sup>20</sup>

### Scope of an order of Prohibition.

1. The object of Prohibition being to prevent an inferior tribunal from usurping jurisdiction which does not belong to it, the writ will not issue to correct mere errors or irregularities in the exercise of jurisdiction. In other words, where the tribunal has authority to do the act, but the manner of doing it is erroneous or improper, the writ will not lie. This is what is meant by saying that the writ of Prohibition cannot be used to serve the purposes of an appeal.<sup>23</sup>

2. Where the proceedings of the inferior tribunal are partly within and partly without its jurisdiction, prohibition will lie only against doing what is in excess of its jurisdiction,<sup>24</sup> e.g. against the enforcement of invalid conditions imposed upon a valid order.<sup>24</sup>

**Costs in a proceeding for Prohibition.**—see under *certiorari*, post.

## CERTIORARI

### Certiorari, nature of.

Whenever any body of persons (a) having legal authority, (b) to determine question affecting rights of subjects and (c) having the duty to act judicially (d) act in excess of their legal authority, *certiorari* may issue,<sup>25-1</sup> to remove the proceedings from such body to the High Court and to quash<sup>2-2</sup> a decision that goes beyond jurisdiction.<sup>25-1</sup>

The object of this writ is to keep the exercise of powers by judicial and quasi-judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain them from acting in excess of their authority.<sup>4</sup>

### Conditions necessary for issuing Certiorari.

When any body or persons (a) having legal authority, (b) to determine questions affecting rights of subjects, (c) having the duty to act judicially, (d) act in excess of their legal authority,—a writ of *certiorari* may issue. Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to *certiorari*.<sup>1</sup>

I. *The tribunal must have legal authority*—*Certiorari* does not issue where the proceedings of the inferior tribunal are not merely voidable but are absolutely null and void, for in such a case, no benefit will arise from

22. Cf. *Kalipada v. Union of India and Others*, A. 1963 S.C. 134.

23. *Afghan Commercial Co. v. Union of India*, A. 1953 Punj. 225.

24. *Sawpajanrai v. Collector of Customs*, A. 1958 S.C. 845 (885).

25-1. *Prov. of Bombay v. Khosaldas*, (1950-51) C.C. 189 (191); (1950) S.C.R. 621.

2. *Basappa v. Nagappa*, A. 1954 S.C. 440.

3. *Hari Vishnu v. Ahmed*, A. 1955 S.C. 233.

4. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459 (518).



the issue of the writ, e.g., (a) where an altogether unauthorised person has purported to act in a judicial capacity, or (b) where the proceedings of the tribunal have already become void by the operation of a statute.

The object of *certiorari* and prohibition is to restrain a tribunal established by law from usurping jurisdiction which has not been conferred by the Legislature. When a person or body of persons has no legal authority to act as a tribunal, its acts are void *ab initio* and these need not be quashed by *certiorari*.<sup>5</sup> This is why neither of these writs is available against a private individual or a domestic tribunal,<sup>6</sup> having no statutory power.<sup>7</sup>

II. *Such legal authority must be an authority to determine questions affecting rights of subjects.*

In order to attract prohibition or *certiorari* the determination of the authority must affect the 'rights' of subjects. Not being qualified in any way, it would comprise any legally enforceable right or interest, proprietary, pecuniary, or personal,—whether the right is created by statute or by common law.<sup>8</sup>

III. *The tribunal must have the duty to act judicially*—The writ of *certiorari* does not issue against executive acts or even ministerial acts of a judicial authority. It is issued only if the act done by the inferior body or authority is a 'judicial' act, which term includes the concept of a 'quasi-judicial' act.<sup>9</sup> *Certiorari* is not available against administrative orders,<sup>7,9</sup> or the orders of non-statutory bodies.

IV. The judicial or quasi-judicial authority must act (a) *without* or in excess of *jurisdiction*; or (b) in contravention of the rules of *natural justice*, or (c) commit an *error apparent* on the face of the record.

In order that *certiorari* may lie, the tribunal must have acted without jurisdiction or in excess of the jurisdiction conferred upon it by law.<sup>10</sup> Defect of jurisdiction must be distinguished from defect in mere *procedure*. (As to when a tribunal may be said to act without or in excess of jurisdiction, see *post*).

(A) Once an order is made by a tribunal without jurisdiction, that order becomes liable to the writ jurisdiction of the Court, even though the decision of the tribunal requires the sanction of a higher authority who may not be amenable to the writ jurisdiction. Where the responsibility for the passing of a particular kind of order is by statute vested in a specified authority but such an order is passed by a different authority, the fact that the proper appellate authority affirmed the original order does not cure the invalidity thereof.<sup>11</sup>

(B) On the other hand—

1. When the inferior tribunal has jurisdiction to decide the matter, *certiorari* will not issue, even though—

(i) there is no right of appeal or other remedy against the order complained of;<sup>12</sup>

(ii) there will be inconvenience to the party aggrieved unless *certiorari* is issued;<sup>13</sup>

5. *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96.

6. *Thomas v. Industrial Tribunal*, A. 1961 Ker. 265.

7. *Lakshmi v. S. P. T. C. M. Society*, A. 1962 Mad. 169.

8. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707 (717); *Pannalal v. Union of India*, (1957) S.C.R. 233 (262).

9. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018 (1026).

10. *Prov. of Bombay v. Khosaldas*, (1950) S.C.R. 621.

11. *Ramchandra v. Santharamma*, (1955) S.C.A. 686 (691).

12. *Haji Wajid v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

(iii) the finding of the tribunal be *erroneous in fact*,<sup>12-13</sup> or the tribunal has acted without sufficient evidence or has misdirected itself in considering the evidence; or has not admitted legal evidence or rejected legal evidence or has misconstrued a statute.<sup>14</sup> In other words, *certiorari* does not lie for an erroneous decision in respect of a matter which is within the jurisdiction of the inferior tribunal unless such erroneous decision relates to anything collateral, an erroneous decision upon which might affect jurisdiction, and the statute does not confer upon the tribunal final jurisdiction to decide such question, which is technically known as a 'jurisdictional' question.<sup>15</sup>

The Court issuing a writ of *certiorari* acts in a *supervisory* and not appellate jurisdiction.<sup>16</sup> In cases of mere erroneous decision within jurisdiction, remedy lies only under the procedure prescribed by the law for setting matters right.<sup>17</sup> Acting under art. 226, the High Court cannot convert itself into a court of appeal.<sup>14-15</sup> Hence, it cannot interfere with a finding of fact, unless it is shown to be *wholly* unsupported by evidence.<sup>18</sup>

(iv) On the same principle, *certiorari* will not issue to correct a mere error of law,<sup>12</sup> except where there is an 'error apparent on the record',<sup>19</sup> which means that (a) there must be something more than a mere error; (b) such error must be 'apparent on the face of the record'. [As to when an error may be said to be 'apparent on the face of the record', see p. 501, *post*].

2. But even where the tribunal has acted within its jurisdiction, *certiorari* will lie in the following cases of complete failure of justice:

(a) Where the order of the inferior tribunal has been obtained by fraud, collusion or corruption.<sup>17</sup>

(b) Where the tribunal has acted contrary to the principles of natural justice,<sup>18</sup> *e.g.*, adjudging a person guilty without giving him opportunity of being heard.<sup>18</sup>

(c) Where there is an error apparent on the face of the record.<sup>19</sup>

In the absence of any such grounds, the Court will not interfere with an order within jurisdiction, however erroneous or improper it may be.<sup>19</sup>

V. *The tribunal whose order is sought to be quashed must be inferior to the Court*<sup>20</sup> before which *certiorari* has been applied for.—No Court can issue *certiorari* to quash an order made by itself or a Court<sup>21</sup> of equal status or co-ordinate jurisdiction or against an independent tribunal. For the same reason, a High Court cannot issue a writ of *certiorari* against itself on its administrative side, *e.g.*, to quash an order of refusal to enrol the Petitioner as an Advocate.<sup>21</sup>

But the Excise Appellate Authority under the East Bengal and Assam Excise Act, 1910, is not a tribunal of co-ordinate jurisdiction with the High Court for the present purpose, even though the highest appellate powers as regards revenue cases are vested in him.<sup>22</sup>

VI. *The tribunal whose order is sought to be quashed or the authority from whose custody the record is called for, must be within the jurisdiction*

12. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621 (1629-30).

13. *Perry & Co. v. Commercial Employees' Assn.*, (1962) S.C.R. 519 (524); *Ebrahim v. Custodian of Evacuee Property*, (1952) S.C.R. 696 (702).

14. *Veerappa v. Raman*, (1952) S.C.R. 583.

15. *D. C. Works v. State of Rajasthan*, A. 1957 S.C. 261 (269).

16. *Basappa v. Nagappa* (1955) 1 S.C.R. 250.

17. *Mohasinali v. State of Bombay*, A. 1951 Bom. 303.

18. *Asst. Collector v. Soorajmull*, (1962) 56 C.W.N. 452 (468).

19. *Mahboob v. State of A. P.*, (1961) S.C. [C.A. 235/59].

20. *Jenardhan v. State of Hyderabad*, (1951) S.C.R. 344.

21. *In re Bahad Chandra*, A. 1952 Pat. 309.

22. *Nagendra v. Commr.*, A. 1953 S.C. 396 (407); (1959) S.C.R. 1240.

of the High Court.—The Tribunal whose order is sought to be quashed must be situated within the jurisdiction of the High Court before whom *certiorari* is sought.<sup>23</sup>

But the existence of the Tribunal at the date of issue of *certiorari* is not essential. The fact that a tribunal has become *functus officio* is no bar to the issue of *certiorari* to quash its decision. The writ being against the record, it can be issued to whosoever has the custody thereof.<sup>24</sup>

But the writ cannot issue if the person who has the custody of the record is outside the jurisdiction of the High Court.<sup>25</sup> Thus, after the Labour Appellate Tribunal at Lucknow has been abolished and the records removed to Bombay, the High Court of Allahabad cannot issue *certiorari* to quash a decision of that Tribunal.<sup>1</sup>

On the other hand, if the person in whose custody the record is, being within the jurisdiction of the Court, has been named in the petition, it cannot be defeated on the ground that the incumbent of the office, which issued the order complained of has not been impleaded in the petition.<sup>2</sup>

### Certiorari on constitutional grounds.

1. In India, *certiorari* is available against a quasi-judicial decision on the additional ground that the decision is unconstitutional, e.g.,

(i) Where the decision offends a fundamental right.<sup>3</sup>

This may happen in several ways—

(a) Where the decision affects a fundamental right and the law under which the tribunal has made the decision is *ultra vires*<sup>4</sup> or violative of a fundamental right<sup>5</sup> or some mandatory provision of the Constitution.<sup>6</sup>

(b) Where the law itself is valid but the impugned decision violates a fundamental right, e.g., that under art. 14;<sup>7</sup>

(ii) The tribunal acts without or in excess of jurisdiction, and its decision affects a fundamental right.<sup>8</sup>

(iii) The tribunal acts in violation of the principles of natural justice and its decision affects a fundamental right.<sup>9</sup>

(iv) Where the order which initiates the proceedings is unconstitutional.<sup>7</sup>

### A. When does a tribunal act without or in excess of jurisdiction.

Want of jurisdiction may arise in any of the following ways—

I. *Defect in the constitution of the tribunal.* When the tribunal is not properly constituted, it has no jurisdiction to hear the matter.<sup>10</sup>

But where the defect is not as to qualification, but is due to all the members of the tribunal not being present, the question will not be entertained unless objection was raised before the Tribunal itself on this ground.<sup>11</sup>

23. *Rashid v. I. T. J. Commr.*, (1954) S.C.R. 738.

24. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

25. *Bhawani v. Naqul*, A. 1956 Pat 257 (258).

1. *E. S. & Co. v. Textile Mill Union*, A. 1958 All. 80 (84).

2. *Bidi Supply Co. v. Union of India*, A. 1956 S.C. 479 (484).

3. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621 (1627-9).

4. *Cf. Jagannath v. State of U. P.*, A. 1962 S.C. 1563 (1569).

5. *Himatlal v. State of M. P.*, (1954) S.C.R. 1122; *Express Newspaper v. Union of India*, A. 1958 S.C. 578 (643).

6. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

7. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267.

8. *Madan Lal v. Excise & Taxation Officer*, A. 1961 S.C. 1565.

9. *Sinha Govindji v. Dy. Controller*, (1961) S.C. [Petn. 307/60].

10. *State of Rajasthan v. Mawan Mills*, (1954) S.C.R. 1129.

11. *Janata M. T. C. S. v. State Transport Appellate Authority*, A. 1965 M.P. 113 (115).

II. It may arise from the nature of the subject-matter,<sup>12</sup> so that the inferior court or tribunal might not have authority to enter upon the inquiry or upon some part of it.<sup>13</sup>

III. It may arise from the absence of some essential preliminary or the existence of some facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it.<sup>14, 15</sup>

The general rule is that a tribunal cannot give itself jurisdiction by wrongly deciding facts the existence of which is essential for the assumption of jurisdiction by the tribunal. But in the application of the rule, a distinction is to be made by two classes of tribunals which may be created by the Legislature:

(a) The Legislature may say that the tribunal shall have jurisdiction to decide a cause or matter only if a certain state of facts is shown to the tribunal to exist, but not otherwise. In such a case, it is not for the tribunal conclusively to determine whether that state of facts exists. If the tribunal exercises the jurisdiction without the existence of that state of facts, its decision of the cause or matter will be without jurisdiction and will be quashed by *certiorari*.<sup>16</sup>

The jurisdiction of the Industrial Tribunal under s. 33A of the Industrial Disputes Act, 1947 depends upon the existence of the conditions mentioned in that section.<sup>17</sup> Similarly, the question whether the employees before the tribunal are 'workmen' or whether the dispute is an industrial dispute within the meaning of the Industrial Disputes Act is a jurisdictional issue, the finding on which is open to scrutiny in a writ of *certiorari*.<sup>18</sup>

(b) The Legislature may confer on the inferior court or tribunal also the jurisdiction to determine whether the preliminary state of facts exists. In such a case, the decision of the tribunal cannot be challenged on the ground that the preliminary state of facts did not, in fact, exist. This case is, thus, an exception to the rule that a tribunal cannot give its jurisdiction by wrongly deciding certain facts.<sup>19</sup>

### Illustrations

(i) The Bihar Buildings' Lease (Rent and Eviction) Control Act (III) of 1947, sets up a complete machinery for eviction of a tenant on certain grounds, including non-payment of rent, and makes the decision of the Controller final, subject only to appeal to the Commissioner. The Act empowers the Controller to determine whether or not there has been non-payment of rent, and upon that finding, to order eviction of the tenant. *Held*, that the impugned Act confers upon the Controller final jurisdiction to determine the preliminary question whether there has been non-payment of rent, as well as the final question of eviction so that his decision cannot be challenged in the Courts on the ground that the preliminary question has been wrongly decided.<sup>20</sup>

(ii) S. 63A of the Motor Vehicles Act, 1939, as amended in Madras, provides that "the State Government may, of its own motion or on application made to it, call for the records of any order passed or proceedings taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity

12. *R. v. Local Govt. Board*, (1882) 10 Q.B.D. 309 (321) C.A.

13. *J. K. Chaudhuri v. Dutta Gupta*, A. 1958 S.C. 722, *Ebrahim v. Custodian of Evacuee Property*, (1952) S.C. 696 (706).

14. *Srinivasa v. State of Mysore*, A. 1960 S.C. 350 (356).

15. *Newspapers Ltd. v. Industrial Tribunal*, A. 1957 S.C. 532 (539).

16. *Raman & Raman v. State of Madras*, A. 1955 S.C. 463 (466); *Raja Anand v. State of U. P.*, A. 1967 S.C. 1061 (1085).

17. *Automobile Products v. Rukmani*, A. 1955 S.C. 258.

18. *Brij Raj v. Shaw & Bros.*, (1951) S.C.R. 145; A. 1951 S.C. 115.

or propriety of such order or proceedings and after examining such records, may pass such order in reference thereto as it thinks fit." *Held*, that in enacting this section, the Legislature clearly intended that the State Government was to decide the issue as to whether any order in question was illegal, irregular or improper and then pass such order as it thought fit. Hence, it would not be open to a Court exercising *certiorari* to intervene merely because it might be of the opinion that the view taken by the State Government as to the impropriety of the order was erroneous.<sup>19</sup>

(iii) S. 5 of the Bombay Land Requisition Act, 1948, which empowers the State Government to requisition a premises which has remained vacant for a particular period provides that the declaration of such vacancy by the State Government, after such enquiry as it deems fit, shall be 'conclusive evidence' of the fact of vacancy. *Held*, the finding of the State Government on the question of vacancy cannot be challenged in a proceeding for *certiorari*, because the Legislature had conferred final power upon the Government to determine this question.<sup>20</sup>

4. Where a tribunal purports to exercise a power not given to it by the statute which created its jurisdiction,<sup>21</sup> or exercises the power in disregard of the conditions laid down by the state for its exercise or on *extraneous* considerations,<sup>22</sup> there is an *excess* of jurisdiction.

But—

(a) Where a tribunal has jurisdiction under any valid law, its omission to refer to that law or its reference to a wrong statute or to an irrelevant provision of the right statute will not render its decision without jurisdiction.<sup>23</sup>

(b) When a statute creates an appellate court or tribunal, without limiting its jurisdiction by providing that the exercise of its powers will depend on any particular state of facts<sup>24</sup> or on particular grounds,<sup>25</sup> the powers of the Appellate Tribunal would be co-extensive with those of the primary authority, so that it may not only quash the orders of the primary authority on the ground of perversity or illegality, but substitute its own decision on the matter before the primary authority, subject, of course, to the relevant provisions of the law.<sup>26</sup>

But *certiorari* will not lie for the breach of *executive* instructions issued by a superior authority even though they may be enforceable against the inferior tribunal by departmental action.<sup>27</sup>

5. Where the law which gives jurisdiction to the tribunal is itself void, there is an obvious absence of jurisdiction.

### When the question of jurisdiction should be raised.

When a question of want of jurisdiction of the inferior tribunal is one of law and goes to the root of the matter,<sup>1</sup> or it is *patent*, it may be raised for the first time in an application under Art. 226.

But where it is a mixed question of fact and law, or the question of law depends upon proof of facts, the High Court would not allow it to be raised in proceeding under Art. 226 unless it had been raised before the

19. *Raman & Raman v. State of Madras*, A. 1956 S.C. 463 (467).

20. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (528).

21. *Nagendra v. Commr.*, A. 1958 S.C. 398 (408): (1958) S.C.R. 1240.

22. *Prani v. State of Madras*, A. 1961 S.C. 1731 (1740).

23. *Hazari Mal v. I. T. O.*, A. 1961 S.C. 200: (1961) 1 S.C.R. 892.

24. *Ebrahim v. Custodian General*, (1952) S.C.R. 696 (704).

25. *Abadhi v. S. T. A. T.*, A. 1959 S.C. 896.

1. *Bhadrathi v. The State*, A. 1955 All 113 (F.B.); *Arumachalam v. Southern Railway*, A. 1960 S.C. 1191.

2. *Pannalal v. Union of India*, A. 1957 S.C. 397 (412); *Munshi Lal v. Pannalal*, A. 1957 S.C. 425: (1957) S.C.R. 575.

inferior tribunal itself,<sup>3</sup> or he can show that he was unaware of those facts when the matter was before the inferior tribunal.<sup>4</sup>

### Whether a quasi-judicial tribunal can review its own orders.

The general rule is that a quasi-judicial tribunal becomes *functus officio* as soon as it makes a decision relating to a particular matter. It cannot, therefore, review its decision, unless so empowered by statute.<sup>4</sup>

This does not mean that it is powerless to rectify its own mistake, overlooking a change in the law which had taken place before its decision.<sup>4-5</sup>

### B. When is an error 'apparent on the face of the record'.

1. When the decision of an inferior tribunal is vitiated by an error 'apparent on the face of the record', it is liable to be quashed by *certiorari*,<sup>6</sup> even though the Court may have acted within its jurisdiction.<sup>7</sup>

2. 'Error', in this context, means 'error of law'.<sup>7-9</sup> Where the Tribunal states on the face of the order the grounds on which they made it and it appears that in law these grounds were not such as to warrant the decision to which they had come, *certiorari* would issue to quash the decision.<sup>11</sup>

3. An 'error of fact' apparent on the face of the record may be a ground for review under O. 47, r. 1 of the C. P. Code but *not* for interference by means of *certiorari*, *however* gross the error may be;<sup>7, 10</sup> except where a finding of fact is based on *no evidence at all*,<sup>11</sup> or perverse,<sup>11</sup> that is to say, a conclusion which no one instructed in law and acting judicially could have arrived at from the evidence, in which cases it constitutes an 'error of law',<sup>8</sup> or the Tribunal, in arriving at that finding, has been *influenced* by inadmissible evidence or has refused to admit admissible evidence.<sup>8</sup>

4. Interference on the ground of error apparent on the face of the record is an exception to the rule that, in exercising its power to issue *certiorari*, the Court cannot act as a court of appeal. This does not mean, however, that in exercise of this power, the court issuing *certiorari* can interfere in case of every error of law which could be corrected by a court of appeal.<sup>9</sup> The purpose of *certiorari* on the ground of error apparent on the face of the record is to determine, on an examination of the record, whether the inferior tribunal has not proceeded in accordance with the *essential* requirements of the law which it was meant to administer.<sup>7</sup>

Thus,

(A) The Court will not, by *certiorari*, interfere with—

(a) Mere formal or technical errors, even though of law,<sup>12-14</sup> e.g., errors in appreciation of documentary evidence.<sup>7</sup>

(b) A decision on a question of law merely because two views are possible on such question.<sup>15</sup>

3. *Gopalan v. C. R. T. Board*, A. 1958 Ker. 311 (349); *Gandhinagar M. T. Society v. State of Bombay*, A. 1954 Bom. 202.

4. *State of Bihar v. Ram Doyal*, (1961) S.C. [C.A. 114/60].

5. *Shib Prasad v. State of W. B.*, (1953) 63 C.W.N. 89.

6. *Hari Vishnu v. Ahmad*, (1955) 1 S.C.R. 1104 (1123).

7. *Nagendra v. Commr.*, A. 1958 S.C. 398 (412).

8. *Yakoub v. Radhakrishnan*, A. 1954 S.C. 477.

9. *Ambica Mills v. Bhatt*, A. 1961 S.C. 970 (973).

10. *Custodian v. Abdul Shakor*, A. 1961 S.C. 1097 (1094).

11. *P. T. Services v. S. I. Coast*, A. 1963 S.C. 114.

12-14. *Prem Singh v. Deputy Custodian General*, (1958) S.C.A. 24.

15. *Ambica Mills v. Bhatt*, A. 1961 S.C. 970 (974).

(B) But it will be issued where there is a *patent* error of law, manifest on the record, which goes to the root of the matter, e.g.—

(i) Where it is based on a clear disregard of the provisions of law,<sup>16</sup> e.g., where the charge laid before a Magistrate, as stated in the information, does not constitute an offence punishable by the Magistrate or where it does not amount in law to the offence of which the defendant is convicted or where an order is made which is unauthorised by the finding of the Magistrate,<sup>17</sup> or where the impugned order is founded on an obviously wrong interpretation of a statutory provision;<sup>18</sup> or other instrument<sup>19</sup> upon which the decision rests; or where a material provision of law is overlooked.<sup>19</sup>

(ii) A finding based on *no evidence* constitutes an error of law,<sup>20, 21</sup> but an error in appreciation of evidence or in drawing inferences is not,<sup>22, 23</sup> except where it is 'perverse', that is to say, such a conclusion as no person properly instructed in law could have reached.<sup>21</sup>

5. It is not easy to define how far the Court would be entitled to go for the purpose of determining whether there has been an 'error apparent on the face of the record'.<sup>22</sup> Nor would it be expedient to lay down any general test to determine which errors of law can be described as errors apparent on the face of the record.<sup>21</sup> It has to be decided in each case.<sup>24</sup>

6. Broadly speaking, *certiorari* is available on the present ground only when the impugned order is a 'speaking order', i.e., an order which *sets out the grounds of the decision* and it appears that the grounds so stated were not such as to warrant the decision to which the inferior Court had come.<sup>25</sup> Hence, in the majority of cases, an error could not be said to be apparent on the face of the record where it was not self-evident on the face of the record and required argument or evidence<sup>1</sup> or a long-drawn process of reasoning<sup>2</sup> to establish it.

7. For finding out whether there is such an error, the Court must<sup>3</sup>—

(a) find whether there is any legal proposition which is the basis of the order;

(b) read the order as it stands, without inserting any words into it or drawing any inferences.

7. For the purpose of application of this principle, a record consists of the pleadings, if any, or the document which initiates the proceedings, and the adjudication, but not the evidence.<sup>4</sup> It would not include other subsidiary records, if any, called for by the Court itself.<sup>2a</sup>

But there may be cases where this test would break down and the question whether there has been an error apparent on the face of the record

16. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

17. *Cf. Registrar v. Ishwari Prasad*, A. 1956 All. 603 (608).

18. *Nanag Ram v. Ghinsi Lal*, A. 1952 Raj. 107.

19. *Juvasinji v. Tribunal*, A. 1957 Bom. 182 (185).

20. *Kaushalya v. Bachittar*, A. 1960 S.C. 1168 (1171); *Board of High School v. Bagleswar*, A. 1966 S.C. 875 (876).

21. *P. T. Services v. S. I. Court*, A. 1962 S.C. 114 (117).

22. *Hari Vishnu v. Ahmad*, (1955) S.C.R. 1104; (1962-4) 2 C.C. 480 (486); A. 1955 S.C. 233.

23. *Yakoob v. Radhakrishnan*, A. 1964 S.C. 477.

24. *Shanmugam v. S. R. V. S.*, A. 1963 S.C. 1626; *Premasagar v. S. V. Oil Co.*, A. 1965 S.C. 111 (116).

25. *Basappa v. Nagappa*, (1951) 1 S.C.R. 250.

1. *Ambica Mills v. Bhatt*, A. 1961 S.C. 970.

2. *Satyanarayan v. Mallikarjun*, A. 1960 S.C. 137 (142), reversing *Mallikarjun v. Satyanarayan*, A. 1953 Bom. 207.

3. *Bharat Bottel Co. v. Bose*, A. 1967 S.C. 351 (358).

2a. *S. K. Dutt v. A. I. Jute Mills*, A. 1967 Cal. 514 (520); *Habib v. Bhishanchand*, A. 1954 Nag. 306.

must be left to be determined on the facts of each case.<sup>23</sup> Thus, where the order incorporates<sup>24</sup> reference to other documents, the Court is not prevented from looking into them to determine whether there has been such an error.<sup>4</sup>

### Instances of 'error apparent on the face of the record'.

(A) In the following cases, it has been held that the order of the tribunal or authority has been vitiated by an error apparent on the face of the record:

(i) Where an administrative tribunal plainly misread the provisions of an agreement, ignoring their very object where two views were not possible and based its decision thereon.<sup>5</sup>

(ii) Where the decision is, on the face of the record, based on *no evidence* at all<sup>6</sup> or not warranted by the findings arrived at.

(iii) Where the Tribunal made a patent error in interpreting the material statutory provision.<sup>7</sup>

(B) On the other hand, in the following cases it has been held that there was *no* error apparent on the face of the record:

(i) A petition for declaring the election of the successful candidate void and holding the Petitioner elected on the ground of irregularity in commencing the polling at a centre half an hour later than the scheduled time and of corrupt practices on the part of the successful candidate, was allowed on both grounds. In an application for *certiorari*, it was urged that the finding that the result of the election was materially affected by reason of the late commencement of the polling was vitiated by an error apparent on the face of the record inasmuch as it was pure surmise so long as the exact number of voters who went away owing to the late commencement and the number of those out of such persons who would have voted for the Petitioner, were not known. Held, that if the Tribunal had declared the Petitioner to be the duly elected candidate merely upon the view that he would have got more votes than the successful candidate had the polling commenced in due time, there would, obviously, have been an error apparent on the face of the record. But the Tribunal, in fact, considered the fact of late commencement only as one of the circumstances in coming to a determination, under s. 100 (2) (c) of the Representation of the People Act, 1951 as to whether the violation of the statutory rule materially affected the result of the election, and the declaration in favour of the Petitioner specifically rested on the finding that the Petitioner could have secured the majority of votes but for the *corrupt* practices of the respondent. There was no error of law apparent on the face of the record in this latter finding which the Tribunal was competent to make under the law.<sup>8</sup>

(ii) The Bombay Revenue Tribunal rejected a landlord's application for possession on the ground that a previous notice required by s. 14 of the Bombay Tenancy and Agricultural Lands Act, 1948, had not been given. The order was challenged as being vitiated by an error of law. The Supreme Court refused *certiorari*, holding that the question whether such notice would be required in the facts of the case was a controversial one and required arguments to establish the error, if any. There might have been erroneous decision on a point of law, but it was *not apparent* on the face of the record.<sup>9</sup>

4. *Abanindra v. Marumdar*, A. 1966 Cal. 273 (275) F.B.

5. *Ambica Mills v. Bhatt*, A. 1961 S.C. 970 (974).

6. *Kaushalya v. Bachittar*, A. 1960 S.C. 1168.

7. *Union of India v. India Fisheries*, A. 1966 S.C. 35 (37).

8. *Bachappa v. Nagappa*, A. 1964 S.C. 440.

9. *Satyannarayan v. Mallikarjun*, A. 1960 S.C. 137 (142).



### Proper order where the decision of the inferior tribunal is vitiated by error of law.

Where the High Court finds that the decision of the inferior tribunal is vitiated by error apparent on the face of the record, it should correct the error and send back the case to the Tribunal for its decision in accordance with law. It would be inappropriate for the High Court to consider the evidence itself and reach its own conclusions in matters which have been left by the Legislature to the decisions of specially constituted Tribunals.<sup>10</sup>

### C. Violation of the Principles of Natural Justice.

1. *Certiorari* will lie where a judicial or quasi-judicial authority has violated the principles of natural justice even though the authority has acted within its jurisdiction.

2. The requirements of natural justice vary with the varying constitution of the different quasi-judicial authorities and the statutory provisions under which they function. Hence, the question whether or not any rule of natural justice has been contravened in any particular case should be decided not under any pre-conceived notions, but in the light of the relevant statutory provisions.<sup>11,12</sup> This should be borne in mind while applying the general principles relating to natural justice.

3. The broad principles of natural justice are—

I. A quasi-judicial authority cannot make any decision adverse to any party without giving him an effective opportunity of meeting any relevant allegation against him;<sup>13</sup> or before an order affecting him is made.<sup>14</sup>

This principle requires—

(a) That every person whose civil right is affected must have a *reasonable notice* of the case he has to meet;<sup>15</sup>

(b) That he must have a reasonable opportunity of being heard in his defence,<sup>16</sup> or to meet the case against him.<sup>17</sup>

(c) That he must have the opportunity of adducing all relevant evidence on which he relies,<sup>18</sup> the evidence of the opponent should be taken in his presence and that he must have the opportunity of cross-examining the witness<sup>19</sup> examined<sup>19</sup> or relied upon<sup>20</sup> by the opponent,<sup>21</sup> and that documents which are necessary for the purpose of an *effective exercise* of the foregoing rights, should not be withheld from such person.<sup>24</sup>

But—

The acceptance of previous depositions of witnesses recorded in the absence of the delinquent does not violate the principle of natural justice if the witnesses are offered for cross-examination,<sup>20</sup> or the delinquent had an opportunity of cross-examining them.<sup>19, 22</sup>

10. *Prem Sagar v. S. V. Oil Co.*, A. 1965 S.C. 111 (118).

11. *N. P. T. Co. v. N. S. T. Co.*, (1957) S.C.R. 98; A. 1957 S.C. 232.

12. *Bharat Barrel Co. v. L. K. Bose*, A. 1967 S.C. 361 (367); *Union of India v. P. K. Roy*, A. 1968 S.C. 850 (858).

13. *D. C. Mills v. Commr. of I. T.*, (1952-4) 2 C.C. 497 (499); A. 1955 S.C. 65.

14. Cf. *Subramania v. State of Madras*, (1965) S.C. [C.A. 560/64].

15. *Mukhtar Singh v. State of U. P.*, A. 1957 All. 297 (301).

16. *Dipa Pal v. University of Calcutta*, A. 1952 Cal. 594.

17. *State of M. P. v. Chintaman*, A. 1961 S.C. 1623.

18. *Union of India v. Verma*, (1958) S.C.R. 499; A. 1957 S.C. 882 (885).

19. *State of Orissa v. Murlihar*, A. 1963 S.C. 404.

20. *State of Mysore v. Sivabasappa*, A. 1963 S.C. 375.

21. *S. E. & Steaming Works v. Workmen*, A. 1963 S.C. 1914; *Tate Oil Mills v. Workmen*, A. 1965 S.C. 155.

22. This exception has not been admitted in proceedings against industrial workmen. *Kennam Cotton Mills v. Gangadhar*, A. 1964 S.C. 708 (709); *Khordak & Co. v. Workmen*, A. 1964 S.C. 719 (720).

A decision based on information gathered at the back of the party affected, without giving him an opportunity to rebut that information, or material, is opposed to the principles of natural justice.<sup>23, 26</sup> But where a party, coming to know that the Tribunal was using a document, raised no objection that he had no opportunity of rebutting it, nor asked for an adjournment to meet the statements made in the document, a superior Court would not entertain such objection at a later stage,<sup>24, 25</sup> particularly when the document contained nothing adverse against him which he could be called upon to meet.<sup>24</sup>

This principle is also violated where the quasi-judicial authority, without exercising his own judgment and without giving the parties an opportunity of meeting the point of view adopted by a superior officer, gives his decision in accordance with instructions received from the superior officer.<sup>21, 25</sup>

v But—

(i) The duty to offer a reasonable opportunity of being heard does not include any obligation to hear a party in person<sup>1</sup> or by a lawyer<sup>2</sup>. Whether a personal hearing should be given or not will depend on the circumstances of each case.<sup>3, 4</sup>

(ii) What the rule of natural justice requires is that proper opportunity must be given to the party to produce his evidence or to cross-examine the opponent's witnesses or to be present when the Court or Tribunal is collecting some evidence against him<sup>5</sup>. Where such opportunity has been given but the party chooses not to avail of that he cannot afterwards complain that the evidence was taken or the inspection held, in his absence<sup>5, 6</sup>.

(iii) Unlike a Court, a quasi-judicial tribunal is entitled to obtain all information material for the points under inquiry from all sources and through all channels, without being fettered by rules of procedure which govern proceedings in court.<sup>7, 25</sup>

The only obligation that the law casts on such tribunals is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it.<sup>7, 25</sup>

(iv) Nor does natural justice require that evidence should be recorded as in a court of law under the Evidence Act.<sup>1</sup>

There may be exceptional cases where opportunity to be heard cannot be given in the public interest before taking action, *e.g.*—

(a) Where a building or similar structure is in imminent danger of collapsing and the municipal authority is obliged to pull it down immediately in the interest of public safety, or the safety of the inmates of the house.<sup>2</sup>

(b) Where immediate orders are necessary to meet an emergency, *e.g.*, for the maintenance of public order.<sup>3</sup>

(c) Where the security of the State is involved.<sup>4</sup>

23. *Brailal v. Union of India*, A. 1964 S.C. 1643 (1645).

24. *N. P. T. Co. v. N. S. A. Co.*, A. 1957 S.C. 232 (242).

25. *Mahadaya v. Commercial Tax Officer*, A. 1958 S.C. 667 (671).

1. *F. N. Roy v. Collector of Customs*, A. 1957 S.C. 648 (652).

2. *Mulchand v. Mukund*, A. 1952 Bom. 296.

3. *Mahabir Motor Co. v. State of Bihar*, A. 1956 Pat. 437.

4. *Abdul Aziz v. State of Mysore*, A. 1957 Mys. 12.

5. *Roshan Lal v. Ishwar Das*, A. 1962 S.C. 646 (655).

6. *State of Orissa v. Murlidhar*, A. 1963 S.C. 404.

7-25. *State of Mysore v. Shivabasappa*, A. 1963 S.C. 375.

1. *Union of India v. Verma*, (1958) S.C.R. 499 (507); A. 1957 S.C. 882.

2. *Ajay Kumar v. Calcutta Corporation*, A. 1956 Cal. 411.

3. *Bapurao v. State*, A. 1955 Bom. 300 (302).

4. *Sadhu Singh v. Delhi Administration*, A. 1956 S.C. 91.

II. It is of the essence of judicial and quasi-judicial decisions that the authority making such decisions should be able to act impartially, objectively and without any *bias*.<sup>5</sup>

This principle is violated when the judicial or quasi-judicial authority is interested in the cause before him. Such interest may be of three kinds—

(a) He may have a direct *connection* with the litigation, without any pecuniary or other personal interest. Thus, a Judge who is himself a party or has personal knowledge of the facts of a case<sup>6</sup> or who has examined himself as a witness in a case,<sup>7</sup> should not hear it.

This principle is otherwise expressed as—

"A person must not be a judge in his own cause" or "the prosecutor shall not also be the judge". The word 'prosecutor' has been rather narrowly interpreted by the Supreme Court in *Hari v. Dy. Commr.*,<sup>8</sup> but it has been rightly pointed out that the principle is not violated unless the power of making the order complained of is placed in the hands of the authority who launches the proceeding.<sup>9</sup> Where the proceedings are initiated and the evidence is also collected by the Police but the actual order of externment is to be made by a Magistrate "if he has reason to believe that such person is likely to engage himself in the commission of an offence", *held*, there was no denial of the above principle of natural justice.<sup>10</sup>

The principle is not confined to Judges but extends to any *authority* vested with quasi judicial functions.<sup>11</sup>

(i) The Secretary to the State Transport Department, as the head of the Department, is disqualified from hearing objections of private operators, under the Motor Vehicles Act, to the schemes framed by the Transport Department as the statutory Undertaking created by the Act.<sup>12,13</sup>

(ii) At the same time, it has been held<sup>14</sup> that the Minister in charge of the Transport Department is *not* disqualified to hear the same objections, on the ground that while the Secretary forms a part of the Department, the Minister does not. A Minister is only a member of the Council of Ministers which, as a body, advises the Governor, and a Minister is only responsible for the disposal of business in a particular Department.<sup>15</sup> Similarly, there is no violation of the principles of natural justice if a scheme is prepared by one authority and objection heard by a differently constituted authority even though some of the members may be common.<sup>16</sup>

(iii) The mere fact that the Registrar or Co-operative Societies has a power of general supervision over all Co-operative Societies does not amount to an inherent bias in him so as to disqualify him for the purpose of acting as an arbitrator or judge under r. 18 of the Rules made under the Co-operative Societies Act, 1912, to decide disputes between members of a society.<sup>17</sup>

(b) Pecuniary interest, however small, would wholly disqualify a person from acting as a judge.<sup>18</sup>

(c) Even where there is no pecuniary interest, a Judge may have a *personal* bias towards a party<sup>19</sup> owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before

5. *A. P. S. R. T. C. v. Satyanarayana Transports*, A 1965 S.C. 1303 (1306); *Manak Lal v. Prem Chand*, 1967 S.C. 425 (429).

6. *Harpershad v. Sheo Dyal*, 3 I.A. 259 (286).

7. *State of U. P. v. Nooh*, (1958) S.C.R. 595.

8. *Hari v. Dy. Commr.*, A. 1956 S.C. 559 (576).

9. *Nageswararao v. State of A. P.*, A. 1969 S.C. 1376 (1378).

10. *Nagawara v. A. P. S. R. T. Corpn.*, A. 1969 S.C. 308 (326).

11. *Kashiprasad v. R. T. A.*, A. 1961 All. 214 (218).

12. *Registrar v. Dharam Chand*, A. 1961 S.C. 1743.

13. *Manak Lal v. Prem Chand*, A. 1967 S.C. 425.

or during the trial. The causes which may lead to personal bias cannot be exhausted.<sup>14</sup>

Any conduct which shows that the authority cannot act with an open mind or that he would decide a case otherwise than on evidence would constitute bias.<sup>14</sup>

While in cases (a) and (b) the Judge is absolutely disqualified, where bias is alleged, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. But even in case (c), the test is not whether in fact a bias *has affected* the judgment; the test is whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal *might have operated* against him in the final decision of the Tribunal.<sup>15</sup> The test is a 'real likelihood' of operative prejudice, conscious or unconscious.<sup>16, 16</sup>

(i) The facts constituting personal bias must be specifically alleged and established.<sup>14</sup>

(a) Where any such allegation is made, the Court must carefully scrutinise the affidavits on either side, remembering that when suitors lose their causes before a judicial or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Tribunal.<sup>14</sup>

(b) The Court should also take into consideration the status of the persons making the affidavits and their motives for making false affidavits, if any.<sup>14</sup>

(c) If, however, the allegations made in the affidavit of the Petitioner are not satisfactorily met or the statements in the counter-affidavit are evasive, the Petitioner's case must be taken to have been established.<sup>14</sup>

(ii) Another limitation which comes into operation where bias (as distinguished from pecuniary interest) is alleged is the doctrine of *waiver*. The alleged bias in a member of a Tribunal does not render the proceedings valid if it is shown that the objection against the presence of the member in question was not taken by the aggrieved party, at the earliest opportunity after coming to know of the circumstances giving rise to the alleged bias and of his right to challenge the presence of the member in the Tribunal.<sup>15</sup>

(iii) Another exception to the rule against bias is that some statutes authorise a person interested to be a judge in the cause because no other judge may be available in the circumstances. This is known as the case of 'necessity'.<sup>17, 18</sup>

III. Where a tribunal consists of several members, bias on the part of one of the members is sufficient to vitiate the decision.<sup>19</sup>

IV. The question of *bias* or the violation of any other rule of natural justice does not arise unless a person is exercising judicial or quasi-judicial authority.<sup>20</sup>

V. The decision of a quasi-judicial authority must be based on materials before it and not on the findings or directions<sup>21</sup> of any outside authority, however eminent it may be.

14. *A. P. S. R. T. C. v. Satyanarayana Transports*, A. 1965 S.C. 1303 (1306).

15. *Bhusan v. Onkar*, A. 1966 All. 715 (718).

16. *Iqbal Singh v. Collector*, A. 1966 Punj. 235.

17. *Serjeant v. Dale*, (1877) 2 Q.B.D. 558.

18. *Laxmi Chand v. State of U. P.*, A. 1962 All. 117.

19. *Narayana v. State of A. P.*, A. 1958 A.P. 636 (637).

20. *Lakshminath v. S. P. T. C. M. Society*, A. 1962 Mad. 169.

21. *Rajagopala v. S. T. A. T.*, A. 1964 S.C. 1573 (1579).

This principle is violated even where the quasi-judicial tribunal feels that he cannot refuse to comply with the directions of an administrative superior, except for reasons to be recorded.<sup>22</sup>

On the other hand,—

In the absence of a specific statutory requirement, an administrative tribunal, exercising quasi-judicial functions—

Is not bound to follow the procedure prescribed for trial in the courts or the rules of evidence.<sup>23, 24</sup>

VI. It is a basic principle of judicial procedure that the person who hears must decide the case and not another person.<sup>24</sup>

Hence, if an officer, who is bound under the law to give a personal hearing, is transferred, his successor-in-office cannot decide the matter without giving a fresh hearing.<sup>25, 1</sup>

4. Though there is agreement about the above fundamental principles, there may be variation as to the detailed application of the above rules according to the nature of the functions of different quasi-judicial bodies and the nature of the rights affected by their decisions and the provisions of the statutes constituting them.<sup>24</sup>

### A quasi-judicial authority must give reasons.<sup>2</sup>

1. Not without some wavering,<sup>3</sup> the Supreme Court has come to hold that a quasi-judicial tribunal must give reasons for its order,<sup>4-6</sup> or, else, the supervisory jurisdiction of the superior Courts under Art. 136<sup>7</sup> or 226<sup>8</sup> or 227<sup>4</sup> will be rendered nugatory.

2. This does not mean that such authority should write out a judgment, like that of a Court of law, but that it must give an *outline of the process of reasoning* by which it arrives at its decision.<sup>4</sup>

### What makes a decision judicial or quasi-judicial.

1. In *Prov. of Bombay v. Khusaldas*,<sup>9</sup> the majority concurred on the proposition that a decision is judicial or quasi-judicial only if the law under which the decision is made, itself *requires* a judicial approach; in other words the *duty* to act judicially must be laid down in the law itself.

But the above wide statement<sup>9</sup> has been modified by the Court in its later decisions and the following propositions may be taken as broadly settled:<sup>10-11</sup>

22. *N. P. T. Co. v. N. S. T. Co.*, (1957) S.C.R. 98.
23. *Union of India v. Varma*, (1958) S.C.R. 499.
24. *Nageswara Rao v. A. P. S. R. T. C.*, A. 1959 S.C. 308; *Union of India v. P. K. Roy*, A. 1968 S.C. 850 (858).
25. *Calcutta Tanneries v. Comm. of I. T.*, A. 1960 Cal. 543.
1. *Ram Saran v. I. T. Commr.*, A. 1969 P. & H. 429.
2. Vide Author's Comp. Administrative Law, Vol. I, pp. 221-3.
3. For earlier decisions to the contrary, see *Narayanappa v. State of Mysore*, A. 1960 S.C. 1073.
4. *Bhagat Raja v. Union of India*, (1967) 2 S.C.R. 302; cf. *Jaisinghani v. Union of India*, A.I.R. 1967 S.C. 1427; *Ganga Motor Service v. Chotanagpur R. T. A.*, (1970) 1 S.C.W.R. 316.
5. *M. P. Industries v. Union of India*, A. 1966 S.C. 671 (675-6).
6. See also *Tesheels v. Desai*, A. 1970 Guj. 1 (4) F.B.; *State v. Bhagat Ram*, A. 1970 P. & H. 9 (15) F.B.
7. *Harinagar Sugar Mills v. Shyam Sundar*, (1962) 2 S.C.R. 239; A. 1961 S.C. 1602.
8. *Govindrao v. State of M. P.*, A. 1965 S.C. 1222.
9. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621.
10. *Radhesham v. State of M. P.*, A. 1959 S.C. 107 (116); see also Subba Rao J., for the majority, in *Gulapalli v. A. P. State Road Transport Corpn.*, A. 1959 S.C. 308 (322); adopted by the Court in *Board of High School v. Gnanashyam*, A. 1962 S.C. 1119.
11. *Shri Bhagwan v. Ram Chandra*, A. 1963 S.C. 1707 (1970).

(i) If a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim by one party under the statute which is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act;<sup>12</sup> and

(ii) If a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties<sup>13</sup> apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act, provided the authority is required by the statute to act judicially.<sup>12</sup>

In other words, while the presence of the two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially.<sup>12</sup>

(iii) The duty to proceed may be laid down by a statute either expressly or by necessary implication.<sup>14-16</sup> Thus, it may be inferred from the *scheme* of the statute and its material provisions.<sup>16</sup>

Hence, even where the statute is *silent* as to any duty to act judicially, such obligation may be inferred from the provisions of the statute and the nature of the rights affected,<sup>14</sup> the nature the power,<sup>17</sup> and other relevant factors.<sup>18</sup>

3. Even a Judge may have administrative functions. Nor is an order necessarily administrative simply because it is made in the course of administration of the assets of a company.<sup>14</sup> Broadly speaking, an order is administrative if it is directed to the *regulation* or *supervision* of matters as distinguished from an order which *decides the rights* of parties or confers or refuses to confer *rights to property* which are the subject of adjudication before the Court.<sup>11</sup> Another test is whether the determination, even though discretionary, is to be made on a subjective or an *objective* basis.<sup>14</sup> A subjective determination is contrary to the judicial approach.<sup>19</sup>

#### (A) As to statutory obligation to act quasi-judicially.

1. Whether an administrative authority has to function in a quasi-judicial capacity must be determined in each case, on an examination of the relevant statute<sup>20</sup> as well as the rules<sup>20</sup> framed thereunder.

2. Where the authority is required by the statute to act judicially, the decision will be quasi-judicial even though one of the parties to the contest is the authority himself.<sup>21</sup>

3. The essential elements of a judicial approach are—giving an

12. *Lakhanpal v. Union of India*, A. 1967 S.C. 1507 (1512).

13. *Board of High School v. Ghanshyam*, A. 1962 S.C. 1110.

14. *Shankarlal v. Shankarlal*, A. 1965 S.C. 506 (511).

15. *Anglo-American Direct Tea Trading Co.*, A. 1963 S.C. 874.

16. *Shri Bhagwan v. Ram Chand*, A. 1965 S.C. 1767 (1770).

17. *Jaswant Sugar Mills v. Lakshmi Chand*, A. 1963 S.C. 677.

18. *State of Assam v. Bharat Kala Bhandar*, A. 1967 S.C. 1766 (1773).

19. *Sadhu Singh v. Delhi Administration*, A. 1965 S.C. 91 (97).

20. *Nagendra v. Commr.*, A. 1968 S.C. 398 (408); (1969) S.C.R. 1240.

21. *Nagendra v. A. P. S. R. T. Orgn.*, A. 1969 S.C. 308 (327).

opportunity<sup>22</sup> to the party who is affected by an order to make a representation, making some kind of inquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy, before any decision is made. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided, in coming to the decision the above well-recognised principles of judicial approach are required to be followed.<sup>23</sup>

4. When an executive authority has to form an *opinion* about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of an objective fact and the exercise of the power based thereon are alike matters of an administrative character and *certiorari* does not lie in such a case. Mere obligation to determine certain objective matters as a preliminary step does not make an executive function judicial, unless the law *requires* those facts to be determined *judicially*.<sup>24</sup>

5. A decision is administrative when it is left by the Legislature to the subjective satisfaction of the authority.<sup>25</sup> Though the same words may have a different meaning according to the context in which they are used and the terms of the statute in which they are used, it may be mentioned generally, that the following expressions have been held to indicate that the authority is empowered to determine the question on the subjective satisfaction—

(i) The words "If the Secretary of State has *reasonable cause to believe*", in an emergency Regulation, authorising the Secretary of State to intern persons "for securing public safety and the defence of the realm."<sup>26</sup>

(ii) The words "shall be *of opinion* that proceedings shall not be taken".<sup>7</sup>

(iii) The words "*reasonable grounds to believe*" in an Emergency Regulation, empowering the Textile Controller to cancel a textile licence.<sup>28</sup>

(iv) The words "*as it may judge most for the benefit of the property and the advantage of the minor*" in a Court of Wards Act, authorising the Court of Wards to enter into certain transaction with respect to the property of the ward.<sup>8</sup>

(v) The words "considers....is likely to be secured".<sup>9</sup>

(vi) The words "after such *summary inquiry*, if any, as he thinks necessary."<sup>10</sup>

6. A decision is administrative where in arriving at its decision the statutory body has only to consider policy and expediency and at no step has before it any form of *lis*.<sup>9</sup>

7. Where a proceeding is quasi-judicial, the mere fact that the decision

22. *E. I. Commercial Co. v. Collector of Customs*, A. 1962 S.C. 1894 (1903), *Subba Rao & Mudholkar JJ.*; *Udit Narayan v. Bd. of Revenue*, A. 1963 S.C. 786 (788).

23. *Prov. of Bombay v. Khushaldas*, (1950) S.C.R. 261: (1950-1) C.C. 189 (192, 195, 205, 207): A. 1950 S.C. 222.

24. *State of Madras v. Sarathy*, S.C.R. 334 (346).

25. *Nekkuda Ali v. Jayaratne*, (1951) A.C. 66 (76).

1-6. *Liversidge v. Anderson*, (1942) A.C. 206.

7. *Allcroft v. Bishop of London*, (1891) A.C. 666.

8. *K. D. Co. v. K. N. Singh*, A. 1956 S.C. 446 (462).

9. *Radheshyam v. State of M. P.*, A. 1969 S.C. 107 (129).

10. *Vishnu v. State of Punjab*, A. 1956 S.C. 183 (157) [s. 36 (2), Representation of the People Act, 1951].

of the authority is subject to *confirmation* and approval of another authority does not take away the quasi-judicial character of the decision.<sup>11</sup>

8. On the other hand, when a question is left to the subjective determination of an authority, the mere existence of a right of appeal against the order is not enough to indicate that the authority whose order is subject to appeal is under an obligation to act judicially.<sup>12</sup> On the other hand, where the decision of an authority is quasi-judicial the act of an authority *confirming* that decision must necessarily be judicial.<sup>13</sup>

**(B) As to quasi-judicial obligation arising out of a contest between two parties.**

1. In this class of cases, the quasi-judicial obligation need not be specifically laid down in the statute under which the authority is to decide the question. It will be *implied*<sup>14</sup> from the following circumstances—

(a) That the dispute is between two parties relating to their respective rights;

(b) That the claim of the one party is opposed by the other;<sup>14</sup>

(c) That there is nothing in the statute to indicate that the authority need not proceed judicially.

In *Express Newspapers v. Union of India*,<sup>14</sup> Bhagwati J. thus observed:

"If the functions performed by the Wage Board would thus consist of the determination of the issues as between a proposition and an opposition on data and materials gathered by the Board in answers to the questionnaire issued to all parties interested and the evidence led before it, there is no doubt that there would be imported in the proceedings of the Wage Board a duty to act judicially and the functions performed by the Wage Board would be quasi-judicial in character".

Once the quasi-judicial duty is implied, the Tribunal will have to comply with the rules of natural justice even though the statute itself does not prescribe any procedure.<sup>15</sup>

**(C) As to quasi-judicial obligation inferred from the nature of the function.**

1. Notwithstanding the decision in *Khusaldas's case*<sup>15</sup> [see p. 508, *ante*] the Court has in some cases implied a duty to inquire or to afford an opportunity to be heard, according to the *nature* of the subject-matter,<sup>16</sup> or the nature of the powers involved,<sup>17</sup> or the nature of the rights affected even though the statute was silent about it. The test of quasi-judicial function in all such cases is, that the determination is to be made by the application of *objective standards*<sup>18</sup> to the facts found in the light of existing legal rights, as distinguished from subjective considerations.<sup>19</sup>

(a) An *appellate function* is *per se* quasi-judicial<sup>20</sup> and even where the appeal is from an administrative order, the appellate authority cannot act against the fundamental principles of natural justice,<sup>21</sup> even though he is not required by the statute to follow any particular procedure.

(b) The same principle has been extended to the power of *revision*

11. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459.

12. *Hammanbux v. S. D. O., Sibsagar*, A. 1952 Assam 115 (118).

13. *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278 (288).

14. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (617).

15. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621.

16. *Board of Revenue v. Vidyawati*, A. 1962 S.C. 1217 (1220).

17. *Anglo-American Direct Tea Trading Co. v. Workmen*, A. 1963 S.C. 874.

18. *Jaswant Sugar Mills v. Lakshmi Chand*, A. 1963 S.C. 677.

19. *Sadhu Singh v. Delhi Administration*, A. 1966 S.C. 91; (1964) 1 S.C.R. 243.

20. *Nagendra v. Commr.*, A. 1959 S.C. 398 (406); (1958) S.C.R. 1240.

21. *D. C. Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941.



vested in a superior administrative authority,<sup>20</sup> even where the power is to be exercised by the superior authority after calling for the record *suo motu*,<sup>22</sup> as well as the power of review,<sup>23</sup> affecting legal rights of individuals.

(c) Disciplinary proceedings against students which may seriously affect their career or render them liable to a criminal prosecution.<sup>24</sup>

(d) Proceeding before a Revenue Authority which may lead to imposition of a heavy pecuniary liability or other penalty<sup>25</sup> and the determination of which involves pure questions of law.<sup>16</sup>

(e) Statutory authority exercising its power to terminate the services of its employees.<sup>1, 2</sup>

**(D) As to quasi-judicial obligation being inferred from the nature of the rights affected.**

The nature of the rights affected by the order of an administrative authority is another test from which a quasi-judicial obligation has been inferred in some cases, where a statute does not lay it down expressly,<sup>4, 5</sup> but the order declares civil rights or imposes obligations affecting the civil rights of the parties,<sup>6, 7</sup> e.g.,—where the order—

(a) deprives a person of his property, e.g., an order for eviction of a tenant;<sup>8</sup>

(b) deprives a person of his profession or calling;<sup>2</sup>

(c) cancels a licence relating to a business or profession,<sup>4</sup> which is not inherently dangerous;

(d) affects a man's reputation.<sup>9</sup>

### I. Some Authorities held to be quasi-judicial.

The following have been held to be quasi-judicial tribunals against whose decisions *certiorari* or prohibition would lie—

(i) Administration of Evacuee Property Act, 1950—the Custodian of Evacuee Property acting under ss. 24;<sup>9</sup> 27;<sup>10</sup> 40.<sup>11</sup>

(ii) Allahabad University Act,—the Chancellor acting under s. 42.<sup>12</sup>

(iii) All India Services Act, 1951,—Selection Board for promotion.<sup>13</sup>

(iii-a) Andhra Pradesh Religious Endowments Act, 1966,—Commissioner making inquiry under s. 46.<sup>13a</sup>

(iv) Assam Forest Regulation Act, 1891,—Board of Revenue, hearing appeal.<sup>14</sup>

22. *Shri Bhagwan v. Ram Chand*, A. 1965 S.C. 1767 (1770).

23. *Shivji v. Union of India*, A. 1960 S.C. 606.

24. *Board of High School v. Ghanshyam*, A. 1962 S.C. 1110 (1115); *Board of High School v. Bagleswar*, (1963) 3 S.C.R. 767.

25. *Ambalal v. Union of India*, A. 1961 S.C. 264.

1. *Calcutta Dock Labour Bd v. Imam*, (1965) 11 S.C.A. 226 (230).

2. *State of Orissa v. Binapani*, A. 1967 S.C. 1269 (1271).

3. *Ram Kanta v. Dt. School Board*, A. 1969 Cal. 397 (405).

4. *Radheshyam v. State of M. P.*, A. 1959 S.C. 107.

5. *Shri Bhagwan v. Ram Chand*, A. 1965 S.C. 1767 (1770).

6. *Jaswant Sugar Mills v. Lakshmi Chand*, A. 1963 S.C. 677.

7. *State of Orissa v. Binapani*, A. 1967 S.C. 1269.

8. *Cf. Pitt v. Grehound Racing Assocn.*, (1968) 2 All E.R. 545.

9. *Cf. Sharfuddin v. Singh*, A. 1961 S.C. 1312.

10. *Mahabir Motor Co. v. State of Bihar*, A. 1956 Pat. 437.

11. *Harigir v. Asst. Custodian*, A. 1961 S.C. 1257.

12. *Lakshmi Prasad v. Registrar*, A. 1955 All. 181.

13. *Krishnak v. Union of India*, (1969) 2 S.C.C. 202 (269).

13a. *Dityadaram v. State of A. P.*, A. 1970 S.C. 181 (186).

14. *Binnabhan v. Gopen*, A. 1967 S.C. 895 (898).

(v) Assam Municipal Act, 1923,—an Appellate authority under a Municipal law,<sup>16</sup> the Town Committee hearing petition of review under s. 89<sup>16</sup>

(vi) Bihar Mica Act, 1948,—the State Government cancelling licence under s. 25 (1)-(c).<sup>17</sup>

(vii) Bombay Municipal Corporation Act, 1888,—the Commissioner's power to evict persons from Corporation premises, under ss. 105B—105E.<sup>18</sup>

(viii) Calcutta Dock Worker (Regulation of Employment) Scheme, 1951,—the Board terminating the employment of a worker under cl. 36.<sup>19</sup>

(ix) Central Excise & Salt Act, 1944,—Central Government exercising power of revision.<sup>1</sup>

(x) C. P. & Berar Municipalities Act, 1922,—the State Government taking action under s. 53A.<sup>21</sup>

(xi) C. P. & Berar Revocation of Land Revenue Exemption Act, 1948,—order of the State Government under s. 5(3).<sup>22</sup>

(xii) Cinematograph Act, 1918,—the Board of Censors.<sup>24</sup>

(xiii) Companies Act, 1956,—Central Government exercising appellate power under s. 111,<sup>21</sup> or power under s. 326(2).<sup>25</sup>

(xiv) Court of Wards Act,—Government disqualifying a proprietor.<sup>1</sup>

(xv) Defence of India Rules, 1962,—Government reviewing order of detention under r. 30A(9).<sup>2</sup>

(xvi) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948,—authority making order under s. 36,<sup>22</sup> the State Government exercising revisional power under s. 42.<sup>3</sup>

(xvii) An Election Tribunal (see Art. 329, *post*).

(xviii) Industrial Disputes Act, 1947—An Industrial Tribunal,<sup>4</sup> arbitrator, under s. 10A.<sup>1a</sup>

(xix) Income Tax Act, 1922,—Income Tax Officer making assessment under s. 34;<sup>5</sup> Commissioner exercising revisional power under s. 33A.<sup>6</sup>

(xx) Iron & Steel Control Order, 1956,—Controller making inquiry under, for cancelling an allocation.<sup>7</sup>

(xxi) Madras Hindu Religious & Charitable Endowments Act, 1951,—Governor extending a notification under s. 64(4).<sup>8</sup>

15. *Chunilal v. Pulashmari Town Committee*, A. 1953 Assam. 132.

16. *Cf. Ram Narain v. State of U. P.*, A 1957 S.C. 18.

17. *Mineral Development Ltd. v. State of Bihar*, A. 1960 S.C. 463

18. *Bombay Municipal Corpn. v. Dhondu*, A. 1955 S.C. 1486 (1488).

19. *Calcutta Dock Labour Bd. v. Imam*, (1965) 11 S.C.A. 226 (230).

20. *Aluminium Corpn. v. Union of India*, (1965) S.C. [C.A. 635/64, 22-9-65].

21. *Radhesyam v. State of M. P.*, A. 1959 S.C. 107.

22. *Govindrao v. State of M. P.*, A. 1965 S.C. 1222 (1226).

23. *Radha Films v. W. B., Board of Censors*, A. 1952 Cal. 653.

24. *Harinagar Sugar Mills v. Shyam Sunder*, A. 1961 S.C. 1669 (1678).

25. *Rampur Distillery Co. v. Company Law Board*, (1969) 2 S.C.C. 774 (779).

1. *Atadhes v. U. P. State*, A. 1952 All. 63 (69).

2. *Lakhanpal v. Union of India*, A. 1967 S.C. 1506 (1511).

3. *Fauja Singh v. Director*, A. 1958 Punj. 305 (307).

4. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188; *Express Newspapers v. Workers*, A. 1963 S.C. 569 (537).

4a. *Rhotak Transport v. Rihal Singh*, A. 1963 Punj. 472.

5. *Suroj Mal v. Viswanatha*, A. 1954 S.C. 545.

6. *Dwarika v. I. T. O.*, A. 1965 S.C. 81, overruling *Sugarchand v. Commr. of I. T.*, (1964) 53 I.T.R. 171.

7. *Bharat Barrel Co. v. L. K. Bose*, A. 1967 S.C. 361 (367).

8. *Subramania v. State of Madras*, A. 1965 S.C. 1587 (1582).

(xxii) Mineral Concession Rules, 1949,—The Central Government acting in revision under r. 54<sup>a</sup> (now r. 59).<sup>10</sup>

(xxiii) Motor Vehicles Act, 1939,—Regional Transport Authority, issuing permits, under ss. 42, 47,<sup>11</sup> 62;<sup>12</sup> State Government disposing of application for revision under s. 64A,<sup>13</sup> or approving a scheme under 68D (2),<sup>14, 15</sup> Appellate Authority, deciding appeal<sup>16</sup>

(xxiv) Municipal authority granting or refusing a licence for running a business.<sup>14</sup>

(xxv) Payment of Wages Act,—The authority acting under s. 15.<sup>17</sup>

(xxvi) Police Act, 1861,—Departmental proceeding against an officer under s. 17.<sup>18</sup>

(xxvii) Punjab Gram Panchayat Act,—A Panchayati Adalat,<sup>19</sup> A Gram Panchayat proceeding under ss. 21, 23.<sup>20</sup>

(xxviii) Punjab Tenancy Act (XVI of 1887).—Revenue Officer acting under s. 17.<sup>21</sup>

(xxix) Rajasthan Land Reforms & Resumption of Jagirs Act, 1952,—the Board acting under.<sup>22</sup>

(xxx) Rent Control Acts.—The Appellate Authority,<sup>22a</sup> and the Rent Control Authority (in respect of certain decision).<sup>23</sup>

(xxxi) Representation of the People Act, 1951,—s. 36 (2).<sup>24</sup>

(xxxii) Sea Customs Act (VIII of 1878).—A Customs Authority ordering confiscation or adjudicating the penalty under ss. 167 (8),<sup>25, 2</sup> 182-4.<sup>1</sup>

(xxxiii) Stamp Act, 1899,—The Board of Revenue determining a reference under s. 56 (2).<sup>3</sup>

(xxxiv) Sugar Cane Control Order, 1966,—The Cane Commissioner, cancelling a previous order of reservation.<sup>2a</sup>

(xxxv) U. P. Intermediate Education Act, 1921,—Examination Committee awarding penalty, under R. 1 of Ch. VI of the Rules made under the Act for using unfair means or committing fraud at an examination.<sup>4</sup>

9. *Shivji v. Union of India*, A. 1960 SC 606; (1960) 2 S.C.R. 775.
10. *Vrajlal v. Union of India*, (1964) 7 S.C.R. 97 (101).
11. *P. T. Co-operative Society v. R. T. A.*, A. 1960 SC 801; (1960) 3 S.C.R. 177.
12. *Capital Bus Service v. S. T. A.*, A. 1962 Punj. 17 (22).
13. *Raman & Raman v. State of Madras*, A. 1959 S.C. 694 (698-9).
14. *Malik Ram v. State of Rajasthan*, A. 1961 S.C. 1575; *Nagenwara v. A. P. S. R. T. C.*, (1959) Supp. (1) S.C.R. 319.
15. *Veerappa v. Raman*, A. 1952 S.C. 192; (1952) S.C.R. 583.
16. *Balaram v. Madras Corpn.*, A. 1952 Mad. 778.
17. *A. V. D'Costa v. Patel*, A. 1955 S.C. 412.
18. *State of U. P. v. Nooh*, A. 1958 S.C. 86 (96).
19. *Shoukat v. The State*, A. 1954 Pat. 194; *Gopi v. Mt. Birni*, A. 1954 Pat. 195.
20. *Narain v. State*, A. 1958 Punj 373 (F.B.).
21. *Teja Singh v. Tehsildar*, A. 1952 Pepsu 102.
22. *State of Rajasthan v. Ramu Pratap*, (1967) S.C. [CA 141/66, d 22-9-67].
- 22a. *Indra v. Ganguly*, (1950) 87 C.L.J. 130; *Krishnaswamy v. Mohandas*, (1949) I.L.R. Mad. 657.
23. *Roshan Lal v. Iswar Das*, A. 1962 S.C. 646 (655); *Leo Roy v. Superintendent*, A. 1958 S.C. 119 (121).
24. *Virindar v. State of Punjab*, A. 1956 S.C. 153 (157).
25. *Sureshchandra v. Collector of Customs*, A. 1958 S.C. 845 (850).
1. *Ambalal v. Union of India*, A. 1961 S.C. 264.
2. *East India Commercial Co. v. Collector of Customs*, A. 1962 S.C. 1828 (1903).
3. *Board of Revenue v. Vidyanasi*, A. 1962 S.C. 1217 (1220-1).
- 3a. *Munabhai Co. v. Cane Commr.*, (1969) 1 S.C.C. 308 (317).
4. *Board of Intermediate Exam. v. Ghanashyam*, A. 1962 S.C. 1110.

(xxvi) U. P. Zamindari Abolition and Land Reforms Rules, 1952,—The Collector acting under r. 115.<sup>6</sup>

(xxvii) U. P. (Temporary) Control of Rent and Eviction Act, 1947,—The authorities exercising their powers under ss. 3 (2), 3(3) and 7 F.<sup>7</sup>

(xxviii) Watan Act,—The State Government excising its revisional jurisdiction under s. 19.<sup>7</sup>

(xxix) Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955,—The Wage Board performing its functions under.<sup>8</sup>

## II. Some Authorities held not to be quasi-judicial.

On the other hand, it has been held that prohibition of *certiorari* does not lie against the decisions of the following authorities, on the ground that they are not quasi-judicial:

(i) Administration of Evacuee Property Act, 1950,—act of taking possession under.<sup>9</sup>

(ii) Bombay Land Requisition Act, 1949,—order of requisition under s. 5.<sup>10</sup>

(iii) C. P. Code,—Advocate General giving consent under s. 92,<sup>11</sup> inquiry under s. 176.<sup>12</sup>

(iv) Companies Act, 1956,—order of the Company Law Board under s. 237(b);<sup>13</sup> 326(2)(b)<sup>14</sup> in so far as the existence of the condition of satisfaction is concerned.

(v) Defence of India Rules,—Administrator reviewing order of detention under r. 30 A (8).<sup>15, 16</sup>

(vi) Employees' State Insurance Act, 1948,—demand of contribution under s. 73D.<sup>17, 18</sup>

(vii) Income tax Act, 1922,—Orders under s. 33A (1),<sup>19</sup> 33A (2);<sup>12, 13</sup> 34 (1A);<sup>14</sup> 46 (5A).<sup>16</sup>

(viii) Industrial Disputes Act, 1947,—Order of reference under s. 10 (1);<sup>10</sup> Conciliation proceedings under s. 12 (1).<sup>17, 18</sup>

(ix) Insurance Act,—action taken by Controller against insurer under s. 152A.<sup>19</sup>

5. *Babulal v. Hashmat*, A. 1968 All. 97.

6. *Shri Bhagwan v. Ram Chand*, A. 1965 S.C. 1767 (1772).

7. *Laxman v. State of Bombay*, A. 1964 S.C. 436; (1964) 1 S.C.R. 200.

8. *Express Newspapers v. Union of India*, A. 1968 S.C. 578.

9. *Masumah v. Custodian of Evacuee Property*, (1951) 6 D.L.R. 45 (Sau.).

10. *Prov. of Bombay v. Khumsaldas*, (1950) S.C.R. 621; *Lilavati v. State of Bombay*, A. 1967 S.C. 521.

11. *Shantanand v. Adv.-General*, A. 1955 All. 372 (376); *Raju v. Advocate General*, A. 1962 Mad. 40.

12. *Rajangam v. State of Madras*, A. 1969 Mad. 294.

13. *Barium Chemicals v. Company Law Board*, (1966) Supp. (1) S.C.R. 311.

14. *Rampur Distillery Co. v. Company Law Board*, (1969) 2 S.C.C. 774 (779).

15-25. *Sadhu Singh v. Delhi Admn.*, A. 1965 S.C. 91.

1-11. *Anand v. E. S. Corpn.*, A. 1967 All. 136.

12. *Edara v. Commr. of I. T.*, A. 1959 A.P. 508.

13. *Sugarchand v. Commr. of I. T.*, (1962) I.T.R. 870.

14. *Bhowani Prasad v. I. T. O.*, A. 1960 All. 377.

15. *Calcutta Discount Co. v. I. T. O.*, A. 1962 Cal. 606.

16. *State of Mysore v. Sarathy*, (1963) S.C.R. 834.

17. *Royal Calcutta Golf Club Union v. State of W. B.*, A. 1966 Cal. 550.

18. *Employees of Collex v. Commr. of Labour*, (1969) 2 M.L.J. 272.

19. *Jupiter General Ins. v. Rajasekaran*, A. 1952 Pun. 9.

(x) Land Acquisition Act, 1894,—Collector hearing objections under s. 5A;<sup>20</sup> Government making a declaration under s. 6.<sup>21</sup>

(xi) *Minimum Wages Act*,—fixation of minimum wages.<sup>22</sup>

(xii) Motor Vehicles Act, 1939,—Order or direction of the State Government under s. 43A,<sup>23,24</sup> functions under ss. 68C-68I,<sup>25</sup> Regional Transport Authority dealing with an application of the State Transport Undertaking under s. 68(F) (1)<sup>26</sup> (2)<sup>27</sup>

(xiii) Orissa Sales Tax Act,—Order of assessment.<sup>28</sup>

(xiv) Pensions Act, 1871,—grant of pension, under s. 5.<sup>29</sup>

(xv) Sea Customs Act, 1878,—Order of assessment under s. 87.<sup>30</sup>

(xvi) Stamp Act, 1899,—Collector imposing stamp duty and penalty under s. 33.<sup>31</sup>

### Whether certiorari is available against administrative proceedings.

1. The Supreme Court of India is becoming more and more conscious of arbitrary action taken by administrative authorities in spheres where the relevant statute does not lay down any quasi-judicial obligation and the law has of late been so much widened that it has gone much ahead of the law on this point in England.

In the earlier cases, the Court adhered to the English view that *certiorari* lies only against judicial and quasi-judicial proceedings and that it will not issue against an administrative order in respect of which the Court could not come to a finding that it was saddled with a quasi-judicial obligation.<sup>32</sup>

2. But the Court has later come to realise that it is not always possible to determine whether a decision is administrative or quasi-judicial, by applying the traditional tests laid down in this behalf in case-law.<sup>33</sup> The recent cases have, therefore, attempted to widen the scope of *certiorari*, by proceeding in two directions:

I. The Court has, firstly, applied the functional test to imply a quasi-judicial obligation in cases where the relevant statute is silent, by bringing more and more classes of cases under the quasi-judicial obligation, having regard to the nature of the power, the nature of the rights affected, and the like,—a trend which has already been noticed (pp. 511-2, *ante*).

II. The other direction in which the Supreme Court has developed the law is more vital and intriguing; the attempt now is to disregard the old distinction between administrative and quasi-judicial decisions,<sup>34</sup> for the purpose of requiring that an administrative authority, in respect of whom the Court cannot predicate a quasi-judicial obligation even by implication, must comply with the minimal requirements of justice and fair play.

20. *Jayantilal v. Rana*, A. 1964 S.C. 648 (569).

21. *Gandalal v. State of Gujrat*, A. 1963 Guj. 50 (67); *T. D. Corpn. v. State of Assam*, A. 1961 Assam 133 (141).

22. *Rambhau v. Tatke*, A. 1959 Bom. 538.

23-24. *Raman & Raman v. State of Madras*, A. 1959 S.C. 695 (700).

25. *Krishnayya v. State of A. P.*, A. 1959 A.P. 292 (302).

1. *Abdul Gafoor v. State of Mysore*, A. 1961 S.C. 1556.

2. *Samarth Transport Co. v. R. T. A.*, A. 1961 S.C. 93 (97).

3. *Cl. State of Orissa v. Chakrabhai*, A. 1961 S.C. 284 (287).

4. *Suryanarayana v. State of Madras*, A. 1959 A. P. 487.

5. *Glaxo Laboratories v. Venkateswaran*, A. 1959 Bom. 372.

6. *Cl. Govt. of U. P. v. Amir Ahmad*, A. 1961 S.C. 787.

7. *Prov. of Bombay v. Khuraldas*, (1950) S.C.R. 621 (631; 698); *Basappa v. Nagappa*, (1955) 1 S.C.R. 251 (257); *State of Bihar v. Ganguly*, A.I.R. 1958 S.C. 3018 (3028); *Radheshyam v. State of M. P.*, A.I.R. 1959 S.C. 107 (119).

7a. *Krisipah v. Union of India*, A. 1970 S.C. 150 (154).

(a) First, came the observation of Das J., in *Radheshyam's case*<sup>8</sup> that though *certiorari* was not available against a purely administrative order, every administrative authority must observe the rules of 'fair play',<sup>9</sup> but this observation was not amplified.

(b) Then came a group of cases where the Court issued either Prohibition or *Certiorari* or orders in the nature thereof against administrative action, on the ground that it was *ultra vires* or without jurisdiction, on the assumption that it could do so even if the action could not be held to be quasi-judicial<sup>10-12</sup> or without going into the question whether the decision was administrative or quasi-judicial.

(c) Then came a group of cases where it was held that even an administrative order must be made in conformity with the rules of natural justice, if it involves civil consequences.<sup>13</sup>

(d) The trend has been accentuated by the widening of judicial review even in cases where the statute authorises the administrative authority to take action upon his subjective satisfaction, by using the words 'is satisfied' or the like.<sup>14</sup> In this arena, the Court first interfered through the following process:

The condition as to which the statutory authority is required to be 'satisfied' is held to be a 'jurisdictional fact'<sup>11</sup> and accordingly subject to the objective scrutiny by the Court as to whether there was such satisfaction in fact and the Court would strike down the order where, on the materials on the record, the alleged satisfaction could be said to be arbitrary, perverse or without any evidence,<sup>11-12</sup> or without considering the relevant materials, or the relevant considerations specified in the statute,<sup>16</sup> even though the Court cannot question 'the sufficiency of the grounds upon which the satisfaction is reached'.<sup>15</sup>

(e) The final stage comes with the view taken in the *Rampur Distillery case*.<sup>15</sup> In this case it has been held that the use of words, such as 'is satisfied', denoting subjective satisfaction, is not conclusive in determining whether the function is quasi-judicial, as was so long supposed,<sup>17</sup> but that if the administrative decision is to affect valuable civil rights, including the liberty of contract, of a person, the statutory authority must proceed judicially, notwithstanding the subjective nature of the statutory power, and that in such cases, the inquiry must be "consistent with the rules of natural justice, . . . without bias, without predilection and without prejudice".

The result of this decision, thus, is that a full-fledged quasi-judicial obligation can be inferred, by the application of the 'functional test' even where the language used by the statute indicates a decision upon subjective satisfaction.

### Availability of *certiorari* against particular proceedings.

#### I. Advocate-General, acting under s. 92, C. P. Code.

Upon the question whether the function of the Advocate-General in

8. *Radheshyam v. State of M. P.*, A.I.R. 1959 S.C. 107 (119).

8a. *Cf. Re. an Infant*, (1967) 1 All E.R. 226 (231).

9. *Calcutta Discount Co. v. I T. O.*, A.I.R. 1961 S.C. 372 (380).

10. *Irani v. State of Madras*, A.I.R. 1961 S.C. 1731 (1738).

11. *Kondala v. A. P. S. R. T. C.*, A.I.R. S.C. 82 (93).

12. *Aurora v. State of U. P.*, A. 1962 S.C. 764 (775); *B. B. L. & T. Merchants' Assocn. v. State of Bombay*, A. 1962 S.C. 485 (496).

13. *State of Orissa v. Binapani*, A. 1967 S.C. 1269; *Kraipak v. Union of India*, A. 1970 S.C. 150 (156); *D. F. O. v. Ram Samshi*, (1970) 1 S.C.W.R. 194 (198).

14. *Shauqin Singh v. Desa Singh*, (1969) S.C. [C.A. 155/67, d. 4-12-69].

15. *Rampur Distillery Co. v. Company Law Board*, (1969) 2 S.C.C. 774 (779).

16. *Barium Chemicals v. Company Law Board*, (1966) Supp. (1) S.C.R. 311 (362).

17. *Nekkunda AH v. Jayaratne*, (1951) A.C. 66.

sanction to institute a suit is quasi-judicial or not, there has been a divergence of opinion.

(A) The Trav. Cochin<sup>18</sup> and Pepsu<sup>19</sup> High Courts have taken the view that the function is quasi-judicial and *certiorari* will lie against the advocate-general's order.

(B) Contrary view has been taken by the Allahabad,<sup>20</sup> Madras,<sup>21</sup> Rajasthan<sup>22</sup> and Kerala High Courts.

The latter view seems to be correct because, in giving his sanction to sue, the Advocate-General is not determining any rights of the parties (see ante); that determination will be made by the Court if the sanction is given. It cannot be said that he is determining the rights of the parties to sue because in the matter of a public trust, no individual has any personal right and that is why the sanction of the Advocate-General is necessary for a suit on behalf of the public. *Certiorari* is not, therefore, available, even if he does hear the parties, in fact.

## II. Administrative Tribunals, in general.

I. (i) *Certiorari* will be issued where an administrative tribunal, exercising quasi-judicial function, offends against the principles of natural justice,<sup>23</sup> the requirements of which, of course, will have to be determined with reference to the provisions of the statute governing its constitution.<sup>25</sup>

(ii) Where the tribunal has no jurisdiction to entertain the proceeding, e.g.—

(a) Where an Industrial Tribunal entertained an application under s. 33A of the Industrial Disputes Act, 1947, in a case not coming under that section.<sup>1</sup>

(b) Where the reference to the Tribunal itself was bad because the employees were not 'workmen' or the dispute referred to was not an 'industrial dispute'.<sup>2</sup>

(iii) Where it has committed an error of law apparent on the face of the record.<sup>3</sup>

II. But the High Court will not, in a proceeding for *certiorari*, sit as a court of appeal to substitute its own view.<sup>4</sup>

Hence, the Court will not interfere—

(a) Where there has been a mere breach of the technical rules of evidence and pleadings, not amounting to a violation of the rules of natural justice.<sup>5</sup>

(b) On a question of fact which the tribunal has jurisdiction to determine,<sup>6</sup> unless it is shown to be fully unsupported by evidence.<sup>7</sup>

18. *Abu Backer v. Advocate-General*, A. 1954 T.C. 331.

19. *Sadhu Singh v. Mangalgar*, A. 1956 Pepsu 65.

20. *Shantanand v. Advocate-General*, A. 1955 All. 372.

21. *Raju v. Advocate-General*, A. 1952 Mad 320.

22. *Srimali v. Advocate-General*, A. 1955 Raj. 166.

23. *Bhaskar v. Advocate-General*, A. 1952 Ker. 90.

24. *Dhakeswari Cotton Mills v. Commr. of I. T.*, A. 1955 S.C. 65 (69-70).

25. *N. P. T. Co. v. N. S. T. Co.*, (1957) S.C.R. 98 (118).

1. *S. K. G. Sugar v. Chairman Industrial Tribunal*, A. 1959 S.C. 230.

2. *Newspapers Ltd. v. State Industrial Tribunal*, (1957) S.C.R. 754 (759).

3. *Nagendra v. Commr.*, (1958) S.C.R. 1240 (1269); *N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232; cf. *Govind Rao v. State of M. P.*, A. 1955 S.C. 1222 (1226).

4. *Basappa v. Nagappa*, A. 1954 S.C. 440.

5. *D. C. Mills v. Commr. of I. T.*, A. 1955 S.C. 65.

6. *Associated Cement Co. v. Vyas*, A. 1950 S.C. 665 (668).

7. *Dharwadkara Chemical Works v. State of Saurashtra*, A. 1957 S.C. 264; (1957) S.C.R. 152; *Union of India v. Goel*, A. 1964 S.C. 364.

(c) On the ground of mere error in the appreciation of evidence, error in drawing inferences, or omission to draw inferences.<sup>8</sup>

(d) In the exercise of its jurisdiction under Art. 226, the Court will not interfere with the exercise of a *discretionary* power by the inferior tribunal, unless it is arbitrarily exercised, e.g.—

The granting of adjournment of a proceeding.<sup>9</sup>

### III. Appellate function.

1. The appellate function, whether it is to be exercised by a judicial or administrative authority,<sup>9</sup> must be exercised quasi-judicially, even where the statute conferring such power is silent in this respect, and the function of the original authority is purely administrative.<sup>11</sup>

This means that the administrative authority must (i) hear in an objective manner, (ii) impartially, (iii) after giving reasonable opportunity to the parties to the dispute to place their respective cases before it, and (iv) pass 'speaking orders', that is, orders giving the reasons for the decision.<sup>9-11</sup>

2. An appeal cannot be disposed of without notice to and hearing the parties.<sup>11</sup>

3. The principle has been extended to the function of statutory review, there being nothing in the statute to indicate that there is no duty to act quasi-judicially.<sup>12</sup>

### IV. Arbitration (under statutory authority).

Though the rules of natural justice, with or without variation, are applicable to arbitration as we shall see presently, neither *certiorari* nor prohibition can lie against arbitrators unless they have 'legal authority to determine the rights of subjects'. It follows, therefore, that—

(a) Where the authority of the arbitrators is *non-statutory* and depends upon the private agreement of the parties, *certiorari* or prohibition is not available even though the principles of natural justice are violated,<sup>13</sup> and the remedy in such cases is an action for declaration and injunction. This principle is applied even when a Judge of an inferior court acts merely as an arbitrator by *consent* of the parties.

(b) But where the authority of the arbitrators is statutory and the parties are *bound* to resort to the statutory body, *certiorari* or prohibition will lie to keep them within their statutory jurisdiction<sup>13</sup> or to prevent them from violating the rules of natural justice, or from committing an error of law apparent on the face of the record. Provision for such arbitration may, e.g., be found in a law of compulsory acquisition which provides for the assessment of the amount of compensation by statutory arbitrator [cf. s. 8 (1) of the Requisition & Acquisition of Immovable Property Act, 1952]

### V. Co-operative Society.

A reference by the Registrar of co-operative societies for settlement of a dispute touching the business of a society, under the provisions of the Co-operative Societies Act, may be challenged on the ground that such reference is without jurisdiction because the dispute is not such as is covered by the relevant statutory provision.<sup>14</sup>

8. *Gayadin Ram v. Khan*, (1951) 55 C.W.N. 667.

9. *Nagendra v. Commr.*, (1958) S.C.R. 1240 (1253).

10. *Hari Narayan Sugar Mills v. Shyamsundar*, A.I.R. 1961 S.C. 1969 (1678); *Govindarao v. State of M. P.*, A.I.R. 1965 S.C. 1222.

11. *State of Assam v. Harisingh*, (1969) 1 U.J.S.C. 463 (466).

12. *Shivji v. Union of India*, A. 1980 S.C. 606 (609).

13. *Rajdhari v. Dy. Registrar*, A. 1963 All. 113.

14. *Deccan Merchants Co-operative Bank v. Dulchand*, (1968) SC [C.A. 358/67, d. 29-8-68].



## VI. Customs Authorities.

1. It is settled that a proceeding by a Customs authority to impose a penalty, e.g., under s. 167(8) of the Sea Customs Act, 1878, is a quasi-judicial proceeding,<sup>14</sup> so that *certiorari* or prohibition<sup>15</sup> would lie against such order on proper grounds, such as the violation of the principles of natural justice,<sup>16-17</sup> or lack of jurisdiction.

2. There is a violation of the principles of natural justice where, in a case to which s. 178A of the Sea Customs Act<sup>18</sup> is not attracted,<sup>19</sup> the burden of showing that the goods were not unlawfully imported is thrown on the person whose goods are sought to be confiscated.<sup>16-19</sup>

3. But the Court should not entertain an application under Art. 226, unless a statutory remedy by way of appeal or revision has been exhausted, particularly where disputed facts have to be investigated.<sup>20</sup>

## VII. Criminal proceedings.

Though there have not been many cases where a criminal conviction has been sought to be quashed by *certiorari* instead of by appeal or revision, it is clear that *certiorari* will lie on the ground of absence or excess of jurisdiction<sup>21</sup> or error of law apparent on the face of the record, or unconstitutionality of the proceedings,<sup>22</sup> being in violation of some fundamental right of the Petitioner.<sup>23</sup>

The absence of jurisdiction may be due to the fact—

(a) That the statutory provision under which the conviction has been made offends against some provision of the Constitution,<sup>21, 24</sup> or

(b) That the Regulation for the breach of which the prosecution was made was *ultra vires*.<sup>21</sup>

## VIII. Disciplinary proceedings by statutory employers.

1. The foregoing principles relating to the termination of the employment of Government servants have been basically extended to the termination of the employment of the employees of statutory authorities, on the ground that the power conferred by the relevant statute to terminate the services of the employees must be exercised quasi-judicially.<sup>25</sup>

2. In the result, even where the employee had been detained by an order under the Preventive Detention Act, for prejudicial activities, his services cannot be terminated on that ground, without holding an inquiry, with notice of the specific charge and upon leading proper evidence, which cannot be dispensed with on the ground that the allegations had been examined by the Advisory Board set up under the Preventive Detention Act.<sup>26</sup>

3. It is to be noted, however, that in the absence of any breach of a statutory obligation,<sup>1, 2</sup> a suit for declaration of invalidity of an order of

15. *East India Commercial Co. v. Collector of Customs*, A. 1962 S.C. 1893 (1903); *Union of India v. Durga Prasad*, (1969) 1 S.C.C. 91 (110).

16. *Amba Lal v. Union of India*, A. 1961 S.C. 264.

17. *Cf. Girdharilal v. Union of India*, A. 1964 S.C. 1519 (1522).

18. *Collector of Customs v. Sampathu*, A. 1962 S.C. 316; *Pukhraj v. Kohli*, A. 1932 S.C. 1569 (1562).

19. *Mangala Prasad v. Manerikar*, A. 1966 Cal. 507 (514-516).

20. *B. I. S. N. Co. v. Jasjit*, A. 1964 S.C. 1451 (1453).

21. *Banwarilal v. State of Bihar*, A. 1961 S.C. 849.

22. *State of W. B. v. Anwar Ali*, (1962) S.C.R. 234.

23. *Venkataraman v. Union of India*, (1964) S.C.R. 1150 [a case under Art. 32].

24. *Ramji v. State of U. P.*, A. 1967 S.C. 620.

25. *Calcutta Dock Labour Bd. v. Imam*, (1965) II S.C.A. 226 (230-2); *Jagdish v. Chancellor*, A. 1968 S.C. 368.

\*1. *L. I. C. v. Sanjit Kumar*, (1964) 5 S.C.R. 528.

2. *Warehousing Corpn. v. Chandra*, (1969) S.C. [C.A. 552/67, d. 8-9-69].

dismissal by a statutory authority, such as a corporation, will not lie but an action for damages for wrongful dismissal may lie.

### IX. Disciplinary proceedings against Government servants.

Not only dismissal but also removal from service as well as reduction in rank can be ordered only after the public servant in question has been given 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him', as specifically required by Art. 311 (2), subject to certain specified exceptions.

Relying upon the words 'reasonable opportunity,' our Supreme Court has laid down the following broad propositions—

I. The proceedings in which the punishments aforesaid are sought to be imposed are quasi-judicial in nature,—both at the earlier stage of inquiry into the charges brought against the delinquent officer and at the later stage of awarding punishment upon the finding on the charges,<sup>3-12</sup> so that *certiorari* would be attracted if there is violation of the quasi-judicial obligation at those stages.<sup>13-14</sup>

II. The principles of natural justice must, accordingly, be followed at both the stages of inquiry and awarding punishment.<sup>15-16</sup>

III. An inquiry, in compliance with the requirements of natural justice, cannot be dispensed with on the ground that the emp'oyee had been detained by an order under the Preventive Detention Act and that the allegation made against him were examined by an Advisory Board for the purposes of that Act.<sup>16</sup>

IV. It follows that prohibition or *certiorari*<sup>17</sup> would lie (at the appropriate stage) if any of the principles of natural justice is violated, e.g.,—

#### A. At the inquiry stage:

(i) Where the inquiry is not directed against the alleged misconduct of the Government servant in question but is a general investigation to find out who is responsible for an accident or the like, without any charge against any particular person, and the penalty is proposed on the basis of such investigation,<sup>18-20</sup> or sufficient particulars of the misconduct with which he is charged are not given.<sup>1-9</sup>

(ii) Where the inquiry is held *ex parte* or the witnesses for the prosecution are examined in his absence<sup>10</sup> or he is denied the opportunity of cross-examining them<sup>10</sup> or any other materials are relied upon without giving the delinquent officer an opportunity of explaining them.<sup>10</sup>

But there is no violation of natural justice—

If a previous statement made by a prosecution witness is read over, a copy delivered to the person charged and the witness is tendered for cross-examination with reference to such statement.<sup>11</sup>

3-12. *Bachittar Singh v. State of Punjab*, A. 1963 S.C. 395.

13. *State of M. P. v. Chinlaman*, A. 1961 S.C. 1623 (1629).

14. *Khem Chand v. Union of India*, A. 1958 S.C.R. 1080 (1094); *Union of India v. Geel*, A. 1964 S.C. 364.

15. *Union of India v. Verma*, A. 1957 S.C. 882 (885).

16. *Calcutta Dock Labour Bd. v. Imam*, (1966) 11 S.C.A. 226 (231-2).

17. As to the scope of inquiry in a proceeding for *certiorari* against disciplinary action re. Government servants, see, further, under Art. 311 (2), *post*.

18-20. *Amalendu v. D. T. S.*, A. 1960 S.C. 992.

1-9. *Sisir Kumar v. State of W. B.*, A. 1955 Cal. 183 (187); *Ananthanarayanan v. General Manager*, A. 1956 Mad. 220; *Niranjan v. State*, A. 1960 All. 323 (331); *State of U. P. v. Salig Ram*, A. 1960 All. 543.

10. *Union of India v. Verma*, (1959) S.C.R. 499 (507); *State of Punjab v. Chuni Lal*, (1970) S.C. [C.A. 2348/66, dt. 16-2-70]; (1970) 1 S.C.W.R. 413.

11. *State of Mysore v. Shivabappa*, A. 1963 S.C. 375; *State of U. P. v. Om Prakash*, (1970) 1 S.C.W.R. 139 (149).

(iii) Where a copy of the application on the strength of which the inquiry started,<sup>12</sup> the statements of the prosecution witnesses,<sup>13</sup> including their previous statements<sup>14</sup>— are relied upon by the prosecution, or any other papers which are relevant to support the defence,<sup>15</sup> are withheld, unless of course, they are 'secret' in the proper sense<sup>16</sup> or there is any other lawful justification for withholding them.

(iv) Where the delinquent officer is denied the opportunity of examining witnesses on his behalf or of adducing other evidence on which he relies.<sup>17</sup>

(v) Where the inquiring officer has a personal bias against the person charged.<sup>18</sup>

VI. The Court may also interfere where there is a patent error of law on the face of the record, *e.g.*—

Where the conclusion arrived at is not supported by any evidence at all,<sup>19</sup> even though it may be *bona fide*. But the Court is not concerned with the sufficiency of evidence.<sup>20a</sup>

#### B. At the punishment stage:

(i) Where the notice is of such a character as to lead to the inference that the authority did not app'y its mind<sup>21</sup> to the question of punishment to be imposed on the Government servant, *e.g.*, where the notice called upon the Government servant to show cause why "disciplinary action, such as reduction in rank, withholding of increments etc" should not be taken against him<sup>22</sup>

(ii) After the punishment has been awarded and communicated to the person charged, it cannot be varied at the will of the authority concerned<sup>23</sup>

#### X. Disciplinary proceedings against students.

I. It is now settled that a disciplinary proceeding against a student on the ground of some misconduct, *e.g.*, malpractice at an examination, is a quasi-judicial proceeding,<sup>24,25</sup> and that principles of natural justice must be observed<sup>26</sup>

It follows that the examination of a candidate or the result<sup>26</sup> thereof cannot be cancelled, without offering him or her an opportunity of being heard<sup>26,27</sup> and of defending himself or herself,<sup>28a</sup> whether there is a statutory obligation to proceed quasi-judicially or no.<sup>29,30</sup>

The punishing authority must also act in good faith.<sup>31</sup>

II. But, subject to the above quasi-judicial obligation<sup>32</sup>—

(a) It is within the jurisdiction of the Educational institution or the tribunal set up by it to decide all relevant questions in the light of the evidence adduced before it.<sup>33</sup>

(b) It would not be reasonable to import into such inquiry all considerations which govern criminal trials in courts of law.<sup>34</sup>

12. *State of M. P. v. Chintamani*, A. 1961 S.C. 1623 (1627-8).

13. *Union of India v. Verma*, (1968) S.C.R. 499 (507).

14. *State of U. P., v. Md. Nooh*, A. 1958 S.C. 86 (91).

15. *State of Orissa v. Govind Das*, (1958) S.C. [C.A. 203/58].

16. *Lakshmi Narayan v. Puri*, A. 1964 Cal. 335.

17. *Bachhitar Singh v. State of Punjab*, A. 1963 S.C. 396.

18. *Union of India v. Goli*, A. 1964 S.C. 364 (369); *State of A. P. v. Ram Rao*, A. 1963 S.C. 1723.

18a. *Kalshande v. Union of India*, (1970) 1 S.C.W.R. 325 (327).

19. *Board of High School v. Ghanshyam*, A. 1962 S.C. 1110.

20. *Board of High School v. Chitra*, (1969) S.C. [C.A. 1191/67].

21. *Suresh v. Punjab University*, A. 1966 Punj. 182.

22. *Ramesh v. Punjab University*, A. 1966 Punj. 120 (122) (F.B.).

(c) There would be a sufficient compliance with the requirements of natural justice in such cases if—

(i) the delinquent student is informed of the charges or the case he has to meet, and

(ii) he is given an adequate opportunity of meeting such charges and the materials used against him<sup>22</sup> and of stating his own case.<sup>23-24</sup>

If these two conditions have been satisfied, the proceeding cannot be vitiated on the ground that the delinquent was not given an opportunity of cross-examining the witnesses examined against him or that they were examined in his absence,<sup>24-25</sup> or that the report of the Inquiry Officer was not supplied to him.<sup>1</sup>

(d) No inquiry of any sort is necessary where the adoption of unfair means by an examinee is detected by the invigilators at the examination hall and the examinee is expelled from the hall on that ground,<sup>2-3</sup> or the examinee walks out as soon as he is detected.<sup>2</sup>

(e) The Court, under Art. 226, cannot sit as a court of appeal over such domestic tribunals, e.g., in the matter of quantum of punishment (in the absence of any statutory limitation in that behalf).

(f) The head of an educational institution has the inherent power to take disciplinary action against students who misbehave.<sup>4</sup>

III. Disciplinary action by way of expulsion<sup>5</sup> or rustication or suspension<sup>6</sup> must, however, be distinguished from a refusal to admit or readmit a student, which is solely within the discretion of the head of the institution.<sup>7</sup>

IV. In general, the Court should not issue *certiorari* against an educational authority where the regulation in question is capable of two constructions, and the Court should be slow to grant an *ex parte* interim order in such matters, unless it thinks it must do so in the interests of justice.<sup>8</sup>

## XI. Election Tribunal.

1. An Election Tribunal is an inferior tribunal subject to the supervisory jurisdiction of the High Court, under Art. 226.<sup>9-25</sup>

2. Though the extraordinary powers of the High Court under Art. 226 cannot be fettered by the Legislature by making the orders of the Tribunal 'final'<sup>1</sup> and though the powers of the High Court under this Article are purely discretionary, in the exercise of this discretion, the High Court should bear in mind—

(a) that the policy of the Legislature is to have disputes about these special rights decided as speedily as may be;<sup>2-3</sup>

22a. *Board of High School v. Baghelwar*, (1963) 3 S.C.R. 767.

23. *Robindra v. Uthal University*, A. 1969 Ori. 206 (206).

24. *University of Ceylon v. Fernando*, (1960) 1 All E.R. 631 (P.C.).

25. *Nagarej v. University of Mysore*, (1968) S.C. [C.A. 1957/66, d. 15-4-68].

1. *Suresh v. University of Kerala*, A. 1969 S.C. 198 (202).

2. *University of Calcutta v. Dipa Pal*, A. 1962 Cal. 594.

3. *Surendra v. Jabalpur University*, A. 1969 M.P. 234 (239).

4. *Ramesh v. Punjab University*, A. 1965 Punj. 120 (122) F.B.

5. *Ramesh v. Pathy*, A. 1969 Orissa 196.

6. *Rakesh v. State of Punjab*, A. 1965 Punj. 507 (509).

7. *Board of High School v. Chitra*, (1969) S.C. [C.A. 1191/67, d. 20-11-69].

8. *Principal, Patna College v. K. S. Ramon*, (1965) S.C. [C.A. 743/65].

9-25. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104 (1111).

1. *Rajkrishna v. Bined*, A. 1954 S.C. 202.

2. *Sangram v. Election Tribunal*, (1955) 2 S.C.R. 1 (8); *State of Madras v. Sarathy*, (1963) S.C.R. 534.

3. *Vehemami v. Raja*, A. 1969 S.C. 423 (429).

(b) that in the exercise of these discretionary powers, the High Court cannot assume to act as a court of appeal or revision to set aside findings of fact arrived at by the Tribunal or to set right mere errors of law which do not occasion injustice in a broad and general sense.<sup>2</sup>

Hence, petitions under Art. 226 should not be lightly entertained in this class of cases.<sup>3</sup>

3. A writ should not, accordingly, be issued against an *interlocutory order* where there is a statutory remedy against such order, e.g., an appeal to the High Court, under s. 116A of the Representation of the People Act, 1951.<sup>4</sup>

But the Court would interfere even with an interlocutory order where it is a nullity, e.g.,—

Where the Tribunal has acted without jurisdiction,<sup>5</sup>—

(i) Where an Election Tribunal allows an amendment of the election petition to cure the defect of non-joinder<sup>4-5</sup> or to withdraw or abandon any part of the claim.<sup>6</sup>

(ii) Where the Tribunal has reviewed its previous order, without having a statutory power of review.<sup>6</sup>

4. The High Court can and should interfere against a final order—

(a) Where it violates any principle of natural justice.<sup>7</sup>

(b) Where the Tribunal refuses to exercise a discretion given to it by law because of misapprehension that it had none.<sup>7</sup>

(c) Where its decision is vitiated by an error of law, apparent on the face of the record.<sup>7</sup>

5. The High Court will not, on the other hand, interfere with the decision of an Election Tribunal—

upon a re-appraisal of the evidence on facts,<sup>8</sup> though the Court can interfere where there was no evidence on which the Tribunal could have come to the conclusion it did.<sup>9</sup>

## XII. Election Authority.

The Gujarat High Court has held that the preparation of the electoral roll is a stage anterior to the process of election and would not, therefore, come within the scope of the bar imposed by Art. 329(b) of the Constitution; hence, a petition under Art. 226 will lie to quash an order of the Electoral Officer refusing to include the name of a person in the electoral roll.<sup>10-25</sup>

## XIII. Income-tax Authorities.

1. Since assessment of a tax is a quasi-judicial procedure,<sup>1-4</sup> *certiorari* (or prohibition<sup>7-9</sup>) may issue in proper cases against orders of (or proceedings for) assessment.

2. But the Court would not, ordinarily, interfere under Art. 226,

4. *Rasappa v. Ayyappa*, (1958) 1 M.L.J. 58 (S.C.).

5. *Kamraja v. Kamra*, A. 1958 S.C. 687.

6. *Brijmohandas v. Election Tribunal*, A. 1963 AIL 450.

7. *Hari Vishnu v. Syed Ahmad*, (1955) 1 S.C.R. 1104.

8. *Umai Sahib v. Karimnagar*, (1968) 1 S.C.C. 741.

9-25. *S. J. Jhala v. Chief Electoral Officer, A.*, 1969 Guj.

1-4. *Kannathat v. State of Kerala*, A. 1961 S.C. 552 (1).

7-9. *Musaffar v. Potti*, (1955) 2 S.C.R. 1196 (1217) [Prohibition].

where a statutory remedy by way of appeal<sup>9</sup> is open, particularly where disputed facts are to be investigated<sup>10</sup> before giving relief.

3. But even where a statutory remedy was available, *certiorari* would issue—

(i) Where the impugned order is, on its face, or on undisputed facts, without jurisdiction,<sup>10</sup> e.g., where an order under sub-sec. (2) of s. 25A of the Income Tax Act, 1922 had been made, without recording an order under sub-sec. (1) thereof.<sup>12</sup>

(ii) Where the law which gives jurisdiction to the Authority is unconstitutional<sup>13</sup> or *ultra vires*.

(iii) Where the impugned order violates the principles of natural justice,<sup>13-14</sup> e.g., where it is based on pure guess or suspicion; or where the materials relied upon are not disclosed to the assessee or the latter is not allowed to produce his own materials or to rebut those produced by the Department.<sup>13</sup> But the Court would not interfere in the absence of proper averments.<sup>13a</sup>

(iv) Where the impugned order violates a fundamental right.<sup>10</sup>

(v) Where the impugned order is vitiated by an error apparent on the face of the record.<sup>15</sup>

(vi) Where the assessment is not based on any material or evidence whatever.<sup>13b</sup>

3. But the Income-tax officer is not fettered by the technical rules of evidence<sup>13, 15</sup> and may even use materials collected by private inquiry, provided the assessee is informed of such material and adequate opportunity is given to the assessee of explaining it.<sup>15</sup> Mere collection of undisclosed materials is, however, immaterial if they are not used.<sup>16</sup>

4. The Court will not interfere on ground of mere irregularity, not amounting to want of jurisdiction,<sup>17</sup> or upon a question the determination of which is within the jurisdiction of the Income-tax authorities, e.g., whether an assessment proceeding is barred by limitation under s. 34(3) of the Income-tax Act, 1922.<sup>18</sup>

#### XIV. Industrial Tribunal.

1. Since an industrial tribunal is a quasi-judicial tribunal,<sup>19</sup> *certiorari* would lie to quash its award or other decision—

(a) Where its decision is without jurisdiction,<sup>20</sup> e.g., where it assumes jurisdiction over a non-industrial dispute.<sup>21</sup>

Under the Industrial Disputes Act, 1947, an Industrial Tribunal has been given power, when a dispute arises, to see whether the termination

9. *Abraham v. I. T. O.*, A. 1961 S.C. 609 (611).
10. *Shivram v. I. T. O.*, A. 1964 S.C. 1096 (1099).
11. *Calcutta Discount Co. v. I. T. O.*, A. 1961 S.C. 372 (380).
12. *Addl. I. T. O. v. Thimmayya*, (1964) S.C. [1019/63].
13. *Suraj Mall v. Viswanatha*, (1955) 1 S.C.R. 448 (466) [Prohibition].
- 13a. *I. T. O. v. Veerish*, (1966) S.C. [C.A. 708/66, dt. 10-10-66].
- 13b. *D. C. Mills v. I. T. O.*, (1955) 1 S.C.R. 941 (951).
14. *Chockalingam v. C. I. T.*, (1963) 48 I.T.R. 34 (S.C.).
15. *Vasantlal v. C. I. T.*, (1962) 45 I.T.R. 206 (S.C.).
16. *Namasivayam v. C. I. T.*, A. 1960 S.C. 729.
17. *Nerayanam v. I. T. O.*, A. 1959 S.C. 213.
18. *Lalji Haridas v. I. T. O.*, (1961) 43 I.T.R. 387 (S.C.).
19. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459; *Muir Mills v. Smit Mills Union*, (1955) 1 S.C.R. 991.
20. *Moan Mills v. Meher*, A. 1967 S.C. 1450.
21. *Express Newspapers v. Workers*, A. 1963 S.C. 569; *S. K. G. Sugar v. Chairman, Industrial Tribunal*, A. 1959 S.C. 230 (238); *Newspapers Ltd. v. State Industrial Tribunal*, (1957) S.C.R. 754 (769).

of service of a workman is justified and to give appropriate relief. In exercise of this power, however, the Tribunal cannot sit as a court of appeal and substitute its own judgment for that of the management. It can interfere where the management is guilty of (i) want of good faith; (ii) victimisation or unfair labour practice; (iii) a basic error or violation of a principle of natural justice;<sup>22</sup> or (iv) when on the materials, the finding of the management is completely baseless or perverse;<sup>23</sup> (v) where the inquiry held by the management violates the principles of natural justice or those rules of evidence which form part of the principles of natural justice.<sup>24</sup>

(b) Where the Tribunal exceeds its jurisdiction by entering into a question which is not within the terms of reference.<sup>25</sup>

(c) Where its decision is vitiated by an error of law<sup>1</sup> apparent on the proceedings.

(d) Where the conclusion reached by the Tribunal is entirely arbitrary<sup>2</sup> or perverse.<sup>3</sup>

2. Prohibition also lies to restrain proceedings before the tribunal where it is about to exercise jurisdiction over a non-industrial dispute and it is open to a party to have the issue of jurisdiction decided by the High Court in a proceeding for prohibition, going into the jurisdictional fact.<sup>4</sup> But in view of the technical nature of the question, it cannot be said that a High Court has wrongly exercised its discretion in refusing to interfere by prohibition until the tribunal itself came to its decision on this jurisdictional issue,<sup>5</sup> which depends upon the appreciation of evidence.

3. But the High Court will not interfere—

(a) Where there has been a mere breach of the technical rules of evidence and pleadings, not amounting to a violation of the rules of natural justice,<sup>6</sup> or failure of justice.<sup>7</sup>

(b) On a question of fact which the tribunal has jurisdiction to determine,<sup>8</sup> unless it is shown to be fully unsupported by evidence.<sup>9</sup>

(c) On a question of error of fact, even though it is apparent on the face of the record.<sup>10</sup>

(d) On a question of error of law, unless it is apparent on the face of the record.<sup>10a</sup>

(e) On the ground of rejection of some evidence, unless it is material.<sup>10</sup>

(f) In the exercise of its jurisdiction under Art. 226, the Court will not interfere with the exercise of a discretionary power by the inferior tribunal, unless it is arbitrarily exercised, e.g.,—

22. *Meenglas v. Workmen*, A. 1963 S.C. 1719.

23. *Indian Iron & Steel Co. v. Their Workmen*, A. 1958 S.C. 130 (138); *McKenzie & Co. v. Its Workmen*, A. 1959 S.C. 389; *Central Bank of India v. Prakash*, (1970) 1 S.C.A. 87.

24. *Central Bank of India v. Jain*, A. 1969 S.C. 983 (988); *Tata Engineering v. Prasad*, (1969) 11 LL.J. 799 (812).

25. *D. C. M. v. Workmen*, (1967) 1 LL.J. 423 (S.C.)

1. *Provincial Transport Services v. State Industrial Court*, A. 1963 S.C. 114 (117); *Engineering Mazdoor Sabha v. Hind Cycles*, A. 1963 S.C. 874.

2. *State of A. P. v. Rama Rao*, A. 1963 S.C. 1723.

3. *Central Bank of India v. Prakash*, (1970) 1 S.C.A. 87.

4. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

5. *Raman & Raman v. State of Madras*, A. 1966 S.C. 463 (467).

6. *Debar v. Workmen*, A. 1968 S.C. 17.

7. *Alison v. B. L. San*, A. 1957 S.C. 277.

8. *Associated Cement Co. v. Vyas*, A. 1960 S.C. 685 (688).

9. *Dharamgadhia Chemical Works v. State of Saurashtra*, A. 1967 S.C. 264: (1967) S.C.R. 182.

10. *Agarwal v. Radul Das*, (1963) 1 LL.J. 684 (S.C.).

10a. *Anshu Scientific Co. v. Seshagiri*, (1961) 2 LL.J. 117.

The granting of adjournment of a proceeding.<sup>11</sup>

## XV. Licensing.

### I. Granting or refusal.

There has been some wavering of judicial opinion on this point.

In *Veerappa v. Raman*,<sup>12</sup> there was a short observation that the function of granting permits under s. 42 of the Motor Vehicles Act, 1939, was a quasi-judicial function. The provisions of the Act which led the Court to take this view were not analysed but presumably the Court was influenced by the terms of s. 47 which, inter alia, provided that in granting or refusing a permit, the Transport Authority shall be guided by certain conditions laid down therein and "shall also take into consideration any representations made by persons.....". There was an inconclusive reference to the question in the intermediate case of *Raman & Raman*,<sup>13</sup> but in the later case of *Raman & Raman v. State of Madras*,<sup>14</sup> the Supreme Court followed the Madras decision in *C. S. S. Motor Service v. State of Madras*<sup>15</sup> and upon an analysis of the provisions of the Act came to the view that "the procedure" for granting permits under the Act was "clearly quasi-judicial".<sup>16</sup>

In *Nagendra v. Commr.*,<sup>17</sup> on the other hand, the Court relied on the language of the relevant statute, vesting absolute discretion in the Excise authorities, to grant or refuse licences for excise shops, to hold that the function of the licensing authorities was administrative, but that when it went on appeal to the superior authority, it became quasi-judicial, as the appellate function was, of its nature, of that class.

In *Kishor Chand v. Commr. of Police*,<sup>18</sup> the Supreme Court has, by a bare majority (3 : 2), held that even where the function of licensing affects a fundamental right (e.g., carrying on the business of an eating house), it is not quasi-judicial where the statute does not provide for a hearing and vests the power to grant or refuse a licence in the subjective satisfaction of the authority.

But, as the minority pointed out, there were no exceptional circumstances in this case which could take it out from the normal rule that the vesting of an absolute power constitutes an unreasonable restriction upon the fundamental right guaranteed by Art. 19(1).

In *Purtabpore Co. v. Cane Commr.*,<sup>19</sup> again, there is an obiter to the effect that the function of granting a licence may not be quasi-judicial, as the function of revocation is.<sup>20</sup> But the statute will be invalid on the ground of constituting an unreasonable restriction upon the fundamental right guaranteed by Art. 19, if it vests uncontrolled discretion in the statutory authority to grant or refuse a licence.<sup>20</sup>

### II. Revocation or cancellation

Where the function of licensing related to a fundamental right, e.g., to carry on the business of public transport, it must be held to be quasi-judicial,<sup>21, 22</sup> even though the statute did not provide for a hearing of

11. *Gavadin Ram v. Khan*, (1951) 55 C.W.N. 667.

12. *Veerappa v. Raman*, (1952) S.C.R. 583 (595).

13. *Raman & Raman v. State of Madras*, A. 1959 S.C. 694 (697, 698).

14. *C. S. S. Motor Service v. State of Madras*, A. 1953 Mad. 279 (288-9).

15. See also *Parbhani v. R. T. A.*, A. 1950 S.C. 801 (806).

16. *Nagendra v. Commr.*, A. 1958 S.C. 398 (407).

17. *Krishna Chand v. Commr. of Police*, A. 1961 S.C. 705 (701).

18. *Purtabpore Co. v. Cane Commr.*, (1969) 1 S.C.C. 308 (316).

19. *Fauk v. State of M. P.*, (1968) 1 S.C.R. 833 (857).

20. In this view, the following decisions as to revocation of licence under the Electricity Act, 1910, do not appear to be correct: *Silcher Electricity Supply v. State*, A. 1969 A. & N. 50 (80); *Narayanan v. State of Kerala*, A. 1965 Ker. 55.



interested objectors. Even dealing in liquor has been brought under this category.<sup>21-22</sup>

In *Shivji Nathubhai's case*,<sup>23</sup> the Supreme Court assumed that the function of cancelling an order granting a lease under the Mineral Concession Rules was a quasi-judicial act because "some kind of a right is created on the passing of an order granting a lease".

In *Mineral Development v. State of Bihar*,<sup>24</sup> the statute did, in fact, provide for an opportunity to be given to the licensee before revocation of his licence. When the constitutionality of the statute was challenged, the Court observed that the fact that the power was "exercisable on the basis of objective tests and in accordance with the principles of natural justice" ensured the reasonableness of the restriction imposed by the statute.

On the other hand,—

(a) The cancellation of an arms licence<sup>25</sup> has been held to be an administrative act.<sup>1</sup>

(b) Similarly, the function of cancelling a licence granted to practise as a deed-writer at a Registration Office has been considered to be administrative, because it did *not* relate to a fundamental right.<sup>2</sup>

The Gordian knot may be cut by holding that whenever a fundamental right of a person is to be affected either by the refusal or revocation of a licence—

(a) If the statute is silent about the quasi-judicial obligation, it should be implied unless the exclusion of it would be justified by exceptional circumstances, *e.g.*,

(i) public safety,—such as in the case of an arms licence;<sup>3</sup>

(ii) public economy,—such as in the case of a licence relating to imports and exports;<sup>4-5</sup> or in the case of a licence relating to the supply of essential commodities in times of emergency;<sup>6</sup>

(iii) inherently dangerous trade or profession, such as relating to trade in or manufacture of liquor;<sup>7</sup>

(iv) public order,—such as relating to a licence for taking out a procession.<sup>8</sup>

The enumeration of exceptions cannot, of course, be exhaustive. The

21. *Sukhtal v. Collector*, A. 1969 M.P. 176 (181).

22. *Krishna v. J. & K. State*, A. 1967 S.C. 1368.

23. *Shivji Nathubhai v. Union of India*, A. 1960 S.C. 606 (609).

24. *Mineral Development Ltd. v. State of Bihar*, A. 1960 S.C. 468 (472).

25. *Kishore v. State of Rajasthan*, A. 1954 Raj. 264; *Chand Singh v. Commr.*, A. 1958 Cal. 420; *Godha Singh v. Dt. Magistrate*, A. 1955 Punj. 33.

1. The view taken in *Nanappa v. Dist. Commr.*, A. 1967 Mys. 238, that an opportunity must be given to the licensee to make representation before making the order does not appear to be sound because it relates to a thing which is inherently dangerous [*Cf. Cooverjee v. Excise Commr.*, (1954) S.C.R. 873] and the statute affords other safeguards [vide ss. 17(3), 18 of the Arms Act, 1959].

2. *Kailash v. Dt. Registrar*, A. 1961 All. 61.

3. *Haran Ali v. Commr.*, A. 1969 A. & N. 50; *Chand Singh v. Commr.*, A. 1958 Cal. 420; *Moti v. Commr.*, A. 1960 M.P. 157; [contra *Jai Narain v. Dt. Magistrate*, A. 1966 All. 285; *Harisingh v. Debas*, A. 1969 Guj. 349; *Nanappa v. Dist. Commr.*, A. 1967 Mys. 238].

4-5. *Cf. Electron Importing Co. v. Courtice*, (1949) 80 C.L.R. (463).

6. *Cf. Harishankar v. State of M. P.*, (1955) 1 S.C.R. 380.

7. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873; *Nagendra v. Commr.*, A. 1958 S.C. 388 (405-6).

8. *Cf. Babulal v. State of Maharashtra*, A. 1960 S.C. 51.

Courts will have to determine in each case whether a denial of a hearing could be justified as a 'reasonable restriction' upon the exercise of the fundamental right in view of the exceptional circumstances, if any, of the case.

It is submitted, with respect, that none of such exceptional circumstances was present in *Kishan Chand's case*,<sup>9</sup> (p. 527, ante). As has been pointed out earlier, the observations of the Privy Council in *Nakkuda Ali v. Jayaratne*<sup>10</sup> that—

"In truth when he cancels a licence he is not determining a question: he is taking executive action to withdraw a *privilege*",

are not applicable to our Constitution inasmuch as that judgment was under a special Act of Ceylon where there was no fundamental right to carry on a business as under Art. 19 (1) (g) of our Constitution and no question of the *reasonableness* of the restriction upon that fundamental right could possibly arise in that case.

(b) If the statute excludes a hearing, it will have to be determined by the Court whether, in view of the circumstances of the case, such exclusion can be upheld as a 'reasonable restriction', if not, the obligation to hear will be *implied* if, by any means, it is possible from the contents of the statute,<sup>11</sup> and where that is not possible, the statute itself must be struck down as unconstitutional.

#### XVI. Payment of Wages Authority.

*Certiorari* would issue to quash the decision of the Authority under this Act when he had no jurisdiction to entertain an application under s 15.<sup>12, 13</sup>

#### XVII. Penalty.

1. The imposition of a pecuniary liability or a proceeding which may lead to such imposition, has been regarded as a quasi-judicial function, by its very nature,<sup>14</sup> e.g., proceedings under the Sea Customs Act in the matter of confiscation and imposition of statutory penalty.<sup>15</sup>

2. The principle has been extended to other spheres e.g., imposing a disability on a person's educational career<sup>16</sup>

#### XVIII. Revisional function.

Sometimes, instead of using the word 'appeal', a statute authorises a higher administrative authority to 'revise' or 'review'<sup>17, 18</sup> the administrative order of an inferior authority.

(a) Of course, if the order of the inferior authority is of a 'quasi-judicial' nature, it is clear that the decision of the superior authority must also be affected by the quasi-judicial obligation.

(b) The question is as to what should happen when the order under revision is an administrative order.

Our Supreme Court<sup>19</sup> has included the *revisional* function within the

9. *Kishan Chand v. Commr. of Police*, A. 1961 S.C. 705 (10).

10. *Nakkuda Ali v. Jayaratne*, (1951) A.C. 66.

11. *Cf. Chaturbhai v. Union of India* A. 1960 S.C. 424 (430).

12. *D'Costa v. Patel*, (1955) S.C.R. 1353.

13. *Sri Ambica Mills v.* (1961) 3 S.C.R. 220.

14. *Board of Revenue v. Vidyawati* A. 1962 S.C. 1217 (1220).

15. *F. N. Roy v. Collector*, A. 1967 S.C. 648; *Leo Roy v. Superintendent*, A. 1958 S.C. 119; *Ambalal v. Union of India*, A. 1961 S.C. 264; *E. I. Commercial Co. v. Collector of Customs*, A. 1963 S.C. 1892 (1903).

16. *Board of High School v. Bugleswar*, (1963) S.C.D. 584 (587); *Board of School v. Ghanshyam*, A. 1962 S.C. 1110 (1115).

17. *Shivji Nathubhai v. Union of India*, A. 1960 S.C. 606.

18. *Vrajlal v. Union of India*, (1964) 7 S.C.R. 97 (101).

19. *Nafendra v. Commr.*, A. 1958 S.C. 398 (405-6).

fold of the dictum in *Arlidge's case*,<sup>20</sup> even where the impugned order is administrative,<sup>21, 22</sup> S. 9(3) of the Eastern Bengal & Assam Excise Act, 1910, provides—

"The Appellate Authority, the Excise Commissioner or the District Collector may call for the proceedings held by any officer or person subordinate to it or him.....and pass *such* orders thereon as it or he *may think fit*".

It was held that the Act laid down no obligation to hear and that it was left entirely to the subjective satisfaction of the licensing authority as to the fitness of a particular candidate for settlement of an excise shop.<sup>23</sup> The original order of the subordinate authority was, accordingly, administrative. But so far as the function of the revisional authority under s. 9(3) was concerned, the Court held that *though the statute imposed no quasi-judicial obligation* and left it entirely to the discretion of the revisional authority, nevertheless, in view of the very nature of the revisional function, he was bound to proceed quasi-judicially.<sup>24</sup>

### XIX. Statutory Tribunal, in general.

A finding of fact by a statutory tribunal is not reviewable by the High Court under Art. 226, except—

Where the finding is on a preliminary question upon which the jurisdiction of the Tribunal depends,<sup>24</sup> and the Legislature has not vested the Tribunal with a final jurisdiction to determine that question as well.<sup>25</sup>

### XX. Taxation.

I. The majority judgment (per Sinha C.J.) in *Kunnathat's case*<sup>21</sup> is authority for the proposition that assessment of a tax is, of its nature a quasi-judicial function. It has also been held in that case that where a law does not provide for a quasi-judicial procedure or empowers the Executive to make arbitrary assessment, such law itself will be void for contravention of Art. 19 (1) (f).

There are other cases where the Supreme Court has issued prohibition<sup>1, 7</sup> or *certiorari*<sup>8</sup> in respect of an order of assessment, either assuming that the function was *per se* quasi-judicial or without entering into an investigation whether the governing statute imposed a quasi-judicial duty.

II. Though normally the Court may refuse prohibition where an adequate alternative remedy is provided by the statute itself,<sup>10</sup> the Court

20. *Local Govt. Board v. Arlidge*, (1915) AC 120 (H.L.).

21. *Laxman v. State of Bombay*, A. 1964 S.C. 436.

22. *Dwarka v. I. T. O.*, A. 1965 S.C. 81 (86).

23. See also *State of Gujarat v. Patil*, (1969) 2 S.C.C. 187 (194), which required a revisional authority to state reasons for his decision.

24. *State of M. P. v. Jadav*, A. 1968 S.C. 1186 (1190); (1968) 2 S.C.J. 863.

25. *Brij Raj v. Shaw & Bros.*, (1961) S.C.R. 145; *Lilavati v. State of Bombay*, A. 1967 S.C. 521 (528).

1. *Kunnathat v. State of Kerala*, A. 1961 S.C. 552 (559); see also *State of Orissa v. Chakobhai*, A. 1961 S.C. 284 S.C. 545.

2. *Calcutta Discount Co. v. I. T. O.*, A. 1961 372 (380).

3. *S. T. O. v. Budh Prakash*, (1955) 1 S.C.R. 243.

4. *Carl Stoll v. State of Bihar*, A. 1961 (1621).

5. *Bengal Immunity v. State of Bihar*, (1955) 1 S.C.R. 603 (668).

6. *Madan Lal v. E. & T. Office*, A. 1961 S.C. 1555 (1567).

7. *Ghulam Hussain v. State of Rajasthan*, (1962) S.C. [C.A. 300/60].

8. *Tate Iron & Steel Co. v. Sarkar*, A. 1961 S.C. (68; 76) [on the ground of 'error apparent on the face of the record'].

9. *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621 (1626).

10. *Abraham v. I. T. O.*, A. 1961 S.C. 609 (611); *Shivram v. I. T. O.*, A. 1964 S.C. 1036; *Thansing v. Supdt. of Taxes*, A. 1964 S.C. 1419.

will not hesitate to afford relief under Art. 226 where the action of the authority is patently without jurisdiction<sup>2</sup> or the law which gives jurisdiction to the authority is unconstitutional,<sup>3, 4</sup> or *ultra vires*,<sup>3, 5</sup> or where the order which gives jurisdiction to the tribunal violates a Fundamental right,<sup>11</sup> e.g., where an order of transfer of a case from one Income-tax Officer to another violates Art. 14 of the Constitution, prohibition would issue to restrain proceedings before the latter.<sup>1</sup>

III. *Certiorari* has also been issued to quash an order of assessment or notice of demand—

(a) Where the initial order (even though administrative) on the basis of which the proceedings were started was *ultra vires*, so that the proceedings became without jurisdiction.<sup>12</sup>

(b) Where a proceeding for assessment of tax is *ultra vires* or violates a fundamental right, e.g., under Art. 19 (1) (f) or 19 (1) (g) by reason of the tax having been imposed by a Legislature having no competence; or where the order which starts the proceedings offends against a fundamental right, such as Art. 14.<sup>11</sup>

(c) Where the proceedings violate the principles of natural justice.<sup>13, 25</sup>

## XXI. Transport Authority.

I. The function of the Regional Authority in granting permits or cancelling them has been held to be a quasi-judicial function.<sup>13, 25</sup>

II. *Certiorari* would lie against the order of the Transport Appellate Tribunal on the ground—

(i) That no appeal lay to it under the statute from the order of the subordinate authority in question.<sup>1-6</sup>

(ii) That there was an error apparent on the face of the record<sup>7-9</sup> or a breach of the principles of natural justice.<sup>9</sup>

(iii) That the Tribunal has acted on irrelevant considerations or on considerations invalid in law.<sup>10</sup>

(iv) That the finding of the Tribunal is based on *no* evidence.<sup>7</sup>

III. But where the Tribunal has arrived at a decision upon a consideration of all relevant factors,<sup>7, 11</sup> *certiorari* cannot issue simply because—

(a) all the reasons have not been set out in the order of the Tribunal;<sup>7, 11</sup>

(b) the considerations upon which the Tribunal acted, though relevant, were contained in the administrative directions issued upon the Tribunal under s. 43A of the Motor Vehicles Act;<sup>11</sup> or

(c) the High Court would have taken a different view on the evidence adduced in the proceedings;<sup>11</sup> or

(d) the Tribunal did not consider *some* item or items of evidence,<sup>2</sup> but there was some evidence to support the finding.<sup>7</sup>

11. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267 (278).

12. *Collector of Monghyr v. Kashav*, A. 1962 S.C. 1694.

13-25. *Raman & Raman v. State of Madras*, A. 1959 S.C. 604 (698-9).

1-6. *Cf. Ram Gopal v. Anant*, (1959) 2 S.C.R. 692.

7. *Yakoob v. Radhakrishnan*, A. 1964 S.C. 477 (479, 482-3).

8. *Shanmugam v. S. R. V. S.*, A. 1963 S.C. 1626.

9. *Cf. N. P. T. Co. v. N. S. T. T. Co.*, (195) S.C.R. 98.

10. *Prem Sagar v. S. V. Oil Co.*, A. 1965 S.C. 107 (111).

11. *Sri Ram Vilas Service v. Chandrasekharan*, A. 1965 S.C. 107.

IV. *Certiorari* may lie against the Transport Authority or other Tribunal under the Motor Vehicles Act, if, in the discharge of its quasi-judicial duties, e.g., the disposal of an application for a permit<sup>12</sup> or renewal of a permit,<sup>13</sup> it is actuated by bias,<sup>12</sup> or its decision is based solely upon a direction issued by the State Government under s. 43A, which is *ultra vires*<sup>12</sup> or it commits an error apparent on the face of the record, e.g., by ignoring a consideration specified in s. 47.<sup>14</sup>

V. *Certiorari* lies against the State Government, exercising revisional authority under the Motor Vehicles Act, where it has, in revision, made an order which the subordinate authority whose order it was revising, had no jurisdiction to pass, e.g., increase the number of permits as fixed by the subordinate authority, under s. 47 (3) of the Act.<sup>15</sup>

VI. *Certiorari* would also lie against the State Government when giving a hearing under s. 68D, for approving Scheme;<sup>16</sup> e.g.,—

(i) Where it is established that the State Government or the Minister in charge<sup>17-19</sup> acted in collusion with the State Transport Undertaking and thus made a *ma a fide* exercise of its statutory power<sup>17</sup> or bias against the private operators.

(ii) Where the State Government or its delegate refused to take relevant and necessary evidence from the parties.<sup>19</sup> In such a case, hearing of arguments is not enough.<sup>19</sup>

(iii) Where the State Government refused to allow a party to the hearing to lead relevant evidence,<sup>19</sup> or does not allow him a reasonable opportunity to be heard.<sup>20</sup>

(iv) Where the scheme prepared amounts to a fraud on s. 68C.<sup>21</sup>

VII. On the other hand, the following functions under the Act have been held to be administrative and not amenable to *certiorari*:<sup>22</sup>

(a) The State Government issuing a direction under s. 43A.<sup>22</sup>

(b) The State Government dealing with an application of the State Transport Undertaking under s. 68F (1)-(2).<sup>23</sup>

### How far certiorari is a discretionary remedy.

1. *Certiorari* being a discretionary remedy, a party may disentitle himself to this remedy by his conduct.<sup>24</sup>

2. Conduct which disentitles the applicant to relief are, *inter alia*,—

(a) Delay which is unexplained,<sup>24</sup> or which constitutes acquiescence.<sup>24</sup>

(b) Suppression of material facts.<sup>1</sup>

(c) Omission to take the objection as to jurisdiction at the trial or

12. *Rajagopala v. S. T. A. Tribunal*, A. 1964 S.C. 1573 (1580).

13. *Samarth Transport v. R. T. A.*, A. 1961 S.C. 93 (98).

14. *Shanmugam v. S. R. V. S.*, A. 1963 S.C. 1626.

15. *Abdul Matten v. Ram Kailash*, A. 1963 S.C. 64.

16. *Raman & Raman v. State of Madras*, A. 1959 S.C. 691 (698-9).

17. *Ci. Kondala Rao v. A. P. S. R. T. C.*, A. 1961 S.C. 82 (88-90).

18. *Rowjee v. State of A. P.*, A. 1964 S.C. 962 (970; 972).

19. *Malk Ram v. State of Rajasthan*, A. 1961 S.C. 1575 (1578).

20. *Narayanappa v. State of Mysore*, A. 1960 S.C. 1073.

21. *Aswathanarayan v. State of Mysore*, A. 1965 S.C. 1848.

22. *Rajagopala v. S. T. A. Tribunal*, A. 1964 S.C. 1573 (1579).

23. *Abdul Gafoor v. State of Mysore*, A. 1961 S.C. 1556; *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1183 (1189).

24. *Moon Mills v. Meher*, A. 1967 S.C. 1450 (1454).

25. *Azizuddin v. Asstt. Quetodian*, A. (1957) S.C.R. 350 (370).

1. *M. U. & Services v. R. T. Authority*, A. 1963 Mad. 59.

original proceeding,<sup>2</sup> unless it is shown that the Petitioner had then no knowledge of the facts constituting the defect of jurisdiction.<sup>24</sup>

3. It has also been refused in consideration of supervening circumstances.<sup>2-17</sup> Thus, where the R.T.A. cancelled the permits of the appellants in pursuance of a scheme for nationalisation, without giving 'due notice' as required by the statutory rules, the Supreme Court refused to interfere on the ground that after the order of the R.T.A., the appellants had withdrawn their vehicles from the routes and the vehicles of the State Transport Corporation had taken their place; that subsequent to the impugned order the appellants had brought the matter before the Supreme Court in appeal from another application under art. 226 and lost on all the issues then raised, in these circumstances, the Supreme Court held that to give another opportunity to the appellants to make representations before the R.T.A. would be "only an idle formality".<sup>17</sup>

4. *Certiorari* to quash a decision will not be granted where the decision is wholly void and the inferior tribunal could not be ordered to resume the proceedings, *e.g.*, where the proceedings have become null and void by the operation of a statute.<sup>18</sup>

5. But, in the absence of such special circumstances, *certiorari* is available almost as of right (*ex debito justitiæ*) where there is a clear excess of jurisdiction and the applicant is the person aggrieved by the order complained of,<sup>19</sup> as distinguished from a member of the public,<sup>20</sup> subject to the overall condition that the Court may refuse to interfere unless substantial injustice has ensued or is likely to ensue.<sup>21-22</sup>

6. It being the *duty of our Courts* to enforce Fundamental rights, no question of discretion arises where fundamental rights are affected.

### Whether right to certiorari may be lost by acquiescence.

On this question, a distinction has been made between cases where the defect in jurisdiction is *patent* and cases where it has to be established by evidence.

(A) Where the want of jurisdiction has to depend upon proof of certain facts, and if those facts are not raised and proved before the inferior tribunal and the party takes a chance of getting a decision in his favour then he cannot be permitted to raise a plea of want of jurisdiction in a proceeding for *certiorari*.

In this case, omission to take the objection as to jurisdiction at the trial or original proceeding is a ground for refusing relief under Art. 226, unless it is shown that the petitioner had then no knowledge of the facts constituting the defect of jurisdiction.<sup>23</sup> The principle is that the petitioner having submitted to the jurisdiction of the inferior tribunal with full knowledge of facts constituting the want of jurisdiction, he should be

2. *Ambaram v. Guman Singh*, A. 1957 M.P. 58; *G. M. T. Society v. State of Bombay*, A. 1954 Bom. 202; *Basant v. Janak*, A. 1954 All. 447; *Supdt. of Police v. Ram*, A. 1959 All. 710.

3-17. *Nageswararao v. State of A. P.*, A. 1959 S.C. 1376.

18. *C. W. Motor Service v. State of Kerala*, A. 1959 Ker. 47 (350).

19. *Abdul Mazid v. State of Madras*, A. 1957 Mad. 551.

20. *Issardas v. Collector*, A. 1950 Mad. 528.

21. *Sangram Singh v. Election Tribunal*, A. 1955 S.C. 425 (429); (1955) 2 S.C.R. 1.

22. *Veerappa v. Raman*, A. 1952 S.C. 192; (1952) S.C.R. 583.

23. *Ambaram v. Guman Singh*, A. 1957 M.P. 58; *G. M. T. Society v. State of Bombay*, A. 1954 Bom. 202; *Basant v. Janak*, A. 1954 All. 447; *Jasoda v. Chintreyjee*, A. 161 Cal. 185 (197).

estopped from raising that objection later, in an application under Art. 226 or 227.<sup>24</sup>

Grounds vitiating jurisdiction which come under this head are—bias,<sup>25</sup> unconstitutionality of the law upon which the jurisdiction of a tribunal to decide a matter depends.<sup>26</sup>

(B) But where the lack of jurisdiction is patent on the face of the record or the objection goes to the root of the jurisdiction<sup>1</sup> the consent or acquiescence of the party cannot give jurisdiction to the tribunal<sup>2</sup> and the decision of the tribunal cannot stand.

Defects of this nature are defects in the constitution of the tribunal.<sup>3-5</sup>

### How far certiorari may be barred by alternative remedy.

1. The rule of refusing relief on the ground of alternative remedy does not apply to *certiorari* to the same extent as it does in the case of *mandamus*.<sup>6</sup> The fact that the aggrieved party has another adequate remedy may be taken into consideration by the superior Court in arriving at the conclusion as to whether it should, in the exercise of its discretion, issue a writ of *certiorari* to quash the decisions of subordinate courts or tribunals and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his statutory remedies<sup>6</sup>, if any,<sup>6</sup> particularly where the impugned order is interlocutory,<sup>7</sup> or facts have to be investigated.<sup>8</sup>

2. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion, rather than a rule of law.<sup>7</sup>

3. The existence of an alternative remedy is therefore, no ground for refusing *certiorari* where—

(a) it appears *on the face of the proceedings*<sup>4</sup> or on undisputed facts<sup>9</sup> that the inferior tribunal has acted without jurisdiction or in excess of jurisdiction,<sup>9</sup> or contrary to the fundamental principles of justice;<sup>4, 10</sup>

the application has been made by a party aggrieved and not merely by one of the public who is not personally concerned; and

the conduct of the applicant has not been such as to disentitle him to relief; or

(b) there was a complete lack of jurisdiction in the inferior tribunal,<sup>11</sup> e.g., where proceedings have been taken under a law which is *ultra vires*,<sup>7, 12</sup>

(c) fundamental rights are affected.<sup>9, 14</sup>

The existence of alternative remedy may thus be a ground for refusing *certiorari* only where the defect of jurisdiction is not patent on the face of the record,<sup>14</sup> and fundamental rights are not involved.<sup>15</sup>

24. *Sarjoo Prasad v. S. B. R. T. A.*, A. 1957 Pat. 732.

25. *Pannalal v. Union of India*, A. 1957 S.C. 397.

1. *Pioneer Traders v. Chief Controller*, A. 1963 S.C. 734 (745).

2. *United Commercial Bank v. Workmen*, A. 1951 S.C. 230.

3. *Badridass v. Appellate Tribunal*, A. 1960 Raj. 101.

4. *State of U. P. v. Nooh*, A. 1958 S.C. 86; (1958) S.C.R. 595.

5. *Abraham v. I. T. O.*, A. 1961 S.C. 609 (611).

6. *Veerappa v. Raman*, A. 1952 S.C. 192; *Raman v. Raman*, A. 1956 S.C. 463.

7. *Baburam v. Antahim Zila Parishad*, A. 1969 S.C. 556 (559).

8. *Shivram v. I. T. O.*, A. 1964 S.C. 1096.

9. *Sambandam v. General Manager*, (1952) 1 M.L.J. 540 (547); *Asst. Collector v. Soorajmal*, (1952) 56 C.W.N. 452 (468, 470).

10. *Vehunani v. Raja*, A. 1961 S.C. 422 (429).

11. *Venkataraman v. Ramchand*, A. 1961 S.C. 1506 (1516).

12. *Carl Hill v. State of Bihar*, A. 1961 S.C. 1615 (162).

13. *Himmattel v. State of M. P.*, (1964) S.C.R. 1122 (1126).

14. *Pradhar v. Dhanubas*, A. 1956 Bom. 530 (536).

15. *Cl. Rashid v. I. T. I. Commr.*, A. 1954 S.C. 20.

But no such question arises where the alternative remedy is not speedy, effective and adequate.<sup>16</sup>

4. Where relief under Art. 226 is discretionary, it may be refused where the party has already brought the matter before High Court under another proceeding, e.g., a reference under s. 8 (5) of the Income-tax Investigation Commission Act, 1947;<sup>15, 17</sup> or where after obtaining a Rule in his application for *certiorari*, the applicant, without the knowledge of the Court, goes to pursue an alternative remedy (say, an administrative appeal) which is still pending at the time of the order in the proceeding for *certiorari*.<sup>18</sup>

#### How far *certiorari* can be barred by statute.

1. The remedies under Arts. 32 and 226 being constitutional remedies, cannot be barred by statute. Thus, the Legislature cannot prevent the Court from determining, in a proceeding under these Articles, whether the provisions of a statute have been complied with.<sup>19</sup>

2. Even when the law confers 'final' power upon a quasi-judicial tribunal or authority to decide a matter, so that the decision of the tribunal cannot be challenged in a court of law, *certiorari* shall lie to quash the decision if (i) it is without jurisdiction; or (ii) if there is an error apparent on the face of the record, or (iii) there is any irregularity in the procedure adopted which goes contrary to the principles of natural justice.<sup>20</sup>

3. This does not mean, however, that the Legislature cannot confer upon the Executive or other authority the final power to determine certain facts. When the Legislature, in its wisdom, confers such final power upon an authority, the Courts cannot, in a proceeding for *certiorari*, question the wisdom of the Legislature or reopen such a conclusive finding of fact.<sup>21</sup>

#### Who may apply for *certiorari*.

1. In *Chiranjit Lal's case*,<sup>21</sup> it was generally stated that except in the case of a proceeding for *habeas corpus*, none but the person whose rights have been affected can apply under Art. 32.

2. There is no doubt that a 'person aggrieved' by the impugned order shall be entitled to apply. The order need not be expressly adverse to the Petitioner in order to make him a 'person aggrieved'.<sup>22</sup> Thus, where out of several applicants, the permit (being the only one to be granted) is issued to one of them, all the others are persons aggrieved by the order granting the permit.<sup>23</sup> The fact that such person does not object at a particular stage is not sufficient to reject his petition for *certiorari*, the principle being whether he has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered.<sup>24</sup>

But *certiorari* will not be granted in favour of—

(i) A person at whose instance or in whose favour the impugned order has been made.<sup>25</sup>

(ii) A person who never applied for a permit cannot be regarded as a person who was 'aggrieved' by an order granting it to another person.<sup>26</sup>

16. *Subramania v. Revenue Divisional Officer*, A. 1956 Mad. 454 (457).

17. *National Coal Co. v. Dave*, A. 1956 Pat. 294 (297).

18. *Ray & Co. v. I. T. O.*, A. 1959 Cal. 131 (140).

19. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (528).

20. *Parry & Co. v. Commercial Employees' Assoc.*, (1952) S.C.R. 519.

21. *Chiranjit Lal v. Union of India*, (1952-54) 2 C.C. 10 (12); (1950) S.C.R. 89.

22. *Cj. Ebrahim v. Custodian-General*, (1952) S.C.R. 696 (706-7); *Abdul Masid v. State of Madras*, A. 1957 Mad. 551.

23. *S. M. Transport v. Ramon & Ramon*, A. 1961 Mad. 180 (184) F.B.

24. *Jabalpur Panchayat v. Jabalpur E. S. Co.*, A. 1962 M.P. 172 (175).

25. *Blumerg v. R. T. A.*, A. 1962 All. 145 (147).



3. Some High Court decisions<sup>1,2</sup> suggested that a person who was not a party to the proceeding before the inferior tribunal was not entitled to apply for *certiorari* to quash an order which was without jurisdiction.

But the better view appears to have been taken in other decisions<sup>3-6</sup> that if the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy of *certiorari* as may such private citizen who suffers peculiar injury by reason of a judgment or order in excess of jurisdiction. In short, any member of the public, who has not disentitled himself by his conduct, may draw the attention of a superior Court to an order passed by a subordinate tribunal being manifestly illegal or *ultra vires*,<sup>3,4</sup> for it is the duty of the superior Court to quash such order.

On the same principle, an elector may apply for *certiorari* to quash an order of an Election Tribunal on the ground that it is without jurisdiction even though the unsuccessful candidate makes no complaint.<sup>5,6</sup>

4. But a distinction is made between a case where an application is made by a stranger and a case where the application is made by the party aggrieved:

(a) If the Court is moved by a member of the public having no personal or particular interest with regard to the subject-matter, the granting of the writ would be entirely within the discretion of the Court.<sup>4,5</sup>

(b) Where, however, the Court is moved by the party aggrieved by the order of the inferior tribunal, the writ will be issued *ex debito justitiae*, unless the party has disentitled himself to the relief by reason of his conduct.<sup>5</sup>

#### Whether an association can apply.

1. The general rule is that an association has no right to apply for *certiorari* where the impugned order affects its members personally<sup>7a</sup> and does not affect the purposes of the association<sup>7</sup> itself.

2. But since in an industrial dispute under the Industrial Disputes Act, 1947, the workmen are represented through their union,<sup>8</sup> the union is entitled to move against an award of the tribunal.<sup>9</sup>

#### Parties to a proceeding for certiorari.

1. The following are necessary parties to a proceeding for *certiorari*:

(a) The inferior tribunal or authority against whose order relief is sought.<sup>10</sup>

(b) Any other authority in whose possession the record remains;<sup>11</sup>

(c) Any person who is interested in maintaining the regularity of the proceedings out of which the petition arises or would be affected by the decision of Court.<sup>10</sup>

(d) Where the order of an authority is subject to confirmation by another body, the latter is not a necessary party, for, on confirmation, it is the order of the initial authority which becomes effective.<sup>10</sup>

1. *Sisir Kumar v. Majumdar*, A. 1955 Cal. 309.

2. *R. T. A. v. Kashi Prasad*, A. 1962 All. 551 (560).

3. *Asst. Collector v. Sagarimal* (1952) 56 CWN. 452 (469).

4. *Damodar v. Naranathavan*, A. 1955 Achen 464 (169).

5. *Isardas v. Collector of Madras*, A. 1959 Mad. 528.

6. *Sasamma Sutar Works v. State*, A. 1955 Pat. 49.

6a. *Bangalore Hotel Owners' Assn. v. Dt. Magistrate*, A. 1951 Mys. 14.

7. *Barrackpore Bus Syndicate v. Sirajuddeen*, A. 1957 Cal. 444.

8. *Ramkrishna v. Industrial Tribunal*, A. 1951 SC 857.

9. *W. B. Press Workers v. Art Union*, A. 1952 Cal. 649.

10. *Udit Narain v. Bd. of Revenue*, A. 1963 SC 785 (788-9).

11. *Hari Vishnu v. Syed Ahmad*, (1955) 1 S.C.R. 1104.

But the position would be otherwise where the final order has been passed on review or appeal by a superior authority. No relief can be given to the Petitioner in such a case if the superior authority has not been impleaded or is outside the jurisdiction of the High Court.<sup>12</sup>

2. Apart from the above, there may be 'proper parties' that is to say, persons whose presence is not required to make the order effective, but in whose absence, there cannot be a complete and final decision of the question involved in the proceeding. The question of making such a person a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may *suo motu* approach the court for being impleaded therein.<sup>13</sup>

### Practice and Procedure.

\* When a superior Court issues a Rule on an application for *certiorari* it is incumbent on the inferior Court or tribunal, to whom the Rule is addressed, to produce the entire records before the Court along with the return.<sup>14</sup>

### Scope of Proceeding.

1. Since the function of the superior Court, in a proceeding for *certiorari* is supervisory and not appellate, the superior Court will not review the *intra vires* findings of the inferior tribunal, even if they are erroneous.<sup>15</sup>

If follows that in a proceeding for *certiorari*, it would not normally be open to a party to challenge the findings of fact made by the inferior tribunal,<sup>16</sup> or to ask for a reappraisal of the evidence.<sup>16</sup>

2 On the other hand,—

A superior Court in India can issue a writ in the nature of *certiorari* in all appropriate cases and in an appropriate manner, free from the technicalities of English law, so long as the fundamental principles which govern the exercise of this jurisdiction are adhered to.<sup>17</sup>

### Scope of order.

1. The general rule is that—

(a) In issuing the writ of *certiorari*, the Court does not sit as a Court of appeal over the judicial or quasi-judicial authority. The Court is only concerned with the question whether the Tribunal has or has not acted without jurisdiction or contravened the principles of natural justice in the exercise of its jurisdiction. If it has done either, the jurisdiction and power of the Court issuing *certiorari* is simply to quash the order.<sup>18</sup>

(b) However wide the jurisdiction, the High Court cannot, under Art. 226, convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.<sup>19</sup> In granting a writ of *certiorari*, the superior Court demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal.<sup>17, 19</sup>

12. *Cf. Shitram v. State of Bombay*, A. 1962 S.C. 670.

13. *Ghose Mal v. State of Delhi*, A. 1969 S.C. 65 (69).

14. *Satyamangam v. Mathuram*, A. 1961 S.C. 133 (136).

15. *Associated Cement Company v. Vyas*, A. 1960 S.C. 665 (669).

16. *Umarsahib v. Kadalarhar*, A. 1970 S.C. 61 (66).

17. *Banappa v. Nagappa*, A. 1964 S.C. 440.

18. *Veerappa v. Ramam*, (1952) S.C.R. 583 A. 1952 S.C. 192.

19. *Bhondre v. State of M. P.*, (1969) S.C. [C.A. 1039 (N)]/69, d. 25-4-69].

(c) It would be left to the Tribunal whether to hear the matter again or not.<sup>20</sup> It cannot be said that the inferior Tribunal ceases to have jurisdiction to proceed further according to law because the High Court has given no such direction.<sup>20</sup>

2. To the above rule, an exception has been engrafted by the majority of the Supreme Court in *Mahboob v. S.T.A.*,<sup>21</sup> in respect of cases where the discretion of the inferior tribunal is circumscribed by statutory provisions. In such a case, besides quashing the impugned order, the Court may issue a direction in the nature of *mandamus*, requiring the tribunal to comply with the requirements of the law, but the Court should not give further directions or make observations as to how the inferior tribunal was to act.<sup>22</sup>

### Whether the impugned order may be quashed partially.

1. The Supreme Court has held that the doctrine of severability which is applicable to a statute where its constitutionality is challenged may be extended to quasi-judicial orders.<sup>22-23</sup>

2. It has therefore, to be determined in each case whether the order is 'severable'.

I (a) Where only one or some of the persons affected by an order comes or come to the Court and it is possible to keep in tact the order except so far as the Petitioner or Petitioners are concerned, the Court may not set aside the order *in toto*, but quash it only so far as the Petitioner or Petitioners have been prejudiced.<sup>24</sup>

(b) Where an administrative tribunal has a discretionary power to renew a permit but the power is circumscribed by the statutory condition that the renewal must not be for less than a minimum specified period, which is not complied with by the impugned order the Court may quash only that part of the order which specifies the period of renewal and direct the tribunal to amend the order so as to comply with the statutory requirement.<sup>25</sup>

(c) Where the Petitioner combines a prayer for *mandamus* along with *certiorari*, the Court may grant *mandamus* in respect of a portion of the impugned order if it is severable, though *certiorari* to quash the order is refused.<sup>1</sup>

II If, however, it is not possible to sever the order, the Court must quash the order as a whole. Thus, the scheme of the Industrial Disputes Act being that a dispute should be finally settled by the Industrial Tribunal and its award should be binding on not only the actual parties before the Tribunal but also on all workers in the establishment, present and future, the Court must quash the *ultra vires* order as a whole and not merely as regards the Petitioner or Petitioners applying for *certiorari*.<sup>2</sup>

### Costs in a proceeding for Prohibition or Certiorari.

1. In the absence of Rules framed by the High Courts in this behalf, the English principles are being followed.

20. *Thekar v. Labour Appellate Tribunal*, A. 1957 Bom. 46.

21. *Mahboob v. S. T. A.*, A. 1960 S.C. 321 (327).

22. *Birendra v. State of M. P.*, (1968) S.C. [C.A. 1069 (N)/68, d. 25-4-69].

23. *Sampuranrai v. Collector of Customs*, A. 1958 S.C. 845: (1959) S.C.R. 291.

24. *Abdul Majid v. Nayak*, A. 1951 Bom. 440.

25. *Mahboob v. Mysore S. T. A.*, A. 1960 S.C. 321 (327).

1. *Sampuranrai v. Collector of Customs*, A. 1958 S.C. 845 (857); (1959) S.C.R. 291.

2. *Usman v. Labour Appellate Tribunal*, A. 1962 Bom. 443.

2. Usually costs are awarded to the successful applicant,<sup>3</sup> and against the unsuccessful applicant.<sup>4-7</sup>

3. But the Court may not award costs against the unsuccessful applicant in special circumstances, e.g., uncertainty of law.<sup>8-9</sup> In some cases costs have not been awarded even to the successful applicant,<sup>10</sup> e.g., because the law was uncertain and the authority was not to blame.<sup>11</sup>

4. As to the party liable for the costs,—in the absence of any misconduct on the part of the Tribunal, costs are awarded against the party who initiated the proceeding<sup>12</sup> and not against the Tribunal. But where such allegation is made and the Tribunal unsuccessfully contests, costs may be awarded against the Tribunal also.<sup>13</sup>

5. Costs may be awarded against the party responsible for the proceeding in which the offending order was made, even though the Court is unable to issue a writ against it because it resides outside the court's jurisdiction.<sup>14</sup>

### Interference with a finding of fact.

1. Since the jurisdiction in *certiorari* is not appellate, it follows that a finding of fact, reached by an inferior court or tribunal, as a result of the appreciation of evidence, or an inference of fact from the materials before it,<sup>15</sup> cannot be reopened in a proceeding for *certiorari*,<sup>16</sup> on the ground that the evidence relied upon is insufficient<sup>16</sup> or that the appreciation of the evidence by the tribunal is wrong,<sup>16</sup> or that some evidence was not duly considered or specifically referred to in its decision.<sup>16</sup>

2. But *certiorari* may issue against a finding of fact of an inferior court or tribunal if it is shown that—

(a) In recording the finding, the Court has refused to admit admissible evidence;<sup>16</sup> or

(b) Erroneously admitted inadmissible evidence;<sup>16</sup>

(c) The finding is based on no evidence, which would be regarded as a species of an error of law;<sup>16</sup>

(d) The finding is such that no reasonable man would have arrived at it on the materials before it.<sup>15, 16</sup>

### Appeal.

1. Appeal lies to the Supreme Court against an order in a proceeding for *certiorari* under Arts. 132—136 as may be applicable.<sup>17</sup>

2. Proceedings by way of *certiorari* are not "of course". Hence, the Supreme Court would not interfere with a dismissal of a petition for *certiorari* by the High Court unless the Supreme Court is satisfied that there has been a failure of justice.<sup>12</sup>

3. *Ebrahim v. Regional Transport Authority*, I.L.R. (1950) Mad 571; *Raghunath v. State T. A.*, A. 1951 Orissa 81, *Suresh v. Himangshu*, (1951) 55 C.W.N. 605.
- 4-7. *Union of Workmen v. R. S. A. Co.*, A. 1951 Assam 96, *Beary v. Hssan*, (1951) 6 D.L.R. 96 (Mad.).
8. *Mohsinali v. State of Bombay*, A. 1951 Bom 303.
9. *Makhan v. Chatterjee*, A. 1955 Cal. 72 [statute being recent, had not been authoritatively interpreted before].
10. *Shankarlal v. Addl. Dy. Commr.*, (1951) 6 D.L.R. 108 (Nag.).
11. *Calcutta Discount Co. v. I. T. O.*, A. 1952 Cal. 606 (610).
12. *Gangadhar v. I. T. Investigation Commr.*, A. 1955 All. 515 (518).
13. *Ahmedali v. Lalkaka*, A. 1954 Bom. 33.
14. *Gangadhar v. I. T. I. Commr.*, A. 1955 All. 515.
15. *Railway Board v. Singh*, A. 1959 S.C. 906 (968).
16. *Yakub v. Radhakrishnan*, A. 1954 S.C. 477.
17. *Ch. N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 233 (233); *A. M. Allison v. Sen*, A. 1957 S.C. 227 (231).

3. Thus, the Supreme Court has set aside an order granting *certiorari* on the ground, *inter alia*, that—

The High Court's decision that there had been a failure of natural justice in the proceeding before a quasi-judicial tribunal is erroneous.<sup>17</sup>

4. On the other hand, the Court has set aside the order of a High Court *refusing certiorari*—

Where the High Court dismissed *in limine* an application under Art. 226 for quashing an order of a Tribunal which was found by the Supreme Court to be without jurisdiction.<sup>18, 23</sup>

## QUO WARRANTO

### Quo Warranto, nature of.

*Quo Warranto* is the remedy or proceeding whereby the State inquires into the legality of the claim which a party asserts to an office or franchise, to oust him from its enjoyment if the claim be not well founded.<sup>1-14</sup>

### I. Conditions for the issue of Quo Warranto in relation to public office.

A writ of *Quo Warranto* will issue in respect of an office only if the following conditions are satisfied:

I. The office must be *public*.<sup>15, 16, 1-14</sup> It will not lie in respect of office of a private charitable institution or of a private association. Thus, the Managing Committee of a private school, even though a small section of the public, viz., the students and their guardians are interested in the school, is not an office of a public nature for the purpose of *Quo Warranto*.<sup>17</sup> The test of a public office is whether the *duties* of the office are public in nature.<sup>18</sup>

II. The office must be *substantive*<sup>1-14</sup> in character, i.e., an office independent in title.<sup>15</sup>

III. It must have been created by *statute* or by the Constitution itself.<sup>17</sup> Thus,

(a) The writ will *not* lie against the Managing Committee, not created by any statute, or by Rules having statutory force, of a private educational institution.<sup>17</sup>

(b) On the other hand, the writ would issue in respect of the offices of—

(i) Officers appointed under the Calcutta Municipal Act;<sup>18</sup>

(ii) Members of a local or municipal body, created by statute;<sup>19, 21</sup>

(iii) Members of any statutory body, such as the Devaswom Board;<sup>23</sup>

15-25. *Punjab National Bank v. Sri Ram*, A. 1957 S.C. 276 (278).

1-14. *University of Mysore v. Govinda*, A. 1965 S.C. 41 (494).

15. *Nityanand v. Khalil*, A. 1961 Punj. 105 (109).

16. *Ramachandran v. Alagiriswami*, A. 1961 Mad. 450 (455; 467).

17. *Amarendra v. Narendra*, A. 1953 Cal. 114.

18. *Ashgar Ally v. Birendra*, (1945) 49 C.W.N. 658.

19. *Haran v. State of W. B.*, A. 1952 Cal. 907.

20. *Madhalla v. Abdul*, A. 1953 All. 193; *Brijnath v. State of U. P.*, A. 1965 All.

21. *Shyambhushan v. Municipality*, A. 1965 S.C. 314.

22. *Govinda v. Balakrishna*, A. 1955 T.C. 42.

- (iv) Officers of a University created by statute;<sup>23</sup>
- (v) Speaker of a House of the Legislature;<sup>24</sup>
- (vi) Advocate-General;<sup>25</sup> or Government Pleader;<sup>1</sup> or Public Prosecutor;<sup>2</sup>
- (vii) Member of a Legislature;<sup>2</sup>
- (viii) Judge of a High Court;<sup>3</sup> District Judge;<sup>4</sup>
- (ix) Vice-Chancellor of a University;<sup>5</sup>
- (x) Minister;<sup>6</sup>
- (xi) Statutory Tribunal;<sup>7</sup>

IV. The respondent must have asserted his claim to the office.

The application is premature until the respondent has assumed the office<sup>8</sup> or asserted his claim to it.

On the other hand,—

\* Whether the respondent has usurped the office is a question of substance and *Quo Warranto* may issue even though the respondent has not assumed the name of the office.<sup>9</sup>

V. The respondent is not legally qualified<sup>10-11</sup> to hold the office or to remain in the office,<sup>12</sup> or some statutory provisions have been violated in making the appointment,<sup>10</sup> which cannot be cured as an 'irregularity'.<sup>10a</sup>

#### When Quo Warranto may be refused.

1. *Quo Warranto* is a discretionary remedy which the Court may grant or refuse according to the facts and circumstances of each case.<sup>13</sup> Thus, the Court may refuse it—

(a) Where it would be vexatious,<sup>14-15</sup>

(b) Where it would be futile in its results,<sup>12</sup> e.g., where the respondent has ceased to hold the office, the appointment to which has been questioned in the proceeding.<sup>15</sup>

But where the respondent has been appointed to another officiating post and is likely to revert to the office in question, the petition cannot be thrown out as not maintainable.<sup>15</sup>

23. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (62). [The Calcutta decision in *S. B. Ray v. P. N. Banerjee*, (1967) 72 C.W.N. 50 (64) that the Principal of the University Law College, appointed under the University Act, 1951, did not hold a public office, it is submitted, appears to have been arrived at upon a misreading of *Fertis on Extraordinary Legal Remedies*, p. 165].
24. *Nesamony v. Varghese*, A. 1952 T.C. 66.
25. *Karkare v. Shinde*, A. 1952 Nag. 330.
1. *Ramachandran v. Adagirisami*, A. 1961 Mad. 450 (460), *Mohambaram v. Jayavelu*, A. 1970 Mad. 63 (67).
2. *In re Chakkarai*, A. 1953 Mad. 96; *Despande v. State of Hyderabad*, A. 1955 Hyd. 396.
3. *Chandra Prakash v. Chaturbhuj*, (1969) S.C. [C.A. 2331/68, 18-12-69]; *Q.-E. v. Gangaram*, (1894) 16 All. 136. [But the acts of a *de facto* Judge cannot be collaterally challenged: *Parameswara v. State Prosecutor*, A. 1951 T.C. 45; *Sri Hanuman Foundries v. Hem Ranjan*, (1965) App No 124 of 1963 (Cal.).]
4. *Kureswar v. State*, A. 1969 A. & N. 128.
5. *Chaturvedi v. Chatterjee*, A. 1959 Raj. 260; *Kashinath v. R. K. Nehru*, (1965) All. [Statesman, 4-12-65, p. 1].
6. *Cf. Har Shoran v. Chandra Bhan*, A. 1962 All 301 (307).
7. *Statesman v. H. R. Deb*, A. 1968 S.C. 1495 (1500).
8. *Pundlik v. Mahadeo*, A. 1959 Bom. 2.
9. *In re Banwarilal*, (1944) 48 C.W.N. 766.
10. *University of Mysore v. Govinda*, A. 1965 S.C. 491 (494).
- 10a. *Hanuman Foundries v. Hem Ranjan*, (1967) 15 F.L.R. 122 (147).
11. *Chandra Prakash v. Chaturbhuj*, (1969) S.C. [C.A. 2331/68, d. 18-12-69].
12. *Cf. Pentiah v. Muddala*, (1961) 2 S.C.R. 295 (311).
13. *Sukhdeo v. Mahadevchand*, A. 1961 Pat. 475 (479).
14. *Mohichandra v. Sory*, A. 1953 Amam 12; *Karkare v. Shinde*, A. 1952 Nag. 330.
15. *Rameshwar v. State of Punjab*, A. 1961 S.C. 816 (818).

(c) Where there has been an *irregularity* in the election to an office which has not affected the result of the election and there is no bad faith;<sup>16</sup>

(d) Where the result of granting a *Quo Warranto* in the matter of election to a corporate office would be to disturb the peace and quiet of the Corporation,<sup>17</sup> unless the illegalities brought to the notice of the Court are grave and manifest, as distinguished from the breach of technical rules.<sup>18</sup>

II. But considerations such as the following, are no grounds for refusing *Quo Warranto*, once the Court is satisfied that the respondent is a usurper to the public office in question:

(a) That the respondent has discharged the functions of the office for any length of time.<sup>19, 20</sup> Delay is, thus, no ground for bringing an application for *quo warranto*, if the respondent is still in office. The reason is that—

"If the appointment of an officer is illegal, every day he acts in that office a fresh cause of action arises, there can, therefore, be no question of delay in presenting a petition for *Quo Warranto* in which his very right to act in such a responsible post has been questioned"<sup>16</sup>

But in the case of a Magistrate having been appointed to an Industrial Tribunal, the Supreme Court seems to have shown reluctance to interfere on the ground that the person had exercised the functions of the office for some years, even though the Court came to hold that the expression 'judicial office' in s. 7(2)(d) of the Industrial Disputes Act referred to members of the 'civil judiciary'.<sup>21</sup>

(b) Acquiescence is no ground for refusing *Quo Warranto* in case of appointment to a public office of a disqualified person, though it may be a relevant consideration in the case of election.<sup>20</sup>

(c) That the respondent has resigned or has been transferred from the office subsequent to issue of the Rule.<sup>20, 22</sup> The case of expiry of the term of office may be different.<sup>23</sup>

### **Quo Warranto, how far barred by alternative remedy.**

1. It has been stated above that a statutory remedy,<sup>24</sup> e.g., an election petition<sup>25</sup> dispaces the writ of *Quo Warranto*, except where the objection taken falls outside the statutory remedy,<sup>21</sup> e.g., a question as to the constitution of the Municipality itself,<sup>1</sup> or as to the invalidity of the electoral roll on the basis of which the election was held.<sup>2</sup>

2. Since the insertion of Art 124(2A) and 217(3), a proceeding for *Quo Warranto* will no longer lie against a Judge of the Supreme Court

16. *B. K. Sen v Bhattacharya*, (1959) 59 C.W.N. 590 (610).

17. *Mohichandra v. Secy., Local Self-Govt.*, A. 1953 Assam 12.

18. *Bhairdal v State of Bombay*, A. 1954 Bom. 116

19. *Kashinath v. State of Bombay*, A. 1954 Bom. 41; *Sanu Sampat v. Jalgaon Municipality*, I.L.R. (1958) Bom 113; *Bairnath v State of M. P.*, A. 1965 All. 151; *S. B. Ray v. P. N. Banerjee*, (1967) 72 C.W.N. 50 (55).

20. *Sri Hanuman Foundries v. Hem Ranjan*, (1967) 15 F.L.R. 122 (148) Cal.

21. *Statesman v. H. R. Deb*, A. 1968 S.C. 1495 (1500).

22. *State of Rajasthan v. Mewar Mills*, (1964) S.C.R. 1129 (1130); *Rameswar v. State of Punjab*, A. 1961 S.C. 816 (818); *R. v. Francis*, (1852) 21 L.J.Q.B. 304; *R. v. Warlow*, (1813) 2 M. & S. 75; *R. v. Blizard*, (1856) 1 L.R.Q.B. 55.

23. *S. B. Ray v. P. N. Banerjee*, (1967) 72 C.W.N. 50 (67); *Puranlal v. P. C. Ghosh*, A. 1970 Cal. 118 (119).

24. *Chattervedi v. Chatterjee*, A. 1959 Raj. 250.

25. *Bhairdal v. State of Bombay*, A. 1954 Bom. 116.

1. *Quaraballi v. Govt. of Rajasthan*, A. 1960 Raj. 152 (158, 166).

2. *Gundit Singh v. Employees' Corpn.*, A. 1961 Punj. 188 (1).

or a High Court on the ground that he has crossed the retiring age specified by the Constitution.<sup>3</sup>

3. Where there is a domestic jurisdiction, the Court may refuse to entertain a proceeding for *Quo Warranto* until the domestic remedy is exhausted.<sup>4</sup>

### Who may apply for Quo Warranto.

Where the application challenges the validity of an appointment to a public office, it is maintainable at the instance of any person, whether any fundamental or other legal right of such person has been infringed or not.<sup>5, 6</sup> provided he is not a man of straw set up by someone else.<sup>9, 10</sup> In other words, if the Court is of the view that in the interest of the public the legal position with respect to the alleged usurpation of a public office should be judicially declared, it can issue a writ of *quo warranto* at the instance of any member of the public who acts *bona fide* and is not a mere pawn in the game having been set up by others.<sup>10, 11</sup> The reason is that in a proceeding for *Quo Warranto*, the applicant does not seek to enforce any right of his as such, nor does he complain of non performance of any duty towards him. What is in question is the *right of the non-applicant* to hold the public office.<sup>7</sup>

Hence, a private relator,<sup>12</sup> such as an ordinary citizen,<sup>13</sup> can apply for *Quo Warranto* to challenge an appointment to a public office even though the applicant himself is not a candidate for that office nor has any other personal interest in such appointment.<sup>11</sup> Thus, not only a member but also a rate-payer can challenge the right of a person to sit as a member in a municipal body.<sup>14</sup>

### Form of order.

In a proceeding for *Quo Warranto* under Art. 226 of our Constitution, the High Court may make the following orders:

(i) The usual order would be an order of ouster of the respondent,—the person holding the office in question.<sup>10, 15</sup>

(ii) It may issue an injunction restraining the respondent from discharging any of the functions, rights or duties of the office in question.<sup>16</sup>

(iii) In proper cases, it may even declare the office to be vacant,<sup>20</sup> or allow the person entitled to occupy the office.<sup>17</sup>

(iv) But no order of refund of salary or the like will be made unless the Petitioner has a statutory right to recover and the Respondent is under

3. *J. P. Mitter v. Chief Justice*, A. 1965 S.C. 961

4-6. *Bimanchandra v. Governor, W. B.*, (1952) 56 C.W.N. 651 (658); *Surendra v. Gopal*, A. 1952 Orissa 358.

7. *Karkare v. Sherde*, A. 1952 Nag. 330

8. *Venkatarama v. Sivarama*, A. 1961 A.P. 251 (252).

9. *Deshpande v. Hyderabad State*, A. 1953 Hyd. 36 (38)

10. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (62).

11. *Shivaramakrishnan v. Arumugha*, A. 1957 Mad. 17, overruling *Chakkarai*, in re, A. 1953 Mad. 96.

12. *Nesamony v. Varghese*, A. 1952 T.C. 66.

13. *Masekulla v. Abdul*, A. 1953 All. 193.

14. *Shivaramakrishnan v. Arumugha*, A. 1957 Mad. 17.

15. *Vishwanath v. State*, A. 1957 Raj. 75; *Nityanand v. Khahl*, A. 1961 Punj. 105; *Venkatarama v. Sivarama*, A. 1961 A.P. 250 (252).

16. *Karkare v. Sherde*, A. 1952 Nag. 330; *Gurdit v. Employers' S. I. Corpn.*, A. 1961 Punj. 105 (109).

17. *University of Mysore v. Govinda*, A. 1965 S.C. 491

18. *Himmaman Foundries v. Hem Ranjan*, (1967) 15 F.L.R. 122 (152).

19. *C. Kashinath v. State of Bombay*, (1953) 8 D.L.R. 226 (229) Bom.; *Masekulla v. Abdul*, A. 1953 All. 193.

20. *Lalit v. Vishwanath*, A. 1952 Cal. 898.



a statutory duty to refund,<sup>21</sup> nor can it be used to quash acts already done by a usurper.<sup>21a</sup>

## II. Conditions for the issue of 'Quo Warranto' in relation to elections.

It has already become clear that *Quo Warranto* lies to test the validity of election (or nomination) to a 'public' office, *e.g.*, in a municipal body.<sup>22-23</sup>

1. In exercising this extraordinary power relating to such elections, the Court is usually guided by the following considerations:

(a) The Court must be reluctant to interfere with elections except on the clearest and strongest grounds. An election is a luxury which a democracy cannot be expected to indulge in too frequently, and the Court should be loath to interfere with the decision of the people except where—

(i) the election was held without any authority of law,<sup>24</sup> as distinguished from non-statutory instructions<sup>25</sup>

(ii) there was any corrupt practice which had materially affected the result, of the election, or

(iii) there was such an irregularity as had resulted in the people not having been able to express their views properly,<sup>26</sup> or

(iv) the election was held on the basis of an electoral roll prepared in contravention of statutory provisions.<sup>27</sup> Where the electoral roll is *illegal*,<sup>1</sup> and not merely defective<sup>23</sup> or irregular,<sup>1</sup> *Quo Warranto* shall issue.<sup>2</sup>

(b) There are other special considerations influencing the Court in the exercise of its discretion where an election is liable to be set aside.

Thus, the Court may refuse to interfere—

(a) Where there has been an *irregularity* in the election to an office which has not affected the result of the election and there is no bad faith.<sup>3</sup>

(b) Where the result of granting a *Quo Warranto* in the matter of election to a corporate office would be to disturb the peace and quiet of the Corporation,<sup>4</sup> unless the illegalities brought to the notice of the Court are grave and manifest,<sup>5</sup> as distinguished from the breath of technical rules.<sup>6-7</sup>

(c) Where the non-applicant is not *disqualified* to hold the office and may be elected at a fresh election, the Court may not issue *quo warranto* on the mere ground that the election was defective.<sup>8</sup>

(d) Where the motive of the relator (*i.e.*, applicant) is suspicious.<sup>9</sup>

(e) Where the petitioner is guilty of laches.<sup>10</sup>

21. *S. B. Roy v. P. N. Banerjee*, (1967) 72 C.W.N. 50 (69).

21a. *Purandari v. P. C. Ghosh*, A. 1970 Cal 118 (119).

22. *Nityanand v. Khalil*, A. 1961 Punj 105.

23. *Hafiz v. State*, A. 1967 M.P. 257 (259).

24. *Cf. Kashinath v. State of Bombay*, A. 1954 Bom 41.

25. *Bhairulal v. The State*, I.L.R. (1954) Bom 104 (116).

1. *Mahadeo v. Bisan*, A. 1953 Nag 166; *Brakhamden v. Narsinh*, (1959) 38 Pat. 1133; *Dev Prakash v. Babu Ram*, A. 1961 Punj. 429 (F.B.); *Sudarsan v. Dt. Collector*, A. 1964 A.P. 421.

2. *Chief Commr. v. Radhey Shyam*, A. 1957 S.C. 304 (308), *A. R. Karmarkar v. Basirhat Municipality*, A. 1959 Cal 548; *Kanglu v. Chief Ex-Officer*, A. 1965 Nag. 49 (F.B.).

3. *E. K. Sen v. Bhattacharya*, (1959) 63 C.W.N. 590 (610).

4. *Mohichandra v. Secy., Local Self-Govt.*, A. 1955 Assam 12.

5. *Saranath v. Gopal*, A. 1952 Orissa 359 (374).

6. *Bhairul v. State of Bombay*, A. 1954 Bom. 116.

7. *Dev Prakash v. Babu Ram*, A. 1961 Punj. 429 (F.B.).

8. *Vandharaya v. Bhadama*, A. 1961 A.P. 250 (253).

9. *Bhattacharya v. State of Punjab*, A. 1960 Punj. 99 (104).

10. *Camal v. Bhattacharya*, A. 1953 Nag. 81 (88); *Hafiz v. State*, A. 1967 M.P. 1257 (1267).

(f) Where the applicant has acquiesced or concurred in the very act which he comes to complain of.<sup>10</sup> Thus,—

(i) Where the Petitioner seeking to object to the validity of the election of the respondent was himself a candidate at the election and came to the Court only after he was defeated, he cannot be allowed to challenge the validity of the election.<sup>10-11</sup>

(ii) But where the Petitioner stood as a candidate for the election but came to Court before the election was held, the writ cannot be refused on the ground of acquiescence.<sup>12</sup>

2. But considerations, such as the following, are no ground for refusing *Quo Warranto*, once the Court is satisfied that the respondent is a usurper to the public office in question:

(a) That the respondent has discharged the functions of the office for any length of time.<sup>13</sup>

(b) That the effect of the granting of the writ would be to dissolve the corporation.<sup>14</sup>

(c) That the application is a friendly proceeding<sup>15</sup> or that a stranger to the corporation was providing the means for carrying on the proceedings,<sup>16</sup> unless the motives of the applicant are suspicious.<sup>17</sup>

#### Who are necessary parties.

In the case of usurpation of a public office, the person who claim the exercise of the public office is the only proper defendant.<sup>18</sup> If others are joined, the misjoinder may not be fatal to the application, but no order can be passed on the application, unless the person who is sought to be ousted is made an Opposite Party by order of the Court. It is not enough that such person is acquainted with the facts of the case or has put in an affidavit in the proceeding other than as a party.<sup>19</sup>

If, however, the object of the application is to obtain a declaration that the approval given by a third party is invalid, the application is not maintainable without making such party, a party to the application.<sup>20</sup>

#### Jurisdiction, whether can be barred by statute.

As in the case of the other writs under Art. 226, the jurisdiction to issue *Quo warranto* cannot be barred by statute.<sup>21</sup>

At the same time, the Supreme Court has<sup>21</sup> held that where the Legislature bars inquiry into the validity of an order of a statutory tribunal on the ground of a defect in its constitution or appointment, though it cannot shut out an inquiry for the purposes of a writ of *quo warranto* if there is a 'clear usurpation', in an 'unclear' case the intent of the Legislature is entitled to 'great weight', and gave its verdict against ouster of jurisdiction because—

"The Legislature has created the conditions of appointment and with its last voice has shut out inquiry"<sup>21, 22</sup>

11. *Raghuni v. Dist. Magistrate*, A. 1959 Pat 7

12. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (63)

13. *Kashinath v. State of Bombay*, A. 1954 Bom 41

14. *Bhairulal v. The State*, I.L.R. (1954) Bom. 104 (116)

15. *B. K. Sen v. Bhattacharya*, (1959) 63 C.W.N. 590 (610).

16. *Mohichandra v. Secy., Local Self Govt.*, A. 1953 Assam 12

17. *Surendra v. Gopal*, A. 1952 Orissa 359 (374).

18. Ferris, Extraordinary Remedies, p. 148.

19. *Mahi Chandra v. Secy., Local Self-Govt.*, A. 1953 Assam 12.

20. *Amarendra v. Narendra*, (1952) 56 C.W.N. 449.

21. *Statesman v. H. R. Deb*, A. 1968 S.C. 1495 (1499).

22. It is submitted, with respect, that the logic is not very clear. If the Court shows any the least regard for the will of the Legislature in barring inquiry, so far as *Quo Warranto* is concerned, that would be the same thing as allowing

### Practice and Procedure.

1. Rules of the Orissa, Mysore, Rajasthan, Patna and Assam High Courts require that the application should be made to a Division Bench.

On the other hand, the Rules of the Trav. Cochin, Madras, Nagpur, Allahabad, Andhra, Bombay High Courts prescribe that such application shall be heard by a Single Judge unless the Single Judge otherwise directs.

Under the Rules of the Calcutta High Court, such application is to be heard by a Single Judge.

2. Where, in a proceeding for *mandamus*, it appears that the Respondents are holding public posts to which they were appointed contrary to the law governing such appointment, the Court cannot refuse to make appropriate orders simply because *Quo Warranto* has not been specially prayed for.<sup>22a</sup>

**227. (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.**  
Power of superintendence over all courts by the High Court.

**(2) Without prejudice to the generality of the foregoing provision, the High Court may—**

- (a) call for returns from such courts;**
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and**
- (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.**

**(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:**

**Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.**

**(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.**

### Scope of and conditions for interference under Art. 227.

I. The power of general superintendence conferred by Art. 227 involves a duty on the part of the High Court to keep all courts and tribunals within its territorial jurisdiction "within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner".<sup>22-24</sup> It is now settled that this power is at least as wide as that under s. 107 of the Government of India Act, 1915.<sup>24</sup>

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*Quo Warranto* to be barred by statute. In this case [A 1968 S.C. 1495 (1500)], eventually the Court held that "the case was not fit for interference by a writ in view of the provisions of s. 9 of the Act (i.e., the section barring inquiry)". If such relaxation on the part of the Court is not permissible in the case of the other writs, how can it be permissible in the case of *Quo Warranto*? [For contrary reasoning, see *Haruman Foundries v. H. R. Deb*, (1967) 15 F.L.R. 122 (p. 153, para. 147)].

<sup>22a</sup> *State of Mysore v. Chandrasekhara*, A. 1965 S.C. 532 (537-8).

<sup>23</sup> *Umarrakab v. Kadalaskar*, A. 1970 S.C. 61 (65).

<sup>24</sup> *Warren v. Amarnath*, (1954) S.C.R. 666; *Satyamaram v. Mallikarjun*, A. 1960 S.C. 137.

This means that the High Court can interfere in cases of—

- (a) Erroneous assumption or excess of jurisdiction; <sup>25, 2</sup>
- (b) Refusal to exercise jurisdiction; <sup>1, 4</sup>
- (c) Error of law apparent on the face of the record, <sup>5, 6</sup> as distinguished from a mere mistake of law; <sup>6</sup> or error of law relating to jurisdiction. <sup>4</sup>
- (d) Violation of the principles of natural justice. <sup>8, 7</sup>
- (e) Fraud on the part of the prosecutor. <sup>5</sup>
- (f) Arbitrary or capricious exercise of authority, <sup>1</sup> or discretion. <sup>6</sup>
- (g) Arriving at a finding which is perverse or based on no material. <sup>2</sup>

II. But—

1. The High Court's power of revision under Art. 227 of the Constitution would be restricted to interference in cases of *grave dereliction of duty or flagrant violation of law*, <sup>7</sup> and would be exercised most sparingly, <sup>8</sup> in cases where *grave injustice* would be done unless the High Court interferes. <sup>7</sup> It cannot be used as an appellate, <sup>10</sup> or revisional power. <sup>10, 11</sup>

2. This power does not vest the High Court with any unlimited prerogative to correct all species of hardship <sup>14</sup> or wrong decisions. <sup>6, 7</sup>

Thus, where an appellate authority, having ample revisional authority, quashed a decision of an inferior authority which was without jurisdiction, the order of the appellate authority would not be set aside under Art. 227, merely on the ground that the appeal was incompetent. <sup>13</sup>

3. The power would not be exercised to correct an error of fact or of law, <sup>6, 11</sup> not being an 'error of law apparent on the face of the record', <sup>11</sup> or an 'irregularity or illegality of procedure', unless such error affects the jurisdiction of the inferior tribunal, <sup>1</sup> or involves a breach of the principles of natural justice, <sup>2, 12</sup> or to reappraise the evidence on which the conclusion of the tribunal is based, <sup>12</sup>

4. Nor will the High Court, in exercise of this power, substitute its own judgment for that of the inferior court or tribunal, whether on a question of fact, <sup>6</sup> or of law <sup>6</sup> or interfere with the *intra vi* exercise of a discretionary power, <sup>11</sup> unless it is 'arbitrary or capricious', <sup>1</sup> or unless there was no evidence *at all* on which the tribunal could have come to the conclusion he did. <sup>13</sup>

### Refusal by an inferior tribunal to follow the law declared by the High Court.

Though there is no specific provision in the Constitution, corresponding

25. *Waman v. Sukreshna*, (1962) SC [CA 56 61]

1. *Jalaluddin v. Jalaluddin*, (1962) SC [CA 62, 61] *Lonand Gram Panchayat v. Ramgiri*, A. 1968 SC. 222 (223)

2. *Nibaran v. Mahendra* A. 1961 SC 1895

3. *Dahya Lal v. State of Maharashtra*, A. 1961 SC 1320 (1331).

4. *Provincial Transport Service v. State Industrial Court*, A. 1963 SC. 114; *State of Gujarat v. Vakhatsinghji*, A. 1968 SC. 1481 (1489)

5. *Warjam v. Amarnath*, (1954) SC A 334 (338)

6. *Satyamnarayana v. Mallikarjuna*, A. 1960 SC 137 (142).

7. Cf. *D. N. Banerjee v. Mukherjee*, (1963) SC R 302 (304)

8. *Manmatha v. Emp*, (1932) 37 C.W.N. 201

9. *Santosh v. Mool Singh*, A. 1958 SC. 312

10. *Bhutanath v. State of W. B.*, (1969) 3 SCC 675 (677)

11. *Rajkamal v. Indian Motion Picture Union* (1963) 7 F.I.R. 190 (SC) (1965) II S.C.W.R. 233.

12. *Dalmia Airways v. Sukumar*, A. 1951 Cal. 193

13. *Nilkant v. State of Bihar*, A. 1962 SC 1135 (1138).

14. *Nagendra v. Commr.*, A. 1958 SC. 398 (412)

15. *Umarsaheb v. Kadalaskar*, A. 1970 SC 61 (66).

16. *D. C. Works v. State of Saurashtra*, A. 1957 SC. 264.

to Art. 141, making the decision of the High Court binding on all subordinate courts and tribunals in the State, this is implicit in the power of supervision vested in the High Court by Art. 227.<sup>17</sup>

The High Court can, therefore, interfere under Art. 227 where an inferior court or tribunal refuses to follow its decisions in proceedings before it.<sup>17</sup>

### Art. 226 and 227.

1. The jurisdiction under the two Articles are separate and independent.

2. The power of judicial superintendence conferred by Art. 227 is not limited by the technical rules which govern the exercise of the power to issue writ of *certiorari* under Art. 226.<sup>18</sup> Thus,

(a) The power under Art. 226 can be exercised only on the application of a party and for the vindication of a legal right. But power under Art. 227 may be exercised by the Court also *suo motu*.<sup>19</sup>

(b) In a *certiorari* proceeding (under Art. 226), the High Court can only quash the decision of the inferior tribunal, but, under Art. 227, it can also issue further directions in the matter,<sup>19</sup> e.g., to take into consideration a piece of evidence which the tribunal has failed to consider.<sup>20</sup>

(c) In the same proceeding, therefore, the Court can quash an order under Art. 227 and also issue further directions which may not be available in a proceeding under Art. 226;<sup>21</sup> e.g., to make further inquiries after taking evidence,<sup>21</sup> or to dispose of the matter according to law.<sup>22</sup>

(i) In *Waryam v. Amarnath*,<sup>23</sup> the Supreme Court upheld an order under Art. 227 by which the Judicial Commissioner had not only quashed the orders of the District Judge and the Rent Controller but also allowed the application for ejectment brought by the respondent, giving the appellant three months' time to vacate the premises.

(ii) In *Hari Vishnu v. Syed Ahmed*,<sup>18</sup> the Supreme Court granted *certiorari* quashing the decision of the Election Tribunal which had rejected an election petition and, further, 'in exercise of the powers conferred by Art. 227', set aside the election of the first respondent and also directed the Election Commission to hold a fresh election.

3. On the other hand,—

The power of superintendence under Art. 227 is not greater than that under Art. 226, and under neither Article can the High Court review the discretion of the inferior tribunal except where it is capricious, perverse or *ultra vires*.<sup>24</sup>

4. The scope of the Articles being different, both Arts. 226 and 227 may be invoked in the same application<sup>2</sup>,<sup>1</sup> and the dismissal of an application under Art. 226 cannot operate as an absolute bar to an application under Art. 227.<sup>25</sup>

### The power under Art. 227 is discretionary.

1. The power under Art. 227 is exercised by the Court in its discre

17 *East India Commercial Co. v. Collector of Custom*, A. 1962 S.C. 1893

18 *Hari Vishnu v. Ahmad*, (1955) 1 S.C.R. 1104.

19 *Aidal Singh v. Karan Singh*, A. 1957 All. 414 (432).

20 *Workmen v. Nellikkai Estate*, A. 1963 Ker. 92.

21 *State of Gujarat v. Vakhutsinghji*, A. 1968 S.C. 1481 (1489).

22 *Bhatia Motor Service v. S. T. A.*, (1968) 1 S.C.W.R. 318 (320); *Kalyan Perplav Co-op Bank v. Dulhanbibi*, (1963) 2 S.C.R. 349; *Nivarti v. Dadatoo*, (1960) 1 S.C.W.R. 779 (786).

23 *Waryam v. Amarnath*, (1952-54) 2 C.C. 490; (1954) S.C.R. 566.

24 *Lonand Gram Panchayat v. Ramgiri*, A. 1968 S.C. 222 (223).

25 *Venkatanarayana v. Ramaswami*, A. 1955 Andhra 40.

1. *Cf. Banerjee v. Mukherjee*, (1952-54) 2 C.C. 489; (1953) S.C.R. 302.

tion and cannot be claimed as of right by any party.<sup>2</sup> Hence, though there is no period of limitation<sup>3</sup> prescribed for such application, it may be refused, *inter alia*, on the ground of unreasonable *delay* which is not explained by special circumstances,<sup>4</sup> and, particularly, where by reason of the delay the position of the opposite party has changed.<sup>5</sup>

2. A petition under Art. 227 on the ground of absence of jurisdiction of an inferior tribunal may also be refused if no objection as to jurisdiction was raised before the tribunal itself.<sup>6</sup>

3. The High Court may also refuse to interfere where the allegations are vague and indefinite.<sup>9</sup>

### How far existence of alternative relief would be ground for refusal to grant relief.

1. Since the power under Art. 227 is an extraordinary power, it is to be used most sparingly,<sup>7,8</sup> e.g., where the applicant has already instituted a suit for precisely the same relief in respect of the same subject-matter or application under s. 115 of the Code.<sup>10a</sup>

2. Relief under Art. 227 has been refused, e.g., where the proper remedy lay—

(i) Under O. 21, r. 90, C. P. Code

(ii) By means of an election petition.

(iii) By moving the Appellate Tribunal constituted under the Police Act.<sup>9</sup>

(iv) By statutory appeal to the High Court against the award of compensation under the Land Acquisition Act.

(v) By suit, e.g., to enforce the terms of a contract.

2. But unless the alternative remedy is as 'speedy and effective' as the remedy by way of application under Art. 227 (there could be very few remedies so speedy and effective), the mere existence of an alternative remedy cannot preclude the High Court from exercising its powers under Art. 227 to interfere with an order in which a violation of the law<sup>11</sup>

A *suo motu* power of statutory revision has not been considered an adequate alternative remedy for this purpose.<sup>12</sup>

3. Again, in the exercise of its power of superintendence the High Court is *bound* to interfere, in cases of

2. *Nilkanth v. State of Bihar*, A. 1962 SC 1135 (1138).

3. The view of the Judicial Committee of His Majesty's Privy Council, *Ram v. Charan*, A. 1951 HP 16, *Sawan Ram v. Guman Singh*, A. 1959 HP 25, that the period of 90 days prescribed by the Limitation Act for applications for revision should apply to applications under Art. 227 is not submitted, without any foundation. It is to be noted that though Art. 131 of the Schedule to the Limitation Act, 1963, provides for limitation of 14 days for an application for revision under the C. P. Code or Cr. P. Code, it makes no provision for an application under Art. 227.

4. *Janam v. N. J. R. Mill*, (1958) 60 Bom LR 539 (546).

5. *G. M. T. Society v. State of Bombay*, A. 1954 Bom 202; *Amtharam v. Guman Singh*, A. 1957 MP 58.

6. *Waryam v. Amarnath*, (1951) SCR 365 (1952) 2 C.C. 190.

7. *Haripada v. Ananta*, A. 1952 Cal 528; *Muchhaju v. Suryanarayana*, A. 1955 Andhra 192.

8. *Premavati v. Satyamati*, A. 1953 All 55.

9. *Ibrahim v. Chudasama*, A. 1956 Bom 541 (548).

10. *Ajit v. Sarbamanjula*, A. 1954 Pat. 476.

10a. *Shankar v. Kishinaji*, (1969) 2 SCC 74 (78); A. 1970 SC 1.

11. *Triloki Singh v. Returning Officer*, A. 1955 All 536.

12. *Bhutnath v. State of W. B.*, (1969) 3 SCC 675 (679).

13. *Deccan Merchants' Co-op. Bank v. Dulichund*, (1968) SC. (CA. 358/67, dt. 29-9-68).

14. *Abanindra v. A. K. Binas*, A. 1954 Cal 355 (361); *Re. Annamali Mudaliar*, A. 1953 Mad. 362.

- (a) Absence or excess of jurisdiction;<sup>15</sup>
- (b) Infringement of a fundamental right;<sup>16</sup>
- (c) Where the law which gives jurisdiction to the tribunal is *ultra vires* or unconditional.<sup>17</sup>

4. Once the Petitioner has invoked the revisional jurisdiction of the High Court under s. 115 of the C. P. Code and failed, the High Court will refuse to entertain a petition under Art. 227 against the order of the inferior tribunal.<sup>18</sup>

### Whether the High Court can go into questions of fact.

1. Sitting under Art. 227, the High Court has the jurisdiction to go into questions of fact,<sup>19</sup> or to look into the evidence if justice so requires.<sup>20</sup>

2. But it would decline to do that, in the absence of clear and cogent reasons, where the question depends upon appreciation of evidence, but was not raised before an appellate tribunal from which the matter is brought before the High Court under Art. 227.<sup>21</sup>

3. It would not also interfere with a finding of fact, within the jurisdiction of the inferior tribunal, except where it is perverse or not based on any material whatever.<sup>22</sup>

### Continued existence of the court or tribunal not a necessary condition.

The power of superintendence of the High Court under Art. 227 is not taken away as soon as the inferior court or tribunal ceases to exist. If the other conditions are satisfied, viz., that the order has resulted in grave miscarriage of justice in violation of the law, the High Court may interfere to set aside the order even though the court or tribunal is no longer functioning;<sup>23</sup> provided that the records of the tribunal are before the High Court.<sup>24</sup> Of course, positive directions cannot be given by the High Court where the Tribunal has ceased to exist.

### Conditions for the exercise of the power under Art. 227.

1. The following conditions must be present in order that the power under Art. 227 may be exercised---

(a) That the impugned order or decision is without jurisdiction,<sup>25</sup> or against the principles of natural justice;<sup>1-4</sup> or involves non exercise of jurisdiction,<sup>26</sup> or a grave dereliction of duty or flagrant violation of the law<sup>5</sup> as distinguished from a merely erroneous decision in fact or law<sup>1-5</sup> or

15. *Maidhan v. Medhi*, A. 1953 Assam 220.

16. *Ibrahim v. Chudasama*, A. 1966 Bom. 514 (547).

17. *Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1620, 1622).

18. *Shankar v. Krishnaji*, A. 1970 S.C. 1 (5).

19. *Deccan Merchants' Co-operative Bank v. Dalichand*, (1969) S.C. [C.A. 358/67, dt. 29-8-68].

20. *Official Receiver v. Devendra*, (1965) S.C. [C.A. 218/64].

21. *P. M. Chakravarty v. Halder*, (1968) S.C. [C.A. 1785 (N)/67, dt. 29-7-68].

22. *Nibaran v. Mahendra*, A. 1963 S.C. 1895.

23. *Bhagirathi v. State*, A. 1955 All. 113 (F.B.); *Municipal Commrs. v. P. R. Mukherjee*, (1950) 54 C.W.N. 784; *Narayan v. Labour Appellate Tribunal*, A. 1967 Bom. 142.

24. *Kulkarni v. Bhimappa*, A. 1959 Mys. 108.

25. *Waman v. Sri Krishna*, (1962) S.C. [C.A. 56/61]; *Jalaluddin v. Jalaluddin*, (1962) S.C. [C.A. 602/61].

1. *Waryam v. Amarnath*, (1964) S.C.R. 565.

2. *Satyanarayan v. Molikajjun*, A. 1960 S.C. 137 (143); (1950) 1 S.C.R. 880.

3. *Danya Lal v. State of Maharashtra*, A. 1964 S.C. 1320.

4. *Santosh v. Mool Singh*, A. 1958 S.C. 321.

5. *D. N. Banerjee v. P. R. Mukherjee*, A. 1964 S.C. 58 (59); (1963) S.C.R. 302.

irregularity in procedure,<sup>6</sup> or an error of law apparent on the face of the record;<sup>7</sup> or that the finding is 'perverse', being founded on no material whatever.<sup>8</sup>

(b) That the exercise of the jurisdiction under Art. 227 does not amount to exercising the power of appeal<sup>2</sup> or revision on question of fact or of law, not affecting jurisdiction.<sup>6</sup>

2. The power under Art. 227 will *not* be exercised in cases like the following:

(i) To allow a simple objection as to local jurisdiction in respect of a suit, which is liable to be corrected by the Court of appeal under s. 21 of the C. P. Code.<sup>9</sup>

(ii) Where the only question involved is one of interpretation of a deed.<sup>10</sup>

(iii) On questions of admission or rejection of a particular piece of evidence, even though the question may be of every day recurrence.<sup>11</sup>

(iv) To correct an *erroneous* exercise of jurisdiction, as a Court of revision.<sup>12</sup>

(v) To set aside an *intra vires* finding of fact,<sup>13</sup> except where it is founded on no material whatsoever.<sup>6</sup>

(vi) To correct an error of law, not being an error apparent on the face of the record.<sup>14</sup>

(vii) To interfere with the *intra vires* exercise of a discretionary power,<sup>15</sup> unless it is violative of the principles of natural justice.<sup>6</sup>

### I. In Civil Proceedings.

1. The power under Art. 227 is wider than that under s. 115 of the C. P. Code and may be used even where<sup>16</sup> s. 115 was not applicable but not so as to correct a mere erroneous decision, the error not being apparent on the face of the record.<sup>17</sup>

Thus, the High Court has interfered with *judicial* orders, under Art. 227:

(i) Where a District Judge, acting under s. 31 of the Provincial Insolvency Act, has wrongly refused protection order as a result of which the insolvent would be imprisoned without any jurisdiction.<sup>18</sup>

(ii) Where a Subordinate Judge has signally failed in his duty by arbitrarily dismissing a suit for default although no default had in fact taken place and there was no neglect on the part of the Petitioner, no other effective alternative remedy being open to the Petitioner.<sup>19</sup>

(iii) Where a Judge of the Small Causes Court heard an appeal under the Rent Control Act, not being empowered in that behalf.<sup>20</sup>

2. But the High Court has no power under this Article, to remand a case for retrial on fresh evidence where there has been a fair trial of the

6. *Rajkamal v. Indian Motion Picture Union*, (1963) 1 L.J. 318 (S.C.); *Surendra v. Stephen Court A. 1960 S.C. 1751*; *Rhumbh v. State of W. B.* (1969) 3 S.C.C. 675; *Narain v. Dedarao* (1959) 1 S.C. 779.

7. *Prov. Transport Services v. State Industrial Court*, A. 1963 S.C. 114.

8. *Nibaran v. Mahendra* A. 1963 S.C. 1895.

9. *Har Saran v. Mukundlal*, A. 1951 All. 514.

10. *N. G. C. Mills v. L. A. Tribunal*, A. 1957 Bom. 111 (115).

11. *Basant v. Arjundas*, A. 1952 V.P. 4.

12. *Waryam v. Amarnath*, (1964) S.C.R. 565.

13. *State of Orissa v. Murlidhar*, A. 1963 S.C. 404.

14. *Umarsahab v. Kadalaskar*, A. 1970 S.C. 61 (65).

15. *Rajkamal v. Indian Motion Pictures Union*, (1963) 7 F.L.R. 400; (1963) 1 L.L.J. 318 (S.C.).

16. *Ashwini v. Dominion of India*, A. 1952 Cal. 261.

17. *Satyawarayan v. Mahikarjun*, A. 1959 S.C. 137 (142).

18. *Ram Roop v. Bishwanath*, A. 1958 All. 417 (464).

19. *Kantilal v. Asirul*, A. 1957 Cal. 546.



dispute at the earlier hearing and a remand would not be warranted under the C. P. Code.<sup>20</sup>

## II. In Criminal Proceedings.

1. Since the power under Art. 227 includes judicial superintendence, it would follow that the High Court can exercise its revisional powers in a proceeding under this Article, *e.g.*, to set aside a conviction which is not supported by any evidence at all,<sup>20a</sup> or which is without jurisdiction.<sup>21</sup>

2. But the powers of the High Court under Art. 227 are not circumscribed by the conditions laid down in s. 439 of the Cr. P. Code.<sup>20</sup>

Thus, the High Court has exercised its power under Art. 227—

(i) To stay a criminal proceeding pending decision of civil suit relating to the same subject matter.<sup>22</sup>

(ii) To quash an order for the taking of photographic copies of account books recovered in pursuance of a search warrant, which was not warranted by s. 561A of the Cr. P. Code and was clearly without jurisdiction.<sup>23</sup>

(iii) To set aside the order of a *persona designata*, which is without jurisdiction even though it might not have been open to revision under ss. 435, 439 of the Code.<sup>24</sup>

3. On the other hand, it has been held<sup>25</sup> that in matters which can be brought before the High Court under s. 342 of the Cr. P. C., no petition under Art. 226 or 227 should be entertained during the pendency of a trial before the Criminal Court.

## III. In Proceedings before Tribunals.

1. In exercise of its power under Art. 227 the High Court cannot interfere with a finding of fact recorded by a Tribunal,<sup>1</sup> *e.g.*,

Whether the relation between the parties is one of employer and employee.<sup>1</sup>

2. The Court can interfere with a finding of fact or of law of a Tribunal only if it affects its jurisdiction,<sup>2</sup> or it is not supported by any evidence.<sup>3</sup>

3. Though, under Art. 227, the High Court will not interfere with discretionary orders made by inferior tribunals *e.g.*, whether an award made by an Industrial Tribunal should be given retrospective effect,<sup>4</sup> it would interfere where the discretion has been exercised arbitrarily or capriciously *e.g.* where an appellate tribunal has arbitrarily refused to stay the administrative proceedings pending disposal of the appeal.<sup>5</sup>

4. In exercise of powers under this Article, the High Court can interfere with interlocutory orders,<sup>6,7</sup> and even go into disputed questions of fact.<sup>8a</sup>

5. Under this article, the High Court can direct an inferior tribunal to carry out the decision of a superior statutory tribunal.<sup>9</sup>

20. *Seobendu v. Teja Bai*, (1967) SC [C.A. 1212/67, d. 14-12-67].

20a. *Baldeo Singh v. State of Bihar*, A. 1957 SC 612 (614). (1957) S.C.R. 995.

21. *Gopal Das v. State of Assam*, A. 1961 SC. 986.

22. *Dharmeswar v. State*, A. 1952 Assam 78.

23. *Goverdhan v. Chacko*, A. 1957 TC. 256.

24. *Cantonment Bd. Pyare Lal*, A. 1966 SC. 108 (110).

25. *Sita Ram v. State of Bihar*, (1968) S.C. [Cr.A. 144/68, d. 10-10-69].

1. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (268).

2. *Nagendra v. Commr.*, A. 1958 S.C. 398.

3. *State of Orissa v. Murlidhar*, A. 1963 S.C. 404 (405).

4. *Raikamal Kalamandir v. Indian Motion Pictures*, (1963) 7 F.L.R. 400 (S.C.).

5. *Durg Transport Co. v. R. T. A.*, A. 1965 M.P. 142 (145).

5a. *Deccan Merchants' Co-op. Bank v. Dulichand*, (1968) S.C. [C.A. 359/67, d. 29-8-68].

6. *Sree Narayan Co. v. State of Orissa*, A. 1969 Orissa 163 (165); *Nandram v. State of Orissa*, A. 1969 Orissa 165 (167).

But—

When the High Court has dismissed a revision petition against an order of an inferior tribunal, the order of the tribunal merges in the order of the High Court, so that thereafter no application under Art. 227 would lie against the original order of the inferior tribunal.<sup>7</sup>

### 'All courts'.

1. These words refer to courts subordinate to the High Court and do not include a Single Judge of the High Court.<sup>8</sup>

Art. 227 was not intended to authorise the High Court to revise its own decision,<sup>9</sup> or that of its officer exercising the powers of the High Court.<sup>9</sup>

2. It is not necessary for the exercise of this jurisdiction that the inferior Court or Tribunal should be subject to the appellate jurisdiction of the High Court<sup>10</sup> or that the order complained of should be appealable.<sup>11</sup>

3. The following have been held to be 'courts' subject to the jurisdiction under Art. 227—

(i) Registrar under s. 48 of the Bihar & Orissa Co operative Societies Act, 1935.<sup>12</sup>

(ii) Election Commissioner under the Bihar District Board Election Petition Rules.<sup>13</sup>

(iii) Chief Judge of the Court of Small Causes acting as *persona designata* under the City of Bombay Municipal Act.<sup>14</sup>

(iv) Labour Court under the Bihar Shops and Establishments Act, 1953.<sup>15</sup>

### Tribunal.

1. Since the word 'tribunal' is used both in Arts. 136 and 226, it should have the same meaning under both Articles, referring to a quasi-judicial tribunal.<sup>16</sup> Hence, tribunals vested with purely administrative or executive functions would not come under Art. 227 (see p. 335, *ante*).

2. The following authorities have been held to be "tribunals" within the meaning of Art. 227—<sup>17</sup>

(i) Labour tribunals.<sup>18</sup>

(ii) The Commissioner of a Division or the Provincial Transport Authority,<sup>19</sup> acting as an Appellate Authority under the Motor Vehicle Act.<sup>20</sup>

(iii) An Appellate Tribunal under the W. B. Premises Rent Control Act, including the Chief Judge of the S. C. Court;<sup>21</sup> or under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958.<sup>22</sup>

7. *Shankar v. Krishnaji*, A. 1970 S.C. 1 (4).

8. *In re Rangaswami A.* 1957 Mad 582.

9. *Santosh v Registrar*, (1957) 63 C.W.N. 339; A. 1959 Cal 317.

10. *Municipal Commis. v. P. R. Mukherjee*, (1950) 50 C.W.N. 784, (797) *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96.

11. *Israil v. State*, A. 1951 Assam 106; *S. C. Co-op. Bank v. Jugal*, A. 1965 Pat. 227 (236-7).

12. *Jugal Kishore v. Sitamarti C. C. Bank*, A. 1967 S.C. 1494 (1504).

13. *Abdul Razak v. Kuldip*, A. 1944 Pat. 147.

14. *Laksmana v. Venkatrao*, A. 1955 Bom. 103.

15. *Calcutta Chemical Co. v. Barman*, A. 1969 Pat. 371 (377).

16. *Associated Cement Companies v. Sharma*, A. 1965 S.C. 1595.

17. See also the list under Art. 136, *ante*.

18. *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96.

19. *Raghunath v. State Transport Authority*, A. 1961 Orissa 81.

20. *S. M. Service v. Asansol Bus Association*, (1950) 55 C.W.N. 81.

21. *P. C. Guha v. Basil* (1951) 55 C.W.N. 611 (617); *Vurjee v. R. H. Singh*, 1952 Cal. 290.

22. *Kalanka Devi Sansthan v. Maharashtra Revenue Tribunal*, (1969) S.C. [C.A. 862/68, d 19-8-69].

(iv) A Panchayati Adalat set up under the U. P. Panchayati Raj Act<sup>23</sup> a Magistrate, acting under s. 52 of the Act; the Panchayat under the Patiala Panchayat Act;<sup>24</sup> a Gram Kutchery under the Bihar Panchayat Raj Act.<sup>25</sup>

(v) A District Magistrate acting under s. 22 of the Bombay District Municipal Act,<sup>1</sup> or under s. 160 of the Municipalities Act.<sup>2</sup>

(vi) A Collector, acting under s. 11 (1)<sup>3-4</sup> or s. 18<sup>5</sup> of the Land Acquisition Act.

(vii) The Tribunal constituted under the Nagpur Improvement Trust Act.<sup>6</sup>

(viii) Authorities under a Rent Control Act.<sup>7</sup>

23. *Abdul Aziz v. State*, A. 1950 All. 611, *Sukhdeo v. Brij Bhusan*, A. 1951 All. 667.

24. *Harnam v. Gurnam*, A. 1952 Pepsu 130.

25. *Baldeo Singh v. State of Bihar*, A. 1957 S.C. 612; (1957) S.C.R. 995.

1. *Ratilal v. Chumilal*, A. 1951 Sau. 15.

2. *Municipal Board v. Dt. Judge*, (1952) 7 D.L.R. 177 (All.).

3. *Radha Prasanna v. Prov. of Orissa*, A. 1952 Orissa 98; *Bimala v. State of West Bengal*, A. 1951 Cal. 258.

4. The contrary view taken by the Division Bench in *State v. Kalicharan*, A. 1965 Cal 638, it is submitted, deserves reconsideration. It is founded on the observation of the Supreme Court in *Harish Chandra v. Deputy Land Acquisition Officer*, A. 1961 S.C. 1500 (1503), to the effect that the award of the Collector is an offer which the Collector makes to the party affected, as an agent of the Government and not as a judicial officer. This observation, however, was made with reference to a different context, namely, the applicability of the limitation for making a reference against the award, under the Proviso to s. 18 (2) of the Land Acquisition Act. The question to be answered, in order to determine whether the Collector acts as a 'tribunal' while determining the compensation under s. 11 is a different one, namely, whether he is required to proceed objectively, to arrive at a decision affecting a civil right of the individual. The answer on this question is in the affirmative even according to the judgment in *Harish Chandra's case*, in other parts which have not been reproduced by the Division Bench. The Supreme Court, thus observed:-

"In a sense it is a decision of the Collector reached by him after holding an enquiry as prescribed by the Act."

"If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affects persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision... is an essential element which must be satisfied before the decision can be brought into force."

In various other cases of the High Courts, it has been held that the procedure adopted by the Collector, in making his award must conform to the principles of natural justice, so that if he acts, not on his independent judgment, but at the dictation of some other officer, his award would be void [e.g., *Baru Mal v. State of U. P.*, A. 1962 All. 61 (64); *Ram Narain v. State of M. P.*, A. 1963 M.P. 351]. True, in *Harish Chandra's case*, it has been said that the Collector, in making the award, does not act as a 'judicial officer'. But as has been observed by the Supreme Court in *A. C. Companies v. Sharma*, A. 1965 S.C. 1595, the word 'tribunal' is wider than the word 'court' and that some of the trappings of a court are sufficient to constitute a 'tribunal', for the purpose of Art. 136. There is no reason to come to a different view for the purposes of Art. 227 [*A. C. Companies v. Sharma*, A. 1965 S. 1595 (1609)]. If, therefore, in arriving at his decision under s. 11, the Collector proceeds in contravention of the rules of natural justice or otherwise than as a quasi-judicial tribunal or in excess of his jurisdiction, it is submitted that Art. 227 can be invoked by the party aggrieved, even though the remedy under s. 18 may be open to him. There is a difference in the scope of the two remedies *Bhutanath v. State of W. B.*, (1969) 3 S.C.C. 675, does not touch this question.

5. *Kalidasi v. L. A. Collector*, (1964) C.L.J. 114 (177); A. 1964 Cal. 283; *Goleam Ali v. Collector*, A. 1969 Cal. 221 (223).

6. *Shridhar v. Collector*, A. 1951 Nag. 90.

7. *Waryam v. Amarnath*, (1954) S.C.R. 563.

(ix) A Deputy Commissioner, acting under s. 6 of the U. P. Land Utilization Act, 1948.<sup>8</sup>

(x) The Custodian, acting under s. 45 of the Administrative of Evacuee Property Act, 1950.<sup>9</sup>

(xi) The Naya Panchayet Adalat under the C. P. & Berar Panchayet Act, 1947.<sup>10</sup>

(xii) A District Judge acting as an Election Tribunal under the Orissa Municipal Act.<sup>11</sup>

(xiii) The Tribunal constituted under the Abducted Persons Recovery Act.<sup>12</sup>

(xiv) The Bombay Revenue Tribunal under s. 76 of the Bombay Tenancy and Agricultural Lands Act, 1948.<sup>13</sup>

(xv) An arbitrator exercising statutory powers.<sup>12-14</sup>

(xvi) A Certificate Officer under the Bengal Public Demands Recovery Act.<sup>15</sup>

(xvii) Tribunal set up under s. 249 of the Merchant Shipping Act, 1923.<sup>16, 20</sup>

(xviii) Tribunal under the Madras Estates Abolition Act.<sup>1</sup>

(xix) Election Tribunal.<sup>2</sup>

(xx) The Commissioner, acting under s. 44 (1) of the Orissa Hindu Religious Endowments Act, 1952.<sup>3</sup>

(xxi) Payment of Wages Act.—Authority under.<sup>4</sup>

(xxii) A Commissioner appointed under the Public Servants Inquiries Act, 1950.<sup>5</sup>

3. On the other hand, it has been held that the following authorities are *not* 'tribunals' within the scope of Art. 227—

(i) The Disciplinary Proceedings Tribunal in Madras, holding enquiry on charges against Government servants and recommending disciplinary action.<sup>6</sup>

(ii) The Revenue Divisional Officer, acting under s. 13 of Madras Act II of 1894.<sup>7</sup>

(iii) The Registrar of the High Court, acting as a Taxing Officer.<sup>8</sup>

(iv) The Advisory Board under the Preventive Detention Act, 1950.<sup>9</sup>

8. *Shitab v. Suraj*, A. 1952 All 750.

9. *Kartar Singh v. Custodian*, A. 1952 Pepsu 82.

10. *Shrikrishna v. Dattu*, (1952) 7 D.L.R. Nag 180.

11. *Jadumani v. Jadumani*, A. 1962 Orissa 244.

12. *State of Punjab v. Ajab*, A. 1953 S.C. 10; (1953) S.C.R. 24.

13. *Nagayya v. Chayappa*, A. 1956 Bom. 560.

14. *Waryam v. Amarnath*, (1962-4) 2 C.C. 490; (1954) S.C.R. 565; *Khela Wat v. Chet Ram*, A. 1952 Punj. 67.

15. *Abanindra v. Biswas*, A. 1954 Cal. 355.

16-25. *Pandiyen Ins. Co. v. Khambatta*, A. 1955 Bom. 241.

1. *Tirupathirayudu v. Venkatacharyulu*, A. 1955 Andhra 240.

2. *Hari Vishnu v. Ahmad*, A. 1955 S.C. 233; (1955) 1 S.C.R. 1104.

3. *Ramakrishna v. Ramesh*, A. 1959 Orissa 98.

4. *Cf. Hira v. Pradhan*, A. 1959 S.C. 1226.

5. *Kapur Singh v. Jagat*, A. 1951 Punj. 49.

6. *Krishnamoorthy v. State of Madras*, A. 1951 Mad. 882.

7. *Mechireju v. Suryanarayana*, A. 1955 Andhra 192.

8. *Santosh v. Registrar*, (1957) 63 C.W.N. 339.

9. *Madan v. State*, A. 1962 Cal. 119 (121).

## (3) D

The power of administrative control, vested by this clause in the High Court, can be exercised only over interior Courts and *not tribunals*.<sup>10</sup>

**CL (4): Exclusion of Military Tribunals.**—This clause embodies the common law principle that a Civil Court has no power to interfere with decisions of military tribunals in respect of matters placed within their jurisdiction by the law.

**Power to transfer proceedings.**

1. Since Art. 227 confers powers of judicial control, the High Court is empowered by this Article to transfer cases from a Court or tribunal to another.<sup>11-12</sup>

2. A Single Judge of the Andhra High Court<sup>13</sup> has, however, held that the power to transfer any proceeding to the High Court itself is contained in Art. 228 exclusively and that since tribunals are not mentioned in Art. 228, the High Court has no power to transfer to itself, under Art. 228, any proceedings pending before any statutory tribunal.

**Forum.**

According to the Rules framed by the Bombay<sup>14</sup> and Patna High Courts, an application under Art. 227 is to be heard by a Division Bench.

On the other hand, under the Rules made by the Allahabad,<sup>15</sup> Calcutta, Madras and Nagpur High Courts, it is cognizable by a Single Judge except in cases of higher value.

**Whether power under Art. 227 may be exercised suo motu.**

The High Court may, in proper cases, interfere under this article *suo motu*, i.e., without any application from any party aggrieved.<sup>16-18</sup>

**Whether question must be raised before the inferior tribunal.**

1. As in the case of a proceeding under Art. 226, so under Art. 227, where the question raised goes to the jurisdiction of the inferior tribunal,<sup>19</sup> or a plea of non-joinder which invalidates the decision,<sup>20</sup> or is a question which the inferior tribunal was not competent to decide, e.g., the *errors* or constitutionality of the statute which created it,<sup>21</sup> the petition cannot be rejected on the ground that the Petitioner should have raised the point before the inferior tribunal.

**2. But—**

(a) Where a piece of evidence was admitted by the inferior tribunal without objection from the Petitioner, the latter will not be heard, under Art. 227, against the admissibility of that evidence, merely because the decision of the tribunal has gone against him.<sup>22</sup>

10. *Hari Vishnu v. Ahmad*, A. 1954 Nag. 166 (F.B.).

11-12. *Abdul Rauf v. State of Hyderabad*, A. 1951 Hyd. 50 (F.B.).

13. *Ramalingam v. Gurumurthy*, A. 1955 Andhra 85.

14. *Cf. Jal Hirji v. Hamid*, A. 1956 Bom. 323 (325).

15. *Ram Prasad v. State*, A. 1952 All. 843.

16. *Faqir v. Gopi*, A. 1952 Punj. 117 (120).

17. *Barrow v. State of U. P.*, A. 1958 All. 154 (158) [affirmed by the Supreme Court in C.A. 274/58, d. 13-8-61].

18. *C. W. Transport Soc. v. State of Punjab*, A. 1952 Punj. 94.

19. *Arunachalam v. Southern Roadways*, A. 1950 S.C. 1191.

20. *Basanta v. Sudhir*, A. 1959 Cal. 360.

21. *Venkataraman v. State of Madras*, A. 1956 S.C. 1089.

22. *Kalyan People's Co-operative Bank v. Dulhanbibi*, (1953) 2 S.C.R. 348 (352).

(b) The High Court will not entertain a point of fact which was not raised before the inferior tribunal.<sup>23-24</sup>

### Parties.

In an application under Art 227, the Tribunal whose order is assailed is not a necessary party,<sup>25</sup> even though it is a necessary party to an application under Art. 226.<sup>26</sup>

### Appeal.

1. The Madras,<sup>1-19</sup> Allahabad,<sup>20</sup> Calcutta<sup>21</sup> and Punjab<sup>22</sup> High Courts have held that the jurisdiction vested in the High Court under Art. 227 is a revisional jurisdiction and, accordingly, no Letters Patent Appeal is competent from an order passed by a Single Judge in exercise of such jurisdiction.

2. Appeal lies to the Supreme Court under Arts 132, 133 (1) (c),<sup>28</sup> 136.<sup>24</sup>

3. In an appeal from such order,<sup>24</sup> it is open to the Supreme Court to exercise the same power under Art 227 as the High Court could have exercised.<sup>24</sup> But it would not interfere with a finding of fact arrived at by a quasi-judicial Tribunal Against whose order the petition under Art. 227 has been brought.<sup>23</sup>

But the Supreme Court would interfere where the High Court has quashed the order of the inferior Tribunal as without jurisdiction, upon an erroneous view of the law, say, as to the termination of a tenancy.<sup>24</sup>

### The jurisdiction under Art. 227 cannot be taken away by legislation.

The powers of the High Court under Art 227 cannot be taken away or barred by any legislation short of constitutional amendment. Nor can it be barred by providing that the decision of an inferior tribunal shall be final.<sup>1</sup>

### Article 227 and 228.

1. Art 228 is only intended to confer jurisdiction and power on the High Court to withdraw a case for the purpose of disposing of a substantial question of law as to the interpretation of the Constitution, from the ordinary Courts of law whose decision may, in the normal course of things, be taken up by the High Court by way of an appeal.

2. Art 227 is of wider ambit, it does not limit the jurisdiction of the High Court to the hierarchy of courts functioning directly under it under the C.P. Code or the Cr. P. C., but gives the High Court powers to correct errors of various kinds of all courts and tribunals in appropriate cases. Errors as to the interpretation of the Constitution are not out of the purview of the powers conferred by Art 227, although the High Court cannot, under this Article, withdraw a case to itself from a tribunal and dispose of the same, or determine merely the question of interpretation of the Constitution arising before the Tribunal.<sup>2</sup>

23. *Kashiram v Maharashtra Revenue Tribunal*, A 1960 Bom 147 (148).

24. *Sri Kishan v Mondal Bros.*, A 1967 Cal 75 (80).

25. *Enamul v Hussain*, (1964) SC [C.A. 985/63].

1-19. *In re Tirupulisuamy*, A 1955 Mad 287.

20. *Asdal Singh v Karan Singh*, A 1967 All 411 (431) FB.

21. *Sukhendu v Hurikrishna*, A. 1963 Cal 636.

22. *Brahm Dutt v Peoples Co-operative Society*, A 1961 Punj 24.

23. *Cf D. C. Works v State of Saurashtra*, A 1957 SC 264 (267).

24. *Cf Baldeo Singh v State of Bihar*, A 1957 SC 612.

25. *Kishan Lal v Ganpat*, A. 1961 SC, 1554.

1. *State of Gujarat v Vaghatsingh*, A 1968 SC 1481 (1488), *Anuyoth v. Min. of Rehabilitation*, (1962) 1 S.C.R. 505 (509).

2. *Jugal Kishore v Sitamanki C. C. Bank*, A. 1967 S.C. 1494 (1504).

3. On the other hand, Art. 227 does not comprehend a power to *transfer* proceedings to the High Court, which power is specifically embodied in Art. 226,<sup>3</sup> although errors as to the interpretation of the Constitution may be corrected under Art. 227.<sup>4</sup>

**228.** If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

Transfer of certain cases to High Court

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

### Object of Art. 228.

The object of this Article is to make the High Court the sole interpreter of the Constitution in a State and to deny to the subordinate Courts a right to interpret the Constitution, for the sake of attaining some degree of uniformity as regards constitutional decisions. Under the present Article —

(a) It is the duty<sup>5</sup> of the High Court to withdraw from a subordinate Court a case which involves a substantial question of law as to the interpretation of the Constitution

(b) It is also the duty of the subordinate Court to refer the case to the High Court as soon as it discovers that it involves such a question.

Under this Article, the High Court may be moved either by the parties or by the subordinate Court.<sup>5</sup>

### Conditions necessary for application of the Article.

1 But though the High Court is made the sole interpreter of the Constitution, the Article does not intend to make the High Court a forum for academic discussions on constitutional questions.<sup>1</sup>

2 The following conditions must exist in order that High Court may exercise its power of withdrawal under the present Art. —

(i) A suit or case must be *actually* pending in a Court subordinate to the High Court. No one can move the High Court under Art 228 stating that such a suit or case is intended to be filed. Nor will Art 228 apply where the case has been already disposed of. On the other hand, the High Court can interfere where the suit or case is still pending,—whatever be the reason for its pendency, whether mischievous or selfish petitions by the plaintiffs or *bona fide* petitions filed for the ends of justice.<sup>2</sup>

(a) If, along with the constitutional question, there are *other* questions independent of the constitutional question (*e.g.*, limitation, formal defect) which are sufficient in themselves to dispose of the case, Art 228 will not apply. The High Court may decline to withdraw a case until the *other* questions are determined by the Court below when it appears that the question whether the constitutional point is necessary for disposal of the case cannot be determined unless the other questions are decided.<sup>3</sup> Thus,

3. *Ganga Prasad v. Allahabad Bank*, A. 1958 S.C. 293 (295).

4. *Tejpr Chand v. Bhagwati*, A. 1958 Punt. 287.

5. *Rameswami v. Madras H. R. E. Board*, A. 1952 Mad. 20.

Where a person has been prosecuted for a statutory offence, no question of constitutional validity of the statute arises until the question whether he has violated the statute is determined.<sup>6</sup>

(b) But where it is clear that the suit cannot be disposed of without a determination of the constitutional question, the High Court is bound to withdraw the suit at once.<sup>6-a</sup> In such cases, the object of Art. 228 would be frustrated if the transfer to the High Court is postponed until the other issues are decided.<sup>9</sup>

(ii) The High Court must be satisfied that the case *involves a substantial question of law* as to the interpretation of the Constitution. A mere frivolous allegation that such a question is involved will not do.<sup>8</sup>

(iii) The High Court must be satisfied that the determination of the constitutional question is *necessary for the disposal of the case*. Usually the High Court will not act until this point is clear, but where it is clear it will act at once.<sup>8</sup>

3. Similarly, a subordinate Court shall refer a case to the High Court under this Article only if it is *satisfied* that the case involves a substantial question of law as to the interpretation of the Constitution, and that the determination of that question is *necessary for disposal of the case*. A mere plea in the defence is not sufficient for this purpose. Where the Court is not satisfied, it should go on with the trial, leaving it to the aggrieved party to move the High Court under this Article.<sup>10</sup>

#### **'Court subordinate to the High Court'.**

This expression includes only 'courts' which are subject to the appellate or revisional jurisdiction of the High Court and not 'tribunals', e.g., an Anti-Ejectment Officer.<sup>11</sup> Art. 228 is, however, an empowering provision and it has no contrary implication that unless the High Court can withdraw a case under Art. 228 from an inferior court the latter cannot be deemed to be a court 'subordinate' to the High Court, for other purposes.<sup>12</sup>

#### **'Substantial question of law as to Interpretation of the Constitution'.**

The following questions have been held to be substantial, for the purpose of application of Art. 228:

(i) The questions (a) whether the Madras Hindu (Bicamy & Prevention and Divorce) Act, 1919 is unconstitutional and (b) whether assuming that the Act is void, whether the petition is sustainable because the second marriage which gave rise to the alleged right of divorce took place before coming into force of the Constitution.<sup>13</sup>

(ii) Where a scheme has been framed under s. 57 of the Madras Hindu Religious Endowments Act and the issue is raised about the constitutional validity of that section as offending Arts. 15 and 26 of the Constitution.<sup>14</sup>

#### **Disposal of such case.**

As regards disposal of such cases by the High Court, the Article makes a distinction between (a) cases solely involving constitutional questions and (b) those where constitutional questions were mixed with questions of ordinary law. In the former class of cases the High Court would dispose of the entire suit or case, while in the latter class of cases the High Court would only dispose of the constitutional issues and return the case to the

6. *Narhari v. State*, A. 1955 Pat. 177.

7. *State of Bihar v. Hamid*, A. 1964 Pat. 387.

8. *Bhoirahendra v. State of Assam*, A. 1955 Assam 154.

9. *Ganga Pratap v. Alahabad Bank*, A. 1958 S.C. 293 (295) (1958) S.C.R. 1150.

10. *In re Rajarama*, A. 1952 Mad. 578.

11. *Inder Singh v. State of Rajasthan*, A. 1954 Rai. 185.

12. *Fateel Kishor v. S. C. Co-operative Bank* (1967) II S.C.W.R. 460 (478-9).

13. *Krishna v. Bhamumati*, A. 1952 Mad. 291.

14. *Ramdasami v. Madras H. R. E. Board*, A. 1952 Mad. 20.



lower Court to determine the other issues in the ordinary way.<sup>15</sup> The High Court is given a discretion<sup>16</sup> in the matter of disposal and in cases of small value or other proper cases, it may dispose of the entire case including ordinary questions.

### S. 113, Proviso, C. P. Code and Art. 228.

Though there is some amount of overlapping between the two provisions, the Prov. to s. 113 of the Code has in view a question as to the validity of an Act or a part thereof, while Art. 228 relates to a question as to the interpretation of the Constitution, in general.

**229. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:**

Officers and servants  
and the expenses of  
High Courts.

Provided that the Governor of the State.....<sup>17</sup> may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.....<sup>18</sup>

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

### Object, of Art. 229.

The object of the various clauses of this Article is to secure the independence of the High Court, which is essential for the working of the democratic form of Government in this country,<sup>19</sup> by giving the High Court absolute control over its staff, subject only to the limitations imposed by the Article itself.<sup>20</sup>

### CL. (1): 'Appointments'.

The power to appoint includes the power to suspend or dismiss.<sup>21</sup>

### Proviso.

1. The Proviso puts a limitation upon the power of appointment of officers and servants of a High Court which is given to the Chief Justice. Ordinarily, he need not consult the Public Service Commission in the matter

15. *Shiv Bahadur v State of U P.*, (1455) S.C.R. 206.

16. The words 'in which principal seat' were omitted by the Constitution (Seventh Amendment) Act, 1956.

17. *Kidar Nath v. Punjab Govt.*, A. 1964 Punj. 285; *Moti Lal v. Union of India*, A. 1965 Punj. 444 (446) F.B.

18. *Hyas v. State of Maharashtra*, A. 1965 Bom. 156 (163)

19. *Pradyat v. Chief Justice*, (1956) S.C.A. 79 (90): A. 1956 S.C. 285: (1956) 2 S.C.R. (1331).

of these appointments. But if the Governor makes a rule specifying any cases, the Chief Justice shall have to consult the Public Service Commission in making post-Constitution appointments to these specified posts.

2. There is no such limitation upon the power of dismissal belonging to the Chief Justice,<sup>20</sup> and Art. 320 (3) (c) also is not applicable to the staff of a High Court.<sup>19</sup> But Art. 311 is.<sup>19</sup>

3. Members of the staff of a High Court are "members of a civil service of a State" within the purview of Arts. 310 (1) and 311 (1) "but not persons" serving *under* the Government of a State "within the meaning of Art. 320 (3) (c)". In the result, Art. 311 (2) is attracted to an order of dismissal of such a person made by the Chief Justice but not Art. 320 (3) (c).<sup>19</sup>

#### **Cl. (2): Salaries, conditions of service etc.**

1. Subject to the Rules made under this clause the Chief Justice is the sole authority for fixing the salaries of, and controlling the High Court employees. Employees of the High Court are thus taken out of the purview of Art. 309.<sup>19</sup>

2. All rules made by the Chief Justice are subject to the provisions of any law made by the Legislature of the State.<sup>20</sup>

Further, if the Rules so made relate to salaries, allowances, leave or pension of the employees, the Rules will require the approval of the Governor before they can be enforced.<sup>20</sup> Without such prior approval such rules have no validity.<sup>21</sup> But after the Governor's approval is recorded, neither the Governor nor anybody else can question the validity of such rules.

3. If the Rules made by the Chief Justice relate to the conditions of service other than salaries, allowances, leave or pension, they need not be sent to the Governor for approval.<sup>20</sup>

4. The Government cannot sport from its power conferred by the Rules framed under Art. 229 fix the salary or authority deduction of pay of any High Court employee.<sup>21</sup>

5. So long as Rules are not made by the Chief Justice under this article, the pre-Constitution Service Rules will continue to be in force by virtue of Art. 313 with the substitution of the word 'Chief Justice' for the word 'Governor' in such Rules.<sup>22</sup>

#### **Integration under the States Reorganisation Act.**

By reason of s. 115 (5) of the States Reorganisation Act, 1956, the power of integration of services as a result of the reorganisation of States and the other matters referred to in s. 115 (5) of that Act is exclusively vested in the Central Government and the Chief Justice of a High Court cannot exercise such power as regards the staff of the High Court.<sup>23</sup>

*Extension of jurisdiction of High Courts to Union territories.*

**\*230.** (1) Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory.

20. *Gurumoorthy v. Accountant General*, A. 1969 A. & N. 25 (30).

21. *Akhil v. State of U. P.*, A. 1690 193.

22. *Bhuban v. A.G.*, A. 17970 A. & N. 26 (30).

23. *Bhimaji v. Registrar*, A. 1966 Mys. 81 (83).

(2) *Where the High Court of a State exercises jurisdiction in relation to a Union territory, —*

(a) *nothing in this Constitution shall be construed as empowering the Legislature of the State to increase, restrict or abolish that jurisdiction; and*

(b) *the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts in that territory, be construed as a reference to the President.*

**Amendment.**—Art. 230 has been substituted by the Constitution (Seventh Amendment) Act, 1956

**Effect of Amendment.**—Prior to the amendment of 1956, Art. 230 empowered Parliament to extend the jurisdiction of a High Court to *any* area outside the State where the principal seat of the High Court was situated, or to exclude any area from the existing jurisdiction of a High Court, e.g., excluding Coorg from the jurisdiction of the Madras High Court and placing it under the jurisdiction of the Mysore High Court. This jurisdiction of Parliament was exclusive and corresponding limitations were placed upon the power of a State Legislature as regards extra-State jurisdiction of a High Court, by Art. 231, as it then stood. Under this power Parliament made the following Acts:

Mysore High Court (Extension of Jurisdiction to Coorg) Act LXXII of 1952), replacing the Governor-General's Order of 1948; Andhra State Act (XXX of 1953) (s. 40); Calcutta High Court (Extension of Jurisdiction) Act (XLI of 1953), extending the jurisdiction of the Calcutta High Court to Chandernagore and the Andamans.

The amendment of 1956 restricts this power of Parliament *only to the Union Territories*. In other words, Parliament shall now be competent to extend the jurisdiction of a High Court to, or exclude its jurisdiction from, a Union Territory only, and not with respect to any area included in another State. Of course, the power to establish a common High Court for more than one States has been conferred by Art. 231 as substituted by the same Amendment Act.

**231.** (1) *Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law*  
*Establishment of a common High Court for two or more States*  
*establish a common High Court for two or more States or for two or more States and a Union territory*

(2) *In relation to any such High Court,—*

(a) *the reference in article 217 to the Governor of the State shall be construed as a reference to the Governors of all the States in relation to which the High Court exercises jurisdiction;*

(b) *the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts be construed as a reference to the Governor of the State in which the subordinate courts are situate; and*

(c) *the references in articles 219 and 229 to the State shall be construed as a reference to the State in which the High Court has its principal seat;*

*Provided that if such principal seat is in a Union territory, the references in articles 219 and 229 to the Governor, Public Service Commission, Legis-*

*lature and Consolidated Fund of the State shall be construed respectively as references to the President, Union Public Service Commission, Parliament and Consolidated Fund of India.*

**Amendment.**—Arts. 230-1 have been substituted for the original Articles 230-2, by the **Constitution (Seventh Amendment) Act, 1956**, in view of the reorganisation of territories:

‘While under article 214 there will normally be a separate High Court for each State, power will be required to establish common High Courts for two or more States. Power will also be required to extend the jurisdiction of a High Court to a Union territory, wherever necessary, and to exclude the jurisdiction of a High Court from such territory. The revised articles 230 and 231 are designed to make these provisions. \* \* \*’<sup>25</sup>

“232. Omitted by the Constitution (Seventh Amendment) Act, 1956

#### CHAPTER VI SUBORDINATE COURTS.

**233. (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.**

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court

#### Cl. (1): Appointment by promotion.

Promotion cannot be claimed as of right, by virtue of seniority or the like.<sup>1</sup>

#### Appointment by designation.

There is no contravention of this clause if the Government, with the assent of the High Court, appoint District Judges by designation as Assistant Sessions Judge.

#### ‘Appointment’.

1. This word, in the present context, means the initial appointment of a person to be a District Judge. For that the authority is the Governor, who has to act in consultation with the High Court.

2. The posting of a District Judge after appointment and subsequent transfers are in the hands of the High Court alone.<sup>2</sup>

3. ‘Appointment’, in this context, includes promotion to the post of a District Judge.<sup>3</sup>

Art. 233, when paraphrased, would read as:

“Appointments of persons to be, and the posting and promotion of (persons to be) District Judges . . .”

25. Art. 232 omitted by *ibid.*, w.e.f. 1-11-56.

1. *High Court v. Amal Kumar*, A. 1962 S.C. 1704.

2. *Palanisamy*, in 10, 1 L.R. (1957) Mad. 597 (600).

3. *Chandranalluwar v. Patna High Court*, A. 1970 S.C. 370 (375).

4. *State of Assam v. Ranga Md.*, A. 1967 S.C. 903.

5. *State of Assam v. Kuseswar*, (1970) 1 J.S.C. 110 (141).

District Judges may be directly *appointed* or may be *promoted* from the subordinate rank. Art. 233 is intended to take care of both. In the result—

(a) The initial appointment and initial promotion of persons to be either district judges or any of the categories included in it (by Art. 236), is a matter coming under Art. 233, and are vested in the Governor, acting in consultation with the High Court.<sup>6</sup>

(b) But *further promotion* of district Judges is a matter of control by the High Court.<sup>7</sup>

**'District Judge'.**—For the interpretation of this term, see Art. 236, *post*

Since by Art. 236, the expression 'District Judge' includes an Additional District Judge, the promotion of a member of the judicial service to the post of Additional District Judge comes under Art. 233, so that it can be made by the Governor in consultation with the High Court.<sup>8</sup> The High Court cannot claim exclusive jurisdiction over such promotion under Art. 235, under which comes the case of promotion to posts inferior to that of a District Judge, as defined in Art. 236.<sup>9</sup>

### Seniority of officers appointed under Art. 233.

The seniority of officers appointed under Art. 233 will be determined by the Service Rules made under Art. 309. The position in a Civil List or gradation List maintained by the High Court merely gives some particulars as to the length of service, dates of appointment of officers, and does not necessarily create any right to seniority."

**Dismissal.**—See under Art. 235, *post*

### 'In consultation with'.

1. Consultation with the High Court should not be an empty formality.<sup>7</sup> The Governor cannot appoint a nominee of his without obtaining the views of the High Court, even where he is not prepared to accept the nominee of the High Court.

2. The Supreme Court<sup>8</sup> has laid down that

(a) Consultation with the High Court at the time of each appointment is mandatory.

(b) 'High Court', in this context means the Full Court of all the Judges and even consultation by a Section Committee of some of the Judges cannot take the place of consultation by the High Court.

(c) Even consultation with some other body besides the High Court would be a contravention of the Article

(d) An appointment made without consulting the High Court would be invalid.<sup>7</sup> <sup>8</sup>

(e) Any Rule made by the Governor under Art. 309 which violates the provisions of Art. 233, as explained above, shall be void.

### Transfer.

1. This Article confers upon the Governor three specific powers as regards District Judges, namely, of (a) appointment; (b) posting and (c) promotion, and that also in consultation with the High Court.<sup>9</sup>

The Governor cannot, therefore, claim any power to transfer a District

6. *Chandranouleswar v. Patna High Court*, A 1970 S.C. 370 (373).

7. *Chandranouleswar v. Patna High Court*, A 1970 S.C. 370 (375).

8. *Chandramohan v. State of U. P.*, A 1966 S.C. 1987 (1992).

9. *State of Assam & Nagaland v. Rangu Mahammad*, (1967) 11 S.C.A. 91: A. 1967 S.C. 903.

Judge from one part to another, which belongs to the High Court, under Art. 235.<sup>7</sup>

"The powers of the Governor cease after he has appointed or promoted a person to be a District Judge and assigned him a post in the cadre".<sup>8</sup>

2. The foregoing right of the High Court is, however, confined to transfers and postings to posts included in the cadre of the judicial service and not to posts outside that cadre, e.g., posts in the Secretariat, such as the post of the Secretary to the Judicial Department or the Legal Remembrancer, which may be filled by judicial officers taken over by the Government with the consent of the High Court.<sup>9</sup> In the result, —

(i) The right to appoint a person to a post in the Secretariat or to any other post outside the cadre of the service judicial (Art. 235) belongs exclusively to the Government.<sup>10</sup>

(ii) Of course, a judicial officer may be taken over by the Government to fill such post only with the consent of the High Court and, at the time of sparing a particular judicial officer, it is open to the High Court to fix the period during which he may hold an executive post. It is equally open to the High Court to recall such officer whenever it thinks fit.<sup>11</sup>

(iii) On the other hand, it is for the Executive to say whether any particular officer would meet its requirements or not and the High Court cannot foist any officer on the Government,<sup>12</sup> and insist that its nominee must be appointed as Judicial Secretary, Legal Remembrancer or the like.<sup>13</sup>

#### Scope of Cl. (2): 'Person not already in service'.

1. This clause has no application where a person in service under the Union or a State in some other capacity is appointed District Judge.<sup>14</sup> In the case of such persons Cl. (1) is the only provision to be complied with.<sup>15</sup>

2. It is only when a person is appointed from the Bar that Cl. (2) is attracted. In such a case, the person cannot be appointed unless—

(a) He satisfies the qualification of 'seven years' practice;

(b) He has been recommended by the High Court.<sup>16</sup>

3. 'Service' in cl. (2) means the 'judicial service'.<sup>17, 18</sup> A member of any other service under the Union or State has no right to be appointed a District Judge.<sup>19</sup> The Allahabad High Court has held that even a member of some other service may be appointed if he satisfies the two conditions specified in Cl. (2), viz., practice at the Bar and recommendation by the High Court.<sup>20</sup>

#### 'If he has been ..... an advocate'.

These words indicate that the state of being has existed and may be, but not necessarily continuing.<sup>21</sup> Consequently, the person to be appointed as District Judge need not be continuing to be an advocate at the date of his appointment.<sup>22</sup>

**"233A. Notwithstanding any judgment, decree or order of any court,—**

*Validation of appointments of, and judgments, etc., delivered by, certain district judges.* (a) (i) no appointment of any person already in the judicial service of a State ... of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and

10. *State of Orissa v. Sudhansu Sekhar*, (1968) 1 S.C.A. 428 (435-6): A. 1968 S.C. 647.

11. *Rameswar v. State of Punjab*, A. 1961 S.C. 816 (822).

12. *Chandramohan v. State of U. P.*, A. 1966 S.C. 1987 (1995).

13. *Beharji v. Chandramohan*, A. 1969 All 594 (597).

14. *Chandramohan v. State*, A. 1969 All. 230 (234).

15. *Cf. State of Assam v. Horizon Union*, A. 1967 S.C. 442.

16. Art. 233A was inserted by the Constitution (Twentieth Amendment) Act, 1966, w.e.f. 22-12-66.

(u) no posting, promotion or transfer of any such person as a district judge,

made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

**Object of Amendment.**—The object of insertion of this article was very limited and of temporary effect, as will appear from the following Statement of Objects and Reasons of the Amendment Act:

'Appointments of district judges in Uttar Pradesh and a few other States have been rendered invalid and illegal by a recent judgment of the Supreme Court<sup>17</sup> on the ground that such appointments were not made in accordance with the provisions of article 233 of the Constitution. In another judgment,<sup>18</sup> the Supreme Court has held that the power of posting of a district judge under article 233 does not include the power of transfer of such judge from one station to another and that the power of transfer of a district judge is vested in the High Court under article 235 of the Constitution. As a result of these judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgments, decrees, orders and sentences passed or made by these district judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the district courts in Uttar Pradesh has practically come to a standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders and sentences passed or made heretofore by all such district judges in those States and also to validate the appointment, posting, promotion and transfer of such district judges barring those few who were not eligible for appointment under Article 233.'

The Amendment<sup>19</sup> was retrospective so that the Rules declared by the Supreme Court to be unconstitutional never ceased to be valid.<sup>20</sup>

**234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.**

**'Appointments'.**

This word does not exclude appointment by promotion.<sup>21</sup>

17. *Chandramohan v State of U. P.*, A. 1966 S.C. 1987.

18. *State of Assam v. Ranga, Md.*, A. 1967 S.C. 903.

19. Validity upheld in *Beharji v. Chandramohan*, A. 1969 All. 594.

20. *Chandra Mahon v. State*, A. 1969 All. 230 (236).

21. *Kesava v. State of Mysore*, A. 1956 Mys. 20 (25).

There is no constitutional bar to a magistrate being appointed to the civil judicial service, in compliance with Art. 234<sup>22</sup>.

**'In accordance with rules.'**

1 The rules must of course be consistent with the Constitution. Thus, though it would be competent to the Governor to prescribe conditions for eligibility for appointment to the civil service necessary to secure an efficient administration of justice (e.g. knowledge of local language, experience at the bar, knowledge of the regional language and the like) any rule which prescribes an irrelevant test (e.g. a particular height or colour or that a candidate must not be an Advocate of any High Court) other than the particular High Court must be held to be void for contravention of Art. 14.

2 Any appointment made otherwise than in accordance with the Rules duly framed would be void.<sup>23</sup>

**'After consultation'.**

1 Consultation is required in the matter of making the rule and of making the appointment.<sup>24</sup> In the rules referred to in Art. 234 are made without consultation with the Chief Justice of the State and the High Court, they are void.<sup>25</sup>

2 Since the power to appoint includes the power to dismiss or remove it follows that rules relating to termination of service of members of the judicial service must also be made in accordance with the present Article.<sup>1</sup>

**235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.**

**Art. 235: Control of Subordinate Judiciary.**

1 While the posting and promotion of District Judges shall be in the hands of the Governor acting in consultation with the High Court—the posting and promotion and granting of leave of officers of the State Judicial Service *other than District Judges* shall exclusively be in the hands of the High Court subject to the right of appeal to the Governor, or to the law regulating conditions of the service.<sup>26</sup>

2 Apart from the posting and promotion of the officers, the High Court shall have exclusive jurisdiction over the subordinate Courts (i.e. Courts subordinate to the District Court) and also over the District Courts<sup>27</sup> as well as the persons presiding over them, including disciplinary control.<sup>28</sup>

In other words, the control vested in the High Court under this Article is complete control, subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promo-

<sup>22</sup> *Devasahayam v State of Madras* A 1958 Mad 53 (61).

<sup>23</sup> *Pondurangarao v A P P S C* A 1963 SC 268 (271-2).

<sup>24</sup> *Chandramohan v State of U P* A 1966 SC 1987 (1993).

<sup>25</sup> *High Court v Amal Kumar* A 1962 SC 1704.

<sup>1</sup> On the point the dissenting view of Isaac J. in *Srinivasan v State* A 1968 Ker 156 (177) F.B. is preferable.



tion of District Judges. In exercise of this power, the High Court can hold inquiries, impose punishment *other than dismissal or removal*, subject, however, to the conditions of service, and a right of appeal, if granted thereby and to the giving of an opportunity of showing cause under Art. 311 (2), unless such opportunity is dispensed with by the Governor, under the Proviso (b) or (c) to Art. 311 (2). This latter power cannot be exercised by the High Court.<sup>2</sup>

Thus, an inquiry conducted against a judicial officer by a person appointed by the Executive is bad,<sup>2</sup> but not so if such person has been appointed by the High Court.<sup>3</sup>

3. The exercise of the power under Art. 235 by the High Court is not justiciable unless some other provision of the Constitution has been violated.<sup>4</sup>

4. Since the control is vested in the High Court, action by the State Government, in compliance with its recommendation, cannot be challenged on the ground that the Government blindly followed the recommendation of the High Court.<sup>5</sup>

### Indirect interference with the High Court's control under Art. 235.

The object of Art. 235 is to secure judicial independence by making judicial offices completely free from executive control.<sup>6,7</sup>

According to this scheme, the power of promoting a Munsif to the post of a 'Subordinate Judge' belongs to the High Court. If, therefore, the Government re-designates the post of a Subordinate Judge as Assistant District Judge, the promotion of Munsif to the higher post would be taken out of the control of the High Court and would be brought under the control of the Executive under Art. 233.<sup>7</sup> The Supreme Court has also expressed the opinion that if such redesignation is made by an Act of the Legislature, that would also be contrary to Art. 235 and would impair the independence of the Judiciary.<sup>1-4</sup>

### 'Promotion'.

1. Promotion cannot be claimed as of right and there is no question of giving opportunity to show cause, under r 49 of the Civil Services (Classification, Control & Appeal) Rules, or of consulting the Public Service Commission, for the purpose of withholding promotion, unless it is withheld by way of *punishment*.<sup>8</sup>

2. Seniority and promotion shall be governed by Rules made under Art. 309.<sup>10</sup>

### Disciplinary powers over subordinate Judiciary.

1. Read with Arts 233-4, Art. 235 means that the High Court alone can initiate and conduct disciplinary proceedings and recommend disciplinary

2. *State of West Bengal v Nripendra*, A. 1966 S.C. 447, affirming *Nripendra v Chief Secy.*, A. 1961 Cal. 1.

3. *Nagmoti v. State of Mysore*, (1969) 3 S.C.C. 325 (330).

4. *High Court v. Amal Kumar*, A. 1962 S.C. 1704.

5. *Ram Gopal v State of M. P.*, A. 1970 S.C. 158 (161).

6. *State of W. B. v. Nripendra*, (1966) 1 S.C.R. 771.

7. *State of Assam v Kueswar*, (1970) U.J.S.C. 140 (143, 145).

8. The Supreme Court, however, suggests that in such a case, the remedy would be to seek an amendment of such law. Nothing is said as to whether such law can be struck down as unconstitutional. *Prima facie*, there is no reason why this cannot be done.

9. *High Court v. Amal Kumar*, A. 1962 S.C. 1704.

10. *Cf. Chandramouleswar v. Patna High Court*, A. 1970 S.C. 370.

action against judicial officers, though the actual order of dismissal can be made only by the appointing authority, i.e., the Government.<sup>9, 11</sup> After the charges are established and the punishment provisionally proposed by the High Court is communicated to the Governor, the latter will issue the notice under Art. 311 (2) and after giving the opportunity of showing cause, finally determine whether the punishment proposed should be inflicted or not.<sup>12</sup>

2. It follows that an order of dismissal based on an inquiry held by an executive officer at the initiative of the Government was invalid.<sup>4</sup> The power of suspension also cannot be exercised by the Governor unless recommended by the High Court.<sup>11</sup>

3. This power of the High Court extends not only to members of the Subordinate Judicial Service but also to District Judges.<sup>12</sup>

4. The power conferred by Art. 235 is, however, subject to the two limitations mentioned at the end of the article, namely, as regards (i) the right of appeal, and (ii) the procedure to be followed for taking disciplinary action, as laid down in the law made under Art. 309.<sup>12</sup>

5. But the High Court's power of control cannot be altogether taken away by the rules or any law made under Art. 309.<sup>11, 12</sup>

#### Interpretation.

#### 236. In this Chapter—

- (a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;
- (b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

#### 'District Judge'.

The expression includes both permanent and officiating incumbents of the posts specified.

#### 'Sessions Judge'.

Since a Civil Judge can be appointed a Sessions Judge only if appointed under s. 9 of the Cr. P. C. as a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, such appointment must be considered to be an appointment as a 'district judge' within the meaning of Art. 236. Consequently such appointment must comply with the requirements of Art. 233 in order to be valid.<sup>13</sup>

#### 237. The Governor may by public notification direct that the fore-

Application of the provisions of this Chapter to certain class or classes of magistrates.

going provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the

11. *Ghouse v. State of Andhra*, A. 1955 Andhra 65 (68), affirmed by A. 1957 S.C. 246.

12. *Nripendra v. Chief Secy.*, A. 1961 Cal 1.

13. *Premnath v. State of Rajasthan*, A. 1967 S.C. 1599.

**judicial service of the State subject to such exceptions and modifications as may be specified in the notification.**

**Application to Magistrates.**

In States where separation of the Judiciary from the Executive has been effected, notifications under this Article have been issued to bring under the control of the High Court the Magistrates exercising judicial powers.<sup>13</sup>

## PART VII

**238.** *Omitted by the Constitution (Seventh Amendment) Act, 1956.*

**Amendment.**—Art. 238, which was the only Article included in Part VII, contained the special provisions relating to States in Part B. With the abolition of States in Part B, Art. 238 became unnecessary and has, accordingly, been omitted by the **Constitution (Seventh Amendment) Act, 1956.**

## PART VIII

### THE UNION TERRITORIES.<sup>1</sup>

**\*239.** (1) *Save as otherwise provided by Parliament by law, every Administration of Union territories of Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.*

(2) *Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the Administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers*

**Union Territories.**

**The Constitution (Seventh Amendment) Act, 1956** replaced the States in Part C and Territories in Part D of the First Schedule by the 'Union Territories', which, under Part II of of the First Schedule (as amended) were six in number,—Delhi; Himachal Pradesh; Manipur; Tripura; Andaman & Nicobar Islands; Laccadive, Minicoy & Anindivi Islands.

By the Constitution (Tenth, Twelfth and Fourteenth) Amendment Acts, the following have been added to the list of Union Territories:

- (a) Dadra & Nagar Haveli;
- (b) Goa, Daman and Diu;
- (c) Pondicherry.

The Provisions relating to the administration of the Union Territories do not materially differ from those relating to the administration of the Part C States, as was provided in repealed Arts. 239 and 240. They are to be administered by the Union, through an administrator.

1. Heading substituted by the Constitution (Seventh Amendment) Act, 1956.

2. Substituted by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.

The provisions of the substituted Art. 239 have been supplemented by the Territorial Councils Act, 1956.

### **A Union Territory is a separate entity.**

The President who is the executive head of a Union Territory does not function as the head of the Central Government, but as the head of the Union Territory under powers specially vested in him under Art. 239. Under Art. 239, the President occupies in regard to Union Territories, a position analogous to that of a Governor in a State. Though the Union Territories are centrally administered under the provisions of Art. 239, *they do not become merged with the Central Government.*<sup>3</sup>

Hence,—

(a) A person who has entered into a contract with Government of a Union Territory cannot be held to have entered into a contract with the Central Government, within the meaning of s. 7 (d) of the Representation of the People Act, 1951.<sup>3</sup>

(b) A suit against a Union Territory should be brought not against the Central Government but against the Administration of the Union Territory,<sup>4</sup> which is represented by the Administrator, in view of s 2 (7) (b) (iii) of the General Clauses Act, which defines the 'Central Government' as including—

*"in relation to the administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Art. 239 of the Constitution"*

*Creation of local Legislatures or Council of Ministers or both for certain Union territories.*

**'239A.** (1) *Parliament may by law create for any of the Union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu, and Pondicherry—*

(a) *a body, whether nominated or elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or*

(b) *a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law*

(2) *Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."*

### **Amendment.**

Art. 239A was inserted by the Constitution (Fourteenth Amendment) Act, 1962.

### **Object of Amendment.**

"It is proposed to create Legislatures and Council of Ministers in the Union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry broadly on the pattern of the scheme which was in force in some of the Part C States before the reorganisation of the States. The Bill seeks to confer necessary legislative power on Parliament to enact laws for this purpose through a new article

3. *Satya Dev v. Padam Dev*, A. 1954 S.C. 586 (591) [but see *Rodhey v. Delhi Adm.*, A. 1969 Delhi 246].

4. *Ct. State of V. P. v. Moula Bux*, A. 1962 S.C. 145.

5. Inserted by the Constitution (Fourteenth Amendment) Act, 1962, w.e.f. 28-12-62.

239A which follows generally the provisions of article 240 as it stood before the reorganisation of the States".<sup>6</sup>

### Legislative power with respect to Union Territories.

Under Art. 240 (4) [p. ... , *post*] Parliament is competent to make laws with respect to subject included in the State List to have application to Union Territories. According to the Supreme Court, in the exercise of this power, Parliament is not fettered by anything in the Entries in the State List or anything following therefrom.<sup>7</sup>

Even after a Legislature is created for a Union Territory, Parliament shall possess paramount power to legislate with respect to any matter included in List II, in relation to that State. In other words, the Legislature of a Union Territory shall have no exclusive power with respect to List II as the Legislatures of States possess [cf. Art. 246 (3), *post*].

*Power of President to make regulations for certain Union territories.* **\*240.** (1) *The President may make regulations for the peace, progress and good government of the Union territory of—*

- (a) *the Andaman and Nicobar Islands;*
- (a) *the Lakadive, Minicoy and Amindivi Islands,*
- (c) *Dadra and Nagar Haveli;*<sup>8</sup>
- (d) *Goa, Daman and Diu;*<sup>9</sup>
- (e) *Pondicherry*<sup>11</sup>

*Provided that when any body is created under article 239A to function as a Legislature for the Union territory of Goa, Daman and Diu or Pondicherry, the President shall not make any regulation for the peace, progress and good government of that Union territory with effect from the date appointed for the first meeting of the Legislature*<sup>11</sup>

(2) *Any regulation so made may repeal or amend any Act made by Parliament or any existing law which is for the time being applicable to the Union territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to that territory*

### Amendment.

1. The above article was substituted by the Constitution (Seventh Amendment) Act, 1956, for the original Art. 240, which was as follows:

(1) Parliament may by law create or continue for any State specified in Part C of the First Schedule and administered through a Chief Commissioner or Lieutenant-Governor—

(a) a body, whether nominated, elected or partly nominated and partly elected, to function as a Legislature for the State; or

(b) a Council of Advisers or Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law

(2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending the Constitution."

The substituted Article corresponds to cl. (2) of Art. 243, which was omitted by the same Amendment Act. Art. 243 (2) provided—

6. Statement of Objects and Reasons.

7. Cf. *Mithan Lal v. State of Delhi*, A. 1958 S.C. 682 (685).

8. Substituted by the Constitution (Seventh Amendment) Act, 1956.

9. Inserted by the Constitution (Tenth Amendment) Act, 1961, w.e.f. 16-8-61.

10. Inserted by the Constitution (Twelfth Amendment) Act, 1962, w.e.f. 20-12-61.

11. Inserted by the Constitution (Fourteenth Amendment) Act, 1962, w.e.f. 16-8-62.

"The President may make regulations for the peace and good government of any such territory and any regulation so made may repeal or amend any law made by Parliament or any existing law which is for the time being applicable to such territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to such territory"

2. New sub-clauses (c), (d) and (e) have been inserted consequential upon the constitution of new Union Territories.

The Proviso, inserted by the Fourteenth Amendment Act of 1962, is a sequel to Art. 239A. Since that Article envisages the setting up of Legislatures for the Territories of (a) Goa, Daman and Diu and (b) Pondicherry, it is obvious that the President's legislative power to make regulations should cease after such Legislatures for these Union Territories are created, but it continues until then.<sup>12</sup>

**Cl. (2):** Since a Regulation made under Art. 20 has the same force and effect as an Act of Parliament, its validity cannot be challenged on the ground of extra-territoriality, by reason of Art. 245 (2).<sup>12a</sup> The President may make regulations for any of the purposes for which Parliament could make law; the power is not confined to the subject of 'law and order' only.<sup>12</sup>

**241. (1) Parliament may by law constitute a High Court for a Union territory<sup>13</sup> or declare any court in any such territory<sup>14</sup> to be a High Court for all or any of the purposes of this Constitution.**

**(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (1) as they apply in relation to a High Court referred to in article 214 subject to such modifications or exceptions as Parliament may by law provide.**

**(3)** *"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, in relation to any Union territory shall continue to exercise such jurisdiction in relation to that territory after such commencement."*

**(4)** *"Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court for a State to, or from, any Union territory or part thereof"*

**Cl. (2): 'Modifications'.**

The power to modify includes the powers to make additions to the law which is modified.<sup>15</sup>

**Cl. (3): Judicial Commissioners.**

By reason of this clause, read with cl. (1), Judicial Commissioners are continuing to function in the Union Territories of Himachal Pradesh, Manipur and Tripura, and under the Judicial Commissioner's Court (Declaration as High Courts) Act, 1950,<sup>16</sup> Judicial Commissioner is to be regarded as a High Court for the purposes of Arts. 132, 133 and 134, and also 215.<sup>17</sup>

12. *Kanniyar v. I. T. O.*, A. 1968 S.C. 637.

12a. *Agencia v. Custodian*, A. 1970 Goa 11.

13. Substituted by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.

14. Clauses (3) and (4) substituted by *ibid.*

15. *Cf. Mithal v. State of Delhi*, A. 1958 S.C. 682.

16. See C3, Vol. II, p. 195.

17. *Vindhya Pradesh v. Vajj Nath*, A. 1951 V.P. 14.

But a Judicial Commissioner is not a High Court for the purposes of Arts. 216-8; 220-4; 230-2; the Second Schedule.<sup>18</sup>

**242.** *Omitted.*<sup>19</sup>

## PART IX<sup>20</sup>

**243.** *Omitted.*<sup>20</sup>

Part IX, which consisted of Art. 243, relating to the "Territories in Part D of the First Schedule and other Territories not specified in that Schedule", has been omitted by the Constitution (Seventh Amendment) Act, 1956, since there is no such category of territory in the Constitution after this amendment.

But notwithstanding such repeal, the existing Regulations made under Art. 243 have been continued to be in force by s. 29 (2) of the Constitution (Seventh Amendment) Act, 1956, which says--

"(2) Notwithstanding the repeal of article 243 of the Constitution by the said Schedule, all regulations made by the President under that article and in force immediately before the commencement of this Act shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority"

## PART X

### THE SCHEDULED AND TRIBAL AREAS

**244. (1)** The provisions of the Fifth Schedule shall apply to the Administration of Scheduled Areas and tribal areas. **administration and control of the Scheduled Areas and Scheduled Tribes in any State<sup>21-1</sup>... other than the State of Assam.**

**(2)** The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.

**CL (2).**—This means that the tribal areas in the State of Assam will be governed not by the other provisions of the Constitution relating to the States of Union Territories of the Union of India but by the provisions of the Sixth Schedule, *post*, which contained a self-contained Code for the governance of the tribal areas.<sup>2</sup>

It is to be noted that Para. 21 of the Sixth Schedule empowers Parliament to make any changes in the provisions of the Sixth Schedule, without going through the process under Art. 368.<sup>3</sup>

**244A. (1)** Notwithstanding anything in this Constitution, Parliament may, by law, form within the State of Assam an autonomous State comprising certain tribal areas in Assam and creation of local Legislatures or Council of Ministers or both therefor. **may, by law, form within the State of Assam an autonomous State comprising (whether wholly or in part) all or any of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and create therefor—**

18. *N. B. Singh v. W. L. Singh*, A. 1958 Manipur 38 (40).

19. Art. 242, relating to Coorg, has been omitted by the Constitution (Seventh Amendment) Act, 1956.

20. Omitted by the Constitution (Seventh Amendment) Act, 1956.

21-1. The words 'specified, ....Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

2. *Edwington v. State of Assam*, A. 1966 S.C. 1220 (1224).

3. Art. 244A was inserted by the Constitution (Twenty-Second Amendment) Act, 1969, w.e.f. 25-9-69.

(a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the autonomous State, or

(b) a Council of Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (1) may, in particular,—

(a) specify the matters enumerated in the State List or the Concurrent List with respect to which the Legislature of the autonomous State shall have power to make laws for the whole or any part thereof, whether to the exclusion of the Legislature of the State of Assam or otherwise;

(b) define the matters with respect to which the executive power of the autonomous State shall extend;

(c) provide that any tax levied by the State of Assam shall be assigned to the autonomous State in so far as the proceeds thereof are attributable to the autonomous State;

(d) provide that any reference to a State in any article of this Constitution shall be construed as including a reference to the autonomous State; and

(e) make such supplemental, incidental and consequential provisions as may be deemed necessary

(3) An amendment of any such law as aforesaid in so far as such amendment relates to any of the matters specified in sub-clause (a) or sub-clause (b) of clause (2) shall have no effect unless the amendment is passed in each House of Parliament by not less than two-thirds of the members present and voting.

(4) Any such law as is referred to in this article shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution

### Object of s. 244A.

The Statement of Objects and Reasons of the Amendment Act says—

"On the 11th September, 1968, the Government of India announced the broad details of the scheme for constituting within the State of Assam an autonomous State comprising certain areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule to the Constitution. Clause 2 of the Bill seeks to insert a new article 244A in the Constitution to confer the necessary legislative power on Parliament to enact a law for constituting the autonomous State and also to provide the autonomous State with a Legislature and a Council of Ministers with such powers and functions as may be defined by that law

## PART XI

### RELATIONS BETWEEN THE UNION AND THE STATES

#### CHAPTER I.—LEGISLATIVE RELATIONS

##### *Distribution of Legislative Powers*

**245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.**

Extent of laws made by Parliament and by the Legislatures of States.



(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

### Nature of the Distribution of powers.

As under the Government of India Act, 1935, there is a *threefold distribution* of legislative powers between the Union and the States, under the Constitution of India (Art. 246) made by the three Legislative Lists in the 7th Schedule of the Constitution:

List I or the *Union List* includes subjects over which the Union shall have exclusive powers of legislation, including 97 items or subjects. These include defence, foreign affairs, banks, currency and coinage, Union duties and taxes and the like.

List II or the *State List* comprises 66 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local Government, public health and sanitation agriculture, forests and fisheries, education, State taxes and duties, and the like.

List III gives concurrent powers to the Union and the State Legislatures over 47 items, such as Criminal Law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, social insurance, economic and social planning.

The residual power belongs to the Union [Art. 248]

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State Lists has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists [Art. 246 (3)].

In case of *repugnancy* between a law of a State and a law of the Union in the *concurrent* sphere, the latter will prevail. The State legislation may, however, prevail notwithstanding such repugnancy, if the State law was reserved for the President and has received his assent [Art. 254 (2)].

Under Article 249 the Union Parliament is empowered to make temporary laws overriding the normally exclusive powers of the State Legislature,—relating to matters enumerated in the State List, if by a special majority the Council of States declares that this is expedient in the national interest.

### 'Subject to the provisions of the Constitution.

1. *Though within the powers assigned to it under the Constitution, each Legislature in India has plenary power: both the Union and the State Legislatures have their powers limited by—*

(a) The distribution of powers by the Seventh Schedule<sup>1</sup>

(b) The Fundamental rights included in Part III.<sup>2</sup>

(c) Other mandatory provisions of the Constitution, e.g., Art. 286 (1):<sup>3</sup>

(d) In the case of a State Legislature, the territorial limits of the Legislature.

2. If any of the above limits is transgressed, the law in question is liable to be struck down by the Court.<sup>3</sup>

3. The competence of a Legislature to make a law<sup>1</sup> is to be deter-

1. Ref. under Art. 143. A. 1945 S.C. 745 (762).

2. *Bengal Immunity Co. v. State of Bihar*, A. 1945 S.C. 661.

3. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232.

mined with reference to the constitutional provision relating to the power of the Legislature as they exist at the time of enactment of the law.<sup>4</sup>

### Extent of Union Legislation.

The Union Parliament, according to the present clause, has the power to legislate for the whole or any part of the 'territory of India' as defined in Art. 1 (3), p. 1, *ante*. But this territorial jurisdiction of Parliament is 'subject to the provisions of this Constitution'. In other words, the provisions of the present cl. (1) are to be read subject to any other provision of the Constitution which may modify the above jurisdiction of Parliament. For example, Art. 240 (2) says that as regards the Union Territories, Regulations made by the President may repeal or amend a law made by Parliament in relation to such territory and that such Regulations shall have the same force as Acts of Parliament. Similarly, para. 5 of the Fifth Sch. says that the application of Acts of Parliament to any Scheduled area may be barred or modified by notifications made by the Governor. See also para. 12 of the Sixth Schedule, *post*.

### Extent of State Legislation.

1. While the Union Parliament has power to make laws for the whole or any part of the territory of India, the Legislature of a State can make laws only for the State or any part thereof. The legislative power of the State Legislature is thus confined to the territory of the State. The subjects included in the State List or in the Concurrent List (in relation to the State) must therefore be read as referring to objects situate within the territory of the State concerned, or objects as between which and that State there is a territorial nexus.

2. Cls. (1) and (2) of Art. 245, read together, imply that the State Legislatures under our Constitution shall have no extra-territorial powers.<sup>5</sup> But though a State Legislature is not competent to legislate as to matters outside its territory, it does not follow that a legislation which is in *substance* in respect of matters within the competence of that subordinate Legislature would be *ultra vires* simply because it may have *possible effect* outside that territory. Thus, when a State Legislature under our Constitution legislates with reference to public order, the enactment would not become *ultra vires* merely because it may have repercussions or consequences outside the State.<sup>6</sup>

3. Hence, when a statute is impugned as having an extra-territorial operation, the validity of that legislation "depends on the *sufficiency* of the purpose" for which it used the territorial connection.<sup>7</sup>

In the absence of such territorial nexus, a State legislation which deals with a subject matter lying outside its territorial limits must be held to be *ultra vires*.<sup>8</sup>

4. Similarly, in a taxing statute, if there is a territorial nexus between the person to be charged and the State seeking to tax him, the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely, (a) the connection must be *real* and

4. *Rehman v. State of J. & K.*, A. 1960 S.C. 1 (6).

5. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (711); *Kochuni v. State of Madras & Kerala*, A. 1960 S.C. 1080 (1085).

6. *Siddique v. Prov. of Bihar*, (1949) 4 D.I.R. 29 (Paa.).

7. *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661 (Venkatarama J.); *Anant v. State of A. P.*, A. 1963 S.C. 853; *State of Bihar v. Charushila*, A. 1959 S.C. 1002.

8. *State v. Narayandas*, A. 1958 Bom. 68 (71) F.B.

not illusory; and (b) the liability sought to be imposed must be pertinent to that connection. If the connection is sufficient in the sense mentioned above, the *extent* of such connection affects merely the policy and not the validity of the legislation. In other words, the fact that the liability imposed may be disproportionate to the territorial connection is of no importance on the question of validity of the statute.<sup>9</sup>

### State Legislature, not a delegate of the Union Parliament.

The State Legislature under *our* Constitution is not a delegate of the Union Parliament. Both Legislatures derive powers from the same Constitution. Within its appointed sphere, the *State* Legislature has plenary powers.<sup>8</sup>

Since both the Union and State Legislatures derive their respective powers from the same written Constitution which divides the legislative powers between them, one Legislature cannot by delegation of subjects that are exclusively within its field clothe the other with legislative capacity to make laws on that subject. Hence, the Union Legislature cannot delegate or transfer its power to the State Legislature, and *vice versa*.<sup>10</sup>

### Competence to make retrospective legislation.

1 The power of Parliament and the State Legislature to make laws is conferred by Arts. 245, 246 and 248. There is nothing in the Articles to provide that the Indian Legislatures do not possess the right to make retrospective legislation which every sovereign Legislature possesses. The power to make a law includes the power to give it retrospective effect.<sup>11</sup> The only express limitation imposed upon the power of retrospective legislation is that contained in Art. 20 (1) viz., that it cannot make retrospective *penal* laws. Any other law may, therefore, be made retrospective under the Constitution<sup>12</sup> including taxing laws,<sup>13</sup> provided no fundamental right is infringed by reason of taking away a vested right by the retrospective legislation, e.g., Art. 14, 19,<sup>14</sup> or 31 (2).<sup>15</sup>

2 It is also competent for the Legislature to *repeal* an Act retrospective.<sup>16</sup> Such retrospective repeal can also be made of one enactment where there were two enactments prescribing two different procedures, in order to remove the discrimination which was in existence as a result of such different procedures.<sup>17</sup>

3 The power of such retrospective legislation is not affected by anything in the Government of India Act, 1935. The Constitution does not restrict or limit the legislative competence of Parliament so as to make it exercisable only with regard to that part of the territory of India or only with regard to those subjects in regard to which the Dominion Legislature had, before 26.1.50, the power to legislate. It is to the provisions of the present Constitution that we must look for determining the powers of Parliament.<sup>18</sup>

9. *State of Bombay v. Chamarbaigwala*, A. 1957 S.C. 609 (772).

10. *In re Delhi Laws Act*, 1912, (1951) S.C.R. 747, Mahajan J.

11. *Sundararamier v. State of A. P.*, (1959) S.C.R. 1422; *J. K. Jute Mills v. State of U. P.*, A. 1961 S.C. 1534; *Jadav v. Municipal Committee*, A. 1961 S.C. 1486.

12. *Union of India v. Madangopal*, (1954) S.C.R. 541; (1952-4) C.C. 528; *Jawaharimal v. State of Rajasthan*, A. 1966 S.C. 764 (770).

13. *Razhubar v. Union of India*, A. 1962 S.C. 263 (274); *Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667; *Jarawa Sugar Mills v. State of M. P.*, A. 1966 S.C. 416.

14. *Cf. Jadav v. H. P. Administration*, (1960) 3 S.C.R. 756 (761-3).

15. *State of Mysore v. Achiah*, A. 1969 S.C. 477 (482).

4. The competence of a Legislature to make law for a past period depends on its *present* legislative power and not on what it possessed at the period of time when its enactment is to have operation.<sup>16</sup> Hence it is competent for a State Legislature to validate a pre Constitution Act provided the subject-matter is within the jurisdiction of that Legislature under the Constitution.<sup>18</sup>

5. Retrospective effect can be given also to a validating Act.<sup>17</sup>

But even the assent of the President to a subsequent validating Act cannot validate, *ab initio*, an earlier Act which had failed for absence of the President's assent under Art. 255, for, neither the Legislature nor the President has the power to declare that non-compliance with Art. 255 of the Constitution was of no effect.<sup>18</sup>

#### \* Governor's Ordinance-making power.

As has been stated earlier (p. 393, *ante*), the Ordinance-making power of the Governor is co-extensive with that of the State Legislature, subject only to the limitation as to duration, as specified in Art. 213 (2) (a).<sup>19</sup> It is, therefore, competent for the Governor to amend the Rules of Procedure of the State Legislature itself, by making an Ordinance when the Legislature in embryo is not in session.<sup>20</sup>

#### Competence to override a judicial decision and to make a Validating Act.

1. In *Indu* it is competent for the Legislature to put an end to the finality of a judicial decision and reopen a past controversy, and even to pass a validating Act to declare to be valid a law which has been pronounced to be void by the Court. By so enacting the Legislature does not exercise a judicial function.<sup>21</sup>

2. It can confer jurisdiction upon a Court with retrospective effect and validate sentences passed without jurisdiction.<sup>22, 23</sup>

3. A validating Act may be given retrospective effect like any other enactment, so as to validate an enactment held to be void, with effect from the very date when it had been passed.<sup>24</sup> notwithstanding any change in the situation.<sup>25</sup> A validating Act, if it is otherwise valid, cannot be challenged on the ground that it fixed an arbitrary date for the valuation of the property which bore no relation to the acquisition proceedings,<sup>26</sup> or that it has validated a discrimination by eliminating one of two discriminating procedures.<sup>27</sup>

4. It may even validate an Act which had failed for non-compliance with Art. 255,<sup>28</sup> but not retrospectively, so as to revive the invalid Act *ab initio* and to validate all acts done under the Act, and thus render Art. 255 nugatory.<sup>29</sup>

16. *Abdul Shakoor v. State*, A. 1964 S.C. 1729 (1735).

17. *Calcutta Gas Co. v. State of W. B.*, A. 1952 S.C. 1041 (1050); *Rai Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667.

18. *Jawaharlal v. State of Rajasthan*, A. 1966 S.C. 764 (771).

19. *State of Punjab v. Satya Pal*, A. 1969 S.C. 903 (912).

20. *Piave Dusadh v. Emp.*, A. 1944 F.C. 1.

21. *Biharilal v. Ramcharan*, A. 1957 M.P. 165 (168).

22. *West Ramnad E. D. Co. v. State of Madras*, A. 1962 S.C. 1753.

23. *Rai Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667.

24. *Udai Ram v. Union of India*, A. 1968 S.C. 1188 (paras. 32, 34).

25. *State of Mysore v. Achiah*, A. 1969 S.C. 477 (483).

26. *Jawaharlal v. State of Rajasthan*, A. 1966 S.C. 764 (769/771).

\*5. But—

(a) The Legislature cannot assume the power of adjudicating a case by virtue of its enactment without leaving it to the Judiciary to decide it with reference to the law in force.<sup>2</sup> Thus, the Legislature cannot declare any pending judicial proceeding to be invalid and discharged.<sup>3</sup>

(b) Nor can the Legislature, while validating a legislation against a judicial decision, bar the jurisdiction of the High Court under Art. 226 to adjudicate future disputes relating to the subject,<sup>4</sup> or make it obligatory upon the High Court to review its previous decisions under Art. 226 and to pass an order as provided in the Validating Act, irrespective of the merits of such cases,<sup>5</sup> or override the other provisions of the Constitution, such as Art. 14.<sup>6</sup>

**Competence to override contracts.**

Contractual rights and obligations are not guaranteed by our Constitution against legislative interference. Hence, the legislative competence of the Legislatures in India is not fettered by the terms of any grant<sup>7</sup> or contract<sup>8</sup> made by the Government.

**The Legislature cannot delegate its essential functions.**

1. Though our Constitution has not admitted the doctrine of Separation of Powers nor embodied any express prohibition against delegation of powers by the Legislature to the Executive or any subordinate body, our Supreme Court has held that the Legislature, under our Constitution, cannot delegate its essential functions which have been entrusted to it by the Constitution.<sup>9-11</sup>

(i) The essential legislative functions are the determination of the legislative policy and its formulation as a rule of conduct.<sup>12</sup> In other words, the Legislature cannot delegate to another agency the exercise of its judgment on the question as to *what the law should be*<sup>13</sup>

On the other hand, if the Legislature lays down the policy in clear and unambiguous terms, the delegation of the power to execute policy by framing appropriate rules cannot be impugned as impermissible,<sup>14</sup> but not so if the policy is couched in vague terms.<sup>15</sup>

(ii) The power to modify an Act in its essential particulars (so as to involve a *change of policy*<sup>16</sup>) is also an essential legislative function.

"To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely, the power to legislate, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered."<sup>17</sup>

It follows that the conferment of the power on the executive to modify an Act *without any limitation* on the power to modify constitutes an unconsti-

2. *Basanta v. Emp.*, A. 1944 F.C. 86.

3. *Bhupendra v. State of Orissa* A. 1960 Orissa 46.

4. *State of Bihar v. State of Assam*, A. 1952 S.C. 252, Mahajan J.

5. *Barada Kant v. State of Assam*, A. 1958 Assam 23; *G. P. W. & T. Dept v. A. G. Factory*, A. 1959 A.P. 538 (542).

6. *In re Delhi Laws Act*, (1951) S.C.R. 747 (Kania C.J., Mahajan Mukherjee & Bose JJ.).

7. *State of Bombay v. Narottamdas*, (1951) S.C.R. 51 (Mahajan, Mukherjee & Das JJ.).

8. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

9. *Vasantilal v. State of Bombay*, A. 1961 S.C. 4, *Makhan Singh v. State of Punjab*, *Hurishanker v. State of M. P.*, A. 1954 S.C. 465 (468).

10. *Makhan Singh v. State of Punjab*, A. 1954 S.C. 381 (401).

11. *Khambalia Municipality v. Gujarat State*, A. 1967 S.C. 1048 (1055); *Devi v. State of Punjab*, A. 1947 S.C. 1885 (1901).

tutional delegation of legislative function. For, in making modification, the whole aspects of an Act or a section may be changed.<sup>11</sup>

On the other hand—

The delegation of a power to modify would not be unconstitutional if it relates not to the legislative policy but to matters of detail which may be considered as *not essential* to the legislative function.<sup>12a</sup>

(iii) The Legislature cannot delegate to the executive the power to make *exemptions* from the operation of an Act, without laying down the policy for the guidance of the latter.<sup>13</sup>

But a greater attitude has been allowed in respect of taxing legislation, on the principle that it is always open to the State to tax certain classes of goods and not to tax others.<sup>14</sup>

(iv) Prescribing an offence and its punishment is essentially a legislative act.<sup>15</sup>

A Legislature may delegate the power of rule making and provide the penalty for violation of the rule. But instead of prescribing the precise penalty, it may lay down the limit or the standard leaving it to the administrative body to prescribe the penalty within such limits or in accordance with the standard laid down.<sup>16</sup>

(v) Prescribing a special procedure for the trial of a summary offence is a legislative act.<sup>16</sup>

(vi) The majority of the Supreme Court, in *Jalan Trading Co's* case,<sup>17</sup> held that the power to remove difficulties, in giving effect to an Act is an essential legislative function which cannot be delegated by the Legislature to the Executive or other administrative authority.

2. A statute will also be void for abdication of its legislative function, if a legislature adopts an enactment which another Legislature without applying its mind to what it was adopting.<sup>18</sup>

### Ascertainment of the legislative policy.

The legislative policy has to be ascertained by the Court from the provisions of the Act, including its Preamble<sup>19</sup> and, where the impugned Act replaces another Act, the Court may even look into the provisions of that Act in order to determine whether the Legislature has conferred unguided power to the Executive.<sup>20</sup>

### A. Instances where policy has been laid down.<sup>21</sup>

(1) S. 3 of the All-India Services Act, 1951, empowers the Central

12a. *Vanarsi v. State of M. P.* A. 1953 S.C. 909 (S. R. Das C.J., Venkatarama Aiyar, Das, Sarkar JJ., Bose, J. did not concur).

13. *Dwarka Prasad v. State of U. P.*, A. 1951 S.C. 224.

14. *Sarat v. Calcutta Corpn.*, A. 1959 Cal. 36 (11).

15. *D. N. Ghose v. Addl. Session Judge*, (1950) 63 CWN 47 (156).

16. *Sethia Properties v. Bhayani*, A. 1961 Cal. 199 (211).

17. *Jalan Trading Co. v. Mill Mazdoor Sabha* A. 1967 S.C. 601 (703) (Payment of Bonus Act).

18. *Sham Rao v. Union Territory*, A. 1967 S.C. 1480 (Pandicherry General Sales Tax Act, 1965).

19. *Vasanthi v. State of Bombay*, (1961) S.C. 394 (397); *State of M. P. v. Champalel*, A. 1965 S.C. 124 (178); *Union of India v. Bhanmal*, A. 1960 S.C. 475 (179).

20. *Bhatnagar v. Union of India*, A. 1957 S.C. 478 (486).

21. See also *State of Nagaland v. Ratan Singh* A. 1967 S.C. 212 (Scheduled Districts Act); *Pritam Singh v. State of Punjab*, A. 1967 S.C. 930 (933) [Pepsu Tenancy & Agricultural Lands Act 1955], *Khambalia Municipality v. Gujarat State*, A. 1967 S.C. 1048 (1051) [Gujarat Panchayats Acts, 1962]; *Kandiyal v. State of Gujarat* (Bombay Commissioners of Divisions Act, 1958).

\* Government to frame rules for the regulation of the conditions of service of members of the All-India Services. S 4 then says—

"All rules in force immediately before the commencement of this Act and applicable to an all-India Service shall continue to be in force and shall be deemed to be rules made under this Act."

Negating the contention that Parliament had not laid down any policy or standard for the making of rules under the Act but left it entirely to the Central Government, the Supreme Court observed that the Legislature determined the legislative policy by simply adopting the existing rules and the power conferred upon the Central Government was to frame rules 'which may have the effect of adding to, altering, varying or amending' the rules accepted under s 4 as binding. It cannot, therefore, be held that the Legislature had not laid down any policy or standard for the guidance of the Central Government.

An additional ground upon which the delegation was upheld as permissible was that under s 3 (2) of the Act the rules so framed were to be laid before Parliament for the specified period for the approval, repeal or modification by Parliament, so that it could not be said that Parliament had abdicated its authority.

(1) After assuming the conditions of a ceiling area and an 'economic holding' in ss 3 to the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, provided, in s 7—

Notwithstanding anything contained in ss 5 and 6, it shall be lawful for the State Government, if it is satisfied that it is expedient so to do in the public interest to vary by notification the acreage of the ceiling area or economic holding having regard to

- (a) the situation of the land,
- (b) its productive capacity,
- (c) the fact that the land is located in a backward area and
- (d) any other factors which may be prescribed.

It was contended that the words 'any other factors' gave uncharted discretion to the Government to prescribe factor for the benefit of particular individuals or groups on extraneous consideration. This contention was negated by the Supreme Court, observing that the policy of the Act was to be found from the Preamble which stated that it was to amend a previous Act of 1948, and this Act of 1948 sets out the objectives to be achieved. The power to vary the ceiling area and economic holding was also governed by the factors laid down by the Legislature in Cls (a) (c) 'Any other factors' "would be factors *ejusdem generis* to the factors mentioned earlier in the section and could not be any and every factor which crossed the mind of the executive. The power was also circumscribed by the general condition that it must be exercised "in the public interest." Of course, the determination of the public interest was left to the subjective satisfaction of the Government, but if the power abused, the notification so issued would be liable to be invalidated on that ground, as the law could not be invalidated as constituting an excessive delegation of the legislative power, on the ground that the subjective power could be abused.<sup>23</sup>

### **B. Instances where policy has not been laid down.**

1. S. 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, provides—

22. *Gurukul v. State of Punjab*, A. 1959 S.C. 512 (518).

23. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (474).

"Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for—

- (a) the procurement of miscarriage in women or prevention of conception in women; or
- (b) the maintenance or improvement of the capacity of human beings for sexual pleasure; or
- (c) the correction of menstrual disorder in women; or
- (d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in rules made under this Act."

*Held*, that the words in clause (d) above "or any other disease or condition which may be specified in rules" conferred uncanalised and uncontrolled power to the Executive to specify any disease and make established no criteria, no standards, and has not prescribed any principle on which a particular disease or condition is to be specified. . . . It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in section 3 (d) must, therefore, be held to be going beyond permissible boundaries of valid delegation". The Court, accordingly, struck down this portion of section 3 (d).<sup>24</sup>

2. S. 5 of the Punjab General Sales Tax Act, 1948, provided—

"Subject to the provisions of this Act, there shall be levied on the taxable turnover of a dealer a tax at such rates as the Provincial Government may by notification direct."

24 *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554 (568). "It is to be noted that the decision in the instant case is in striking contrast to the case of *Sri Ram v. State of Bombay* (A. 1959 S.C. 359). The impugned provisions of the enactments in both the cases were similar in so far as the Legislature added a residuary clause, after enumerating certain specific cases where the power could be exercised. But while in *Sri Ram's case* the Court applied the *ejusdem generis* rule for interpreting the residuary power that doctrine was not mentioned at all in the unanimous judgment in the *Hamdard case*.

The decision in the instant case is also at variance with that in a number of previous cases (see pp. 580-81, *ante*) where the legislative policy was taken as the standard for determining whether the power of subordinate legislation was uncanalised or not. In the instant case, the Court analysed the history of the legislation, and the different provisions of the statute and had no difficulty in discovering the policy and purpose of the legislation and found that the object of the Act was to control the advertisement of drugs in certain cases, i.e., diseases and to prohibit advertisements relating to remedies professing to have magic qualities and provide other matters connected therewith. The danger aimed at was found to be the danger of 'self-medication' and 'the consequences of unskilful advertisements' relating thereto. If the policy was thus ascertained, and the preceding clauses of section 4 specified advertisements relating to the procurement of miscarriage, the improvement of sexual capacity, the correction of menstrual disorder and the treatment etc. of a venereal disease, was it not possible to hold that the impugned part of clause (d) related to a disease or condition *ejusdem generis* with the preceding categories, constant with the policy of the enactment as ascertained by the Court? In the circumstances, it was possible for the Court to hold, as in previous cases, that the Legislature was not guilty of unconstitutional delegation but that if the subordinate authority ever made a rule specifying a disease or condition which was extraneous to the policy of the enactment and not *ejusdem generis* with the categories enumerated, the rule itself would be void on the ground of *ultra vires*?

Since the judgment in the instant case does not refer at all to the previous decisions on delegated legislation, it is difficult to suggest any ground which led the Court in the instant case to distinguish it from the previous line of decisions. It remains for a future Bench to perform that task).



No guidance was given to the Government by the other provisions of the Act as to how this power was to be exercised. *Held*, the section was invalid for delegating uncontrolled power to the executive.<sup>25</sup>

### Functions which may be delegated.

(a) A Legislature, while legislating, cannot foresee and provide for all future contingencies. Where the Legislature lays down *the policy* and does no more than enable duly authorised officer to meet contingencies and deal with various situations as they arise, there is no 'delegation of legislative authority'.<sup>2</sup>

(b) The power to *extend the operation of an Act may be delegated*.<sup>3</sup>

In the pre-Constitution case of *Jatindranath v Province of Bihar*,<sup>4</sup> Kania C J held that the power to extend, *per se*, could not be delegated as it was "for the Legislature to determine how long a particular legislation will be in operation". The observations of Mukherjea J suggested that the power to extend was a legislative power but where the Legislature itself fixed a maximum period of duration for an enactment and then authorised the Executive to give effect to the Act within the maximum period, according to the exigencies of the situation then prevailing, it was not unconstitutional.

In *Inder Singh v State of Rajasthan*,<sup>5</sup> it was not possible for the Supreme Court to avoid the basic question inasmuch as in this case, no maximum period had been fixed by the legislative authority. S 3 (1) of the impugned Ordinance provided—

"It shall remain in force for a period of two years unless this period is further extended by the Rajpramukh by notification in the Rajasthan Gazette"

It was a case of delegation of the power to extend the duration of the law, without limitation. It is somewhat unfortunate that the Court made no reference to its interim pronouncement in *Loyal's case*.<sup>6</sup> It took pains to demonstrate that in *Jatindranath's case*,<sup>4</sup> the observations were coloured by the fact that a power to modify the law had also been conferred and that the case could not be taken as a conclusive decision on the question whether the power to extend, without more, could be delegated. In any case, the Court,<sup>5</sup> speaking through Venkatarama Ayyar J, clearly observed

"We are unable to agree with the statement of the law in *Jatindranath v State of Bihar*,<sup>4</sup> that a power to extend the life of an enactment cannot validly be conferred on an outside authority."

It is, thus, *settled* that power to extend the duration of a statute is not an essential legislative power and may be delegated.

(c) There is no unconstitutional delegation where the Legislature permits the Executive, at its discretion, to *adapt* (with incidental changes such as name, place and the like) existing statutes and to *apply* them to a new era,—*without modifying* the policy underlying the statute.<sup>7</sup>

(d) Once the essential legislative function is performed by the Legislature by declaring the policy, the extent of delegation is a matter

25. *Devi Das v State of Punjab*, A. 1967 SC 1895 (1968)

1. *Ishar Ahmad v Union of India*, A. 1982 SC 1062 (1967).

2. *State of Bombay v. Bahara*, (1961) S.C.R. 682; *Hussain v State of Bombay*, A. 1962 SC 97 (1962).

3. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.

4. *Jatindranath v. Prov. of Bihar*, (1949) F.C.R. 595

5. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.

6. *Loyal v. State*, (1952) S.C.R. 127.

7. *Rajpramukh v. Chairman, Patna Administration*, A. 1954 S.C. 569: (1955) 1 S.C.R. 290.

for the discretion of the Legislature and the Court is not competent to say that the Legislature should not have done beyond a certain limit,<sup>8</sup> or that it should have provided a different standard.<sup>9</sup>

(e) A delegation cannot be held to be unconstitutional if the rules are required to be laid before Parliament before they are to come into force and Parliament has the power to amend, modify or repeal them.<sup>10</sup>

### Permissible delegation in taxing legislation.

1. The power to impose and assess a tax is essentially a legislative function.<sup>11</sup>

The Legislature must, therefore, either prescribe the rate of taxation itself or formulate a policy for fixation of the rate by a subordinate authority.<sup>12,13</sup>

But no unconstitutional delegation is involved—

Where the Legislature fixes a maximum rate of the imposition (e.g., a cess) and authorises the Executive to determine the rate not exceeding the maximum prescribed by the Legislature, according to the exigencies of the public revenue.<sup>14</sup>

If, however, the maximum rate is included in a Schedule and the Executive is given an unguided and unlimited power to vary that Schedule itself, the delegation must be struck down as delegation of the power to modify the policy laid down by the Legislature.<sup>15</sup>

2. There was a controversy<sup>16</sup> as to whether a State Legislature is competent to authorise a local authority to impose a tax, without fixing a maximum limit to the rate which the local authority may determine.

The Supreme Court has now settled the question by laying it down that the delegation of the power to fix the rate of taxation will be valid if the statute gives guidance to the delegatee as to how the power is to be exercised,<sup>17,18</sup> or the legislative policy is laid down.<sup>19</sup>

3. Of course, if the delegation relates not to a 'tax' but to a 'fee', there is an implied maximum limit inasmuch as it will not be valid unless correlated to the expenses of the services rendered for which the fee is to be levied.<sup>20</sup>

The following are *not* 'essential legislative functions' and may be delegated: the power to select the persons on whom the tax is to be laid; the power to amend the schedule of exemptions;<sup>21</sup> the determination of the rates at which it is to be charged in respect of different classes of goods;<sup>22</sup> the choice of the particular tax suited to the purposes of the Act and within the competence of the Legislature concerned,<sup>23</sup> setting up of the machinery for collection of the tax;<sup>24</sup> or to determine the details relating to the working of the taxation law.<sup>25,26</sup>

8. *Chimnalal v. State of Bombay*, A. 1954 Bom 397.

9. *Union of India v. Bhanmal*, A. 1960 S.C. 475 (481).

10. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (see p. 7, ante).

11. *Rajnaram v. Chairman, Patna Administration*, (1955) 1 S.C.R. 290.

12. *Corpn. of Calcutta v. Liberty Cinema*, A. 1965 S.C. 1107.

13. *Devi Das v. State of Punjab*, A. 1967 S.C. 1895.

14. *Murli v. State of U. P.*, A. 1957 All 159 (163).

15. *Damodaran v. State*, A. 1960 Ker 58 (60).

16. Vide 5 Sh. 532.

17. *Devi Das v. State of Punjab*, A. 1967 S.C. 1895.

18. *Municipal Board v. Raghuvendra*, A. 1966 S.C. 693.

19. *Delhi Municipality v. B. G. S. & W. Mills*, A. 1969 S.C. 1232 (1244, 1247; 1254).

20. *Liberty Cinema v. Calcutta Corpn.*, A. 1959 Cal. 45 (51).

21. *Banwasi Das v. State of M. P.*, A. 1958 S.C. (913).

22. *Western India Theatres v. Municipal Corpn.*, A. 1959 S.C. 586.

23. *Chandhary v. State of Bihar*, A. 1957 Pat. 40.

24-25. *I. T. Commr. v. Ramgopal Mills*, A. 1961 S.C. 338 (342).

### Sub-delegated legislation.

1. The principles discussed above have also been applied to test the validity of sub-delegated legislation. Thus, it has been held that where the Legislature has performed its essential duty by laying down the policy, it can not only delegate the function making *subordinate* and *ancillary* legislation but also empower the delegates to redelegate the function to sub-delegates who are specified in the statute itself.<sup>1-16</sup> Specification by class is sufficient for this purpose.<sup>17-18</sup>

2. But the sub-delegate cannot exercise the function unless the delegate has sub-delegated the function specifically and in terms of the statute which authorises the sub-delegation.<sup>17</sup> Thus it cannot be made with retrospective effect in the absence of a specific provision in the statute authorising such retrospective sub-delegation.<sup>18</sup>

3. In making the sub-delegation, the delegate may further canalise the power to be exercised by the sub-delegate, provided they are in consonance with the policy declared by the Legislature.<sup>18</sup>

4. In the absence of any restriction imposed by the delegate, or the statute, it is competent for the sub-delegate to issue either a specific order against an individual or a general order applicable to a class of persons generally.<sup>19</sup>

### Powers of the Legislature after delegation.

The Legislature is not denuded of its power after it has delegated a function. It retains its to withdraw the delegated power<sup>1-16</sup> or to exercise the power itself so as to override either prospectively or retrospectively the act done by the delegate in exercise of the delegated power.<sup>20</sup>

### Conditional and Subordinate Legislation permissible.

But though the Legislature cannot delegate its essential legislative functions, it can entrust the administration or application of a law to the Executive or some other body. Thus, after laying down the legislative policy—

(i) The Legislature may leave it to the judgment of a local administrative body as to the necessity of applying or introducing the Act in a local area; or the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate.<sup>20-22</sup> This is known as 'conditional legislation'.

(ii) The Legislature may lay down the policy of the legislation and then leave it to a subordinate agency or some executive authority, the power of making rules and regulations for filling in the details to carry out the purposes of the legislation.<sup>20-22</sup> When legislative power is so exercised by an administrative or other subordinate law-making body, under statutory authority, it is known as 'subordinate legislation'. On the part of the Legislature, it is delegated legislation, but it is a permissible delegation if it has laid down the policy.<sup>21-24</sup>

1-15. *Harihankar v. State of M. P.*, A. 1954 465; (1955) 1 S.C.R. 380.

16. *Union of India v. Bhanamal*, A. 1960 S.C. 475 (480) [Cl. 11B of the Iron & Steel (Control of Production and Distribution) Order, 1941, held valid].

17. *Dawood Ali v. Commr. of Police* A 1958 565 (567).

18. *Shivdev v. State of Punjab*, A. 1959 Pini 453 (456).

19. *Santosh Kumar v. State*, (1951) S.C.R. 303.

20. *Epari v. State of Orissa*, A. 1964 S.C. 1581 (1584).

21. *In re Delhi Laws Act*, (1951) S.C.R. 474 (Kania C.J., Mahalan J.).

22. *Bhatnagar v. Union of India*, A. 1957 S.C. 478 (485); *Jinder Singh v. State of Rajasthan*, A. 1957 S.C. 510 (515).

23. *Radhard Dasvakhani v. Union of India*, A. 1960 S.C. 554 (556).

24. *Sel Ram v. State of Bombay*, A. 1959 S.C. 459 (473-4).

25. *State of Bombay v. Narottamdas*, (1951) S.C.R. 51.

### Conditions of validity of Conditional Legislation.

1. There is no delegation of essential legislative power if the Legislature has laid down the policy of the enactment. Conditional legislation, therefore, is valid only where the policy has been laid down by the law itself and no part of it is left to be determined by the administrative authority, who is authorised to select the time when or the area<sup>1</sup> or the object to which the Act is to apply, having regard to the policy of the law, as well as the local conditions and other exigencies.<sup>2,3</sup>

2. It is also permissible for the Legislature to empower the administrative authority to adopt a legislative scheme by stages and in different phases, by fixing different dates for the introduction of different provisions of the Act and in different parts of the territory.<sup>4</sup>

3. The Legislature may authorise the Executive to apply to a new area not only the whole of an existing Act but also any *part* of the Act as the Executive may consider necessary for the area in question; but the Legislature cannot authorise the Executive so to exercise its discretion to select and apply particular provisions of an Act as to constitute a change in the policy of the entire Act, in its application to that area.<sup>5</sup>

Hence, if the Executive, in the exercise of its delegated power to apply particular part of an Act, in fact, selects only such parts as by themselves introduce a policy different from that of the Act, the order or notification of the Executive applying the parts in question must be held to be *ultra vires*.<sup>6</sup>

4. While empowering the Executive to extend an Act to a particular area, the Legislature may provide that upon such extension, the existing laws prevailing in that area shall be deemed to be repealed. It may even authorise the Executive to expressly repeal those existing laws which would otherwise have been repealed by implication. Such delegation of the power of repeal is not unconstitutional, inasmuch as the repeal in such cases is in reality an act of the Legislature itself.<sup>7</sup>

### Delegation of ancillary matters permissible.

Once the policy and standard are laid down by the Legislature, it is permissible for it to delegate *subordinate* and *ancillary* matters to some other authority even though such delegation may not strictly come within the category of conditional legislation.<sup>7,8</sup>

### General conditions for the validity of subordinate legislation.

1. *Publication* is essential for the validity of subordinate legislation. In the case of laws enacted by the Legislature, they become Acts as soon as the assent of the Head of the Executive (President or Governor, as the case may be) is given to the Bill, because the deliberations of the Legislature are public and the laws are passed by the accredited representatives of the people. But this is absent in the case of rules or regulations made by

1. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

2. *Hussain v. State of Bombay*, A. 1952 S.C. 97 (102).

3. *State of M. P. v. Champalal*, A. 1965 S.C. 124.

4. *Basant v. Eagle Rolling Mills*, A. 1964 S.C. 1260.

5. *Rajnarin v. Patna Administration*, (1955) 1 S.C.R. 290.

6. *Ziaullah v. State of U. P.*, A. 1955 All. 554.

7. *Surya v. State of U. P.*, (1952-4) 2 C.C. 396 (401); (1952) S.C.R. 1056; *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (266, Shastri C.J.); *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735; *Hussain v. State of Bombay*, A. 1952 S.C. 97 (102).

8. *State of Assam v. Kidwai*, (1957) S.C.R. 295 (317).

some Department of the Government or other subordinate or non-sovereign law-making authority. Rules or regulations made by them can be binding on the people only after they are published and made known to the people who are to be affected by them.<sup>9</sup>

2. It must not be *ultra vires*. In other words,—

(a) It must not go beyond, nor be repugnant to, the *statute under which it has been made*.<sup>9</sup>

But—

(i) When rule-making power is conferred by the statute in general terms “for the purposes of carrying out the provisions of the Act”, the purposes of the Act must be determined with reference to all the provisions of the Act read together,<sup>11-12</sup> before holding any particular rule to be *ultra vires*.

(ii) If a rule or notification can be validly issued under any provision of the statute under which it purports to have been issued, the fact that by mistake, reference has been made therein to a wrong section would not render the subordinate legislation as *ultra vires*.<sup>13</sup>

(b) It must be made and published in the manner prescribed by the statute under which it is made. Thus, if it is not published in the Official Gazette<sup>14</sup> or laid before Parliament<sup>15</sup> as required by the statute, the rule or regulation must be void.

(c) Subordinate legislation cannot be given retrospective effect unless the statute expressly confers such power upon the rule-making authority.<sup>16</sup>

(d) No tax can be imposed by any bye law, rule or regulation, unless the statute under which the subordinate legislation is made specially authorises the imposition.<sup>15-17</sup>

See, further, under Art. 265, *post*

(e) The rule or regulation must not violate any provision of the Constitution. Thus, a rule which imposes an ‘unreasonable restriction’ (whether substantia ly or procedurally) upon a fundamental right guaranteed by Art. 19, will be void.<sup>18</sup>

### Power to validate *ultra vires* subordinate legislation.

1. When a statutory instrument is *ultra vires* (as distinguished from ‘unconstitutional’) the powers conferred by the statute, it is competent for the Legislature to validate such instrument even with retrospective effect.<sup>19-21</sup>

The reason is—if the Legislature is competent to legislate on the subject, it can exercise that power either directly or by way of validating the *ultra vires* rule or notification which was not covered by its previous delegation.

2. The principle applies to the validation of any executive action<sup>22</sup>

9. *Harla v. State of Rajasthan*, (1952) S.C.R. 110.

10. *Bhim Sen v. State of U. P.*, A. 1955 S.C. 435 (438).

11. *Cf. Chimanlal v. State of Bombay*, A. 1960 S.C. 96.

12. *S. T. O. v. Patel & Co.*, (1959) S.C.R. 520.

13. *Hukumchand Mills v. State of Mo P.*, A. 1964 S.C. 1329 (1132).

13a. *Narendra Kumar v. Union of India*, A. 1960 S.C. 530.

14. *Indramani v. Natu*, A. 1963 S.C. 274 (290-1, per Subba Rao J.). [The opinion of the majority (at p. 287) that the retrospective power may be deduced by the subordinate authority from the statute by necessary intendment also, it is submitted, should receive a fuller consideration].

15. *Narayana v. State of T. C.*, A. 1954 T.C. 504 (505).

16. *K. K. Samaj v. Nagpur Corp.*, A. 1956 Nag. 152.

17. *Maheshwari Prasad v. State of U. P.*, A. 1957 All. 282.

18. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

19. *K. U. V. Mandal v. State of M. P.*, A. 1955 M.P. 6 (8).

20. *Jadav v. Municipal Committee*, A. 1961 S.C. 1436; (1962) 1 S.C.R. 623.

21. *United Provinces v. Atiga*, A. 1941 F.C. 16 (25).

22. *Mukhammadkhal v. State of Gujarat*, A. 1962 S.C. 1517 (1524).

relating to a subject within the competence of the Legislature,<sup>21</sup> or the irregularity following from the omission to issue a statutory notification,<sup>22</sup> or election held under defective electoral rolls.<sup>24</sup>

3. In exercise of the above power of validating an *ultra vires* statutory instrument, it is competent for the Legislature to provide that judicial decisions contrary to the validation shall be of no effect,<sup>25, 2</sup> or that such judicial decisions shall be reopened,<sup>3-4</sup> including a judgment of the Supreme Court,<sup>5</sup> or of a High Court.<sup>24</sup>

But the Legislature cannot, in exercise of the above power, exercise a judicial function by directing, without amending the law, that pending cases shall be decided in a particular manner or that cases decided in one way shall be deemed to have been decided in another way.<sup>1</sup>

3

### Some Aspects of Legislative Power in General.

It is clear from the foregoing discussions that both the Union Parliament and the State Legislatures have within their constitutional limits, plenary powers of legislation like any other sovereign Legislature. Hence, either Legislature shall have the power to exercise its legislative authority in the following ways, *inter alia*,—

(i) It may legislate either absolutely or conditionally,—in the latter case leaving to the discretion of some external authority the *time* and *manner* of carrying its legislation into effect, as also the *area* over which it is to extend.<sup>6</sup>

(ii) It may authorise subordinate bodies to make bye-laws or regulations under a statute, for its detailed administration

(iii) It can make either a permanent or a temporary Act.

(iv) Where the Constitution empowers a Legislature to make laws with respect to a particular subject, *generally*, the Legislature is entitled to legislate with respect to a part of the subject covered by the entry, leaving the other part outside its legislation.<sup>7</sup>

(v) It may legislate either prospectively or retrospectively.

(vi) The power of a Legislature to repeal, modify or alter laws is, as a rule, co-extensive with its powers of direct legislation. It can not only amend or repeal earlier statutes, but may also modify or override the legislative competence.<sup>8</sup>

(vii) It may legislate by 'reference' or 'incorporation'. Where there are provisions relating to a particular subject already embodied in some previous enactment, the Legislature, instead of repeating those provisions in the subsequent Act, may simply refer to those provisions. In such a case, those provisions are to be read as if they are enacted in the subsequent Act for the first time.<sup>9-20</sup>

One peculiar result of legislation by reference is that the repeal of the

23. *Jadev v. H. P. Administration*, (1960) 3 S.C.R. 755 (761).

24. *State of Orissa v. B. K. Bose*, A. 1962 S.C. 945.

25. *Sundaramier v. State of A. P.*, A. 1958 S.C. 468.

1. *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (Sarkar & Imam JJ.).

2. *Jado v. Municipal Committee*, A. 1961 S.C. 1486, affirming A. 1956 Nag. 167.

3. *K. U. V. Mandal v. State of M. P.*, 1965 M.P. 6 (8).

4. *Bhaskar v. Alimullahan*, A. 1953 Nag. 40.

5. *Mohani v. Hargovinda*, A. 1962 M.P. 245.

6. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510 (515).

7. *Hukam Narain v. Province of Bihar*, 1942) 46 C.W.N. (F.R.) 21.

8. *Saffan Singh v. State of Rajasthan*, A. 1965 S.C. 845.

9-20. *Shankar v. Dt. Magistrate*, (1962) S.C.A. 635 (640).

previous Act does not repeal such portions of it as have been incorporated into another Act. In other words, the incorporated sections still operate in the later Act, even though the Act in which the sections were originally enacted no longer exists.<sup>1-3</sup>

(viii) The validity of a legislation depends upon whether the Legislature concerned has any power under the Constitution to enact it; it is immaterial whether the Legislature omits to specify the power or mentions a wrong authority.<sup>3</sup>

(ix) It may validate an unlawful executive act,<sup>4</sup> including an unauthorised assessment of tax.<sup>5</sup>

### **'Subject to the provisions of this Constitution'.**

1. These words indicate that the object of Art. 245 (1) is only to distribute the legislative powers between the Union and the State Legislatures and not to exempt them from any of the limitations which are imposed by the other provisions of the Constitution upon legislative powers. These limitations are—

(i) The fundamental rights guaranteed by Part III of the Constitution,<sup>6a</sup> even where the legislation is undertaken in pursuance of a Directive Principle.<sup>6</sup>

(ii) The limitation imposed by the Entries in the Legislative Lists in the Seventh Schedule as to the subject-matters on which the Union or the State Legislature may legislate.<sup>4</sup>

(iii) Other mandatory provisions of the Constitution which impose limitations upon the powers of the Legislature, e.g., Arts, 286,<sup>7</sup> 301,<sup>8</sup> 303.<sup>9</sup>

(iv) In the case of State legislation, there are further limitation, viz., that (a) its operation cannot extend beyond the boundaries of the State, in the absence of a territorial nexus; (b) it must be for the purposes of the State.<sup>9-10</sup>

(v) What a Legislature cannot do directly, it cannot do indirectly. Hence, if a matter is beyond the legislative competence of a State Legislature (being outside Lists II and III), it cannot legislate on that subject by way of 'adopting' a law made by another Legislature.<sup>11</sup>

2. On the other hand, the powers of the Legislature cannot be fettered by anything outside the Constitution, such as an obligation undertaken by the Government,<sup>12</sup> or a Crown grant or a grant or agreement made by the ex-Ruler of an Indian State.<sup>13</sup>

1. *Secy. of State v. Hindusthan Co-operative Ins.*, (1931) 35 C.W.N. 794 P.C.

2. *Ram Sarup v. Munchi*, A. 1963 S.C. 553 (55).

3. *Ahmed v. Inspector*, A. 1959 Mad. 261 (266).

4. *United Provinces v. Aliqa*, A. F.C. 16.

5. *P. C. Mills v. Broach Municipality*, A. 1970 S.C. 192 (196).

5a. *Bekram v. State of Bombay*, A. 1955 S.C. 123 (145); *R. M. D. C. v. Union of India*, (1957) S.C.A. 912 (922).

6. *Ci. State of Bombay v. United Motors*, (1953) S.C.R. 1069.

7. *Kerala Education Bill*, in re, A. 1958 S.C. 956 (966).

8. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj 114 (119).

9. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699.

10. *State of Bihar v. Charusila*, A. 1959 S.C. 1002; *Anant v. State of A. P.*, A. 1963 S.C. 853.

11. *Durgeshwar v. Bar Council*, A. 1954 All. 728.

12. *Umegh Singh v. State of Bombay*, A. 1956 S.C. 540 (547).

13. *Shubhlaxmi Mills v. Union of India*, (1962) 45 I.T.R. 483 (S.C.).

### Presumption that a Legislature is acting within its competence.

In construing an enactment of a Legislature with limited competence, the Court must presume that the Legislature in question knows its limits and that it is only legislating for those who are actually within its jurisdiction.<sup>14</sup> The enactment should, therefore, receive, if possible, such interpretation as will make it operative and not inoperative.<sup>14</sup>

It is only where there are clear and unequivocal words in the statute which go to show that the Legislature has travelled outside the limitations laid down in the Constitution that the Court will pronounce the statute to be *ultra vires*.<sup>15</sup>

### The Doctrine of Colourable Legislation.

\* 1. This doctrine means that if the Constitution of a State distributes the legislative spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature is passing a statute purporting to act within the limits of its powers, yet in substance and in reality it transgressed these powers,<sup>16</sup> the transgression being veiled by what appears, on proper examination to be a mere pretence or disguise,<sup>17-18</sup> e.g., where the power to acquire property for a public purpose is used to acquire property for the purpose of disposing it at a profit.

2. In order to determine the true nature of a legislation impeached as colourable,—

(i) The Court must look to the substance and not merely the form of the Act.

'Where the law-making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is it that the Legislature is really doing'<sup>19</sup>

For the purpose of investigating the substance of an enactment, the Court will examine two things—(a) effect of the legislation and (b) object or purposes of the Act.<sup>19</sup>

(ii) On the other hand, it should be clearly understood that the doctrine against colourable legislation has nothing to do with the motive of the legislation; it is in essence a question of *vires* or power of the Legislature to enact the law in question.<sup>18</sup>

Thus, the Court has to examine the object of the legislation for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the Legislature to exercise its

14. *State of Bihar v. Charusila*, A. 1959 S.C. 1002 (1010).

15. *Chamarsinghwalla v. Union of India*, (1957) S.C.R. 930.

16. *Jaya Sugar Mills v. State of M. P.* A. 1966 S.C. 416 (421); *Jalan Trading v. Mill Mazdoor Sabha*, A. 1967 S.C. 691 (701).

17. *K. C. G. Narayana Deo v. State of Orissa*, A. 1964 S.C. 375 (379); (1954) S.C.R. 1; *Kunukhoman v. State of Kerala*, A. 1962 S.C. 723 (723); *Hari v. A.* 1966 S.C. 1571.

18. *Singhara Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137 (140); *Vajravelu v. Sp. Dy. Collector*, A. 1965 S.C. 1017.



powers.<sup>18</sup> If the Legislature is competent to make a particular law, its motive<sup>17</sup>,<sup>18a</sup> in enacting it or the fact that it would operate harshly on some persons,<sup>18a</sup> is irrelevant

For instance,—

Since Parliament has the power to provide for detention without trial in the interests of the defence of India, it cannot be urged that the enactment of the Defence of India Act was *mala fide* or colourable since there was already a Preventive Detention Act on the statute book.<sup>18b</sup>

3 To unravel a plan of fraud on powers, it may be necessary to scrutinize all the documents which help to ascertain the truth. It may thus be necessary to look into another Act to ascertain the pith and substance of the impugned Act.<sup>19</sup>

4 The doctrine of colourable legislation has no application where the powers of a Legislature are not fettered by any constitutional limitations.

5. Though the validity of a taxing statute cannot be challenged merely on the ground that it imposes an unreasonably heavy burden,<sup>20</sup> it can be challenged on the ground that it constitutes a colourable exercise of, or a fraud upon, the legislative power, e.g., that it is a mere cloak to confiscate the property of the citizen taxed,<sup>21</sup> or to control and regulate and not to raise revenue.<sup>22</sup>

**246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").**

**(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State . . . . .<sup>a</sup> also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").**

**(3) Subject to clauses (1) and (2), the Legislature of a State . . .<sup>a</sup> has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution referred to as the "State List").**

**(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State<sup>b</sup> notwithstanding that such matter is a matter enumerated in the State List.**

#### Art. 246: Distribution of legislative powers.

1 This Article deals with the distribution of legislative powers as between the Union and the State Legislatures, with reference to

18a. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (947); \* *Nageswara v. Andhra Pradesh Transport Corpn.*, A. 1959 S.C. 308 (316); *State of V. P. v. Maradhvaj*, A. 1960 S.C. 796; *Board of Trustees v. State of Delhi*, A. 1962 S.C. 458

18b. *Makhan Singh v. State of Punjab*, A. 1964 S.C. 381 (401).

19. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1138).

20. *Jogammath v. State of U. P.*, A. 1962 S.C. 1563 (1572).

21. *Kannathal v. State of Kerala*, A. 1961 S.C. 552.

22. *C. J. R. M. D. C. v. State of Mysore*, A. 1962 S.C. 594.

22a. The words 'specified . . . Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

22b. The words 'in a State' were substituted for the words 'in Part A or Part B of the First Schedule' by the Constitution (Seventh Amendment) Act, 1956.

the different Lists in the 7th Sch. The gist of the Article, in short, is that the Union Parliament has full and exclusive power to legislate with respect to matters in List I and has also power to legislate with respect to matters in List III. The State Legislature, on the other hand, has exclusive power to legislate with respect to matters in List II, *minus* matters falling in Lists I and III and has concurrent power with respect to matters included in List III.<sup>23</sup>

2. Art. 246 provides for the distribution, as between the Union and the States, of the legislative power which is conferred by Art 245. Art. 246 therefore, must also be read as 'subject' to the other provisions of the Constitution', e.g., Art 4.<sup>24</sup>

### Distribution not retrospective.

The distribution of legislative powers made by the present article, read with the Entries in the Legislative Lists in the Seventh Schedule, is not retrospective<sup>25a</sup> so as to affect the validity of laws in force at the commencement of the Constitution. They will continue to be in force by virtue of Art. 372, until repealed by the competent Legislature, even though the Legislature which enacted the pre-Constitution law would not have the power to legislate with respect to that subject under the scheme of distribution of legislative powers under the Constitution.<sup>25a</sup>

### Effects of a law being ultra vires.

1. The legislative powers of the Legislatures of the Union and the States being limited by the provisions relating to distribution of powers and other mandatory limitations<sup>26</sup> imposed by different provisions of the Constitution, a law passed without legislative competence is a nullity *ab initio*<sup>1</sup> and nothing can be done to cure that law.<sup>2</sup> Even a subsequent amendment of the Constitution cannot confer jurisdiction upon the Legislature with retrospective effect, so as to validate that law.<sup>3</sup>

2. In *Bhikaji's case*<sup>4</sup> it was opined that while in the case of contravention of a fundamental right the impugned law is not wiped out from the statute book altogether but as a result of the declaration of its unconstitutionality, it ceases to stand in the way of those who are entitled to exercise the fundamental right in question.<sup>4</sup>—in the case of want of legislative competence the law is rendered a nullity for want of jurisdiction.

The above view, as regards contravention of fundamental rights, has been overruled in the subsequent case of *Deep Chand v. State of U. P.*,<sup>5</sup> where it has been held that while the view taken in *Bhikaji's case*<sup>4</sup> may be correct as regards pre-Constitution laws, which cannot be said to have been void *ab initio* for contravention of fundamental rights since no such rights were in existence when such laws were made, the situation is obviously different as regards post-Constitution laws which are void *ab initio*, by reason of Art 13 (2), in case they violate any of the rights included in Part III of the Constitution. Art 13 (2), according to this view, operates as a limitation on the legislative competence of the Legislature

23. *Subramaniam v. Mutuswami*, A. 1941 F.C. 47.

24. *Pillai v. Govt. of India*, A. 1970 Ker 110 (119) F.B.

24a. *Shasankar v. State of M. P.*, A. 1951 Nag 58 (F.B.), *Radhe Lal v. Ladhi*, A. 1957 Punj. 90 (92).

25. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj. 114 (119) F.B.

1. *R. M. D. C. v. Union of India*, A. 1957 S.C. 628 (633).

2. *C. Reddymanay v. State of Bombay*, A. 1958 Bom. 181 (187).

3. *Yerrumati v. State of Hyderabad*, A. 1957 A.P. 1039.

4. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 589 (599).

5. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648.

concerned in the same way as the Lists in the 7th Schedule do; whether a person is a citizen or not may be relevant for the purpose of *enforcement* of a fundamental right but it cannot be used for the purpose of retaining on the statute book an enactment which was void *ab initio* or for the purpose of reviving it by a subsequent constitutional amendment of the fundamental right in question [see p. 16, *ante*].

### Whether a Legislature can validate its *ultra vires* legislation after becoming competent.

Where a Legislature which made a law with respect to a subject over which it had no legislative competence, subsequently acquires legislative competence over that subject, say, as a result of constitutional amendment, it is competent for the Legislature to make a fresh enactment, adopting the provisions of the earlier *ultra vires* Act and then to give retrospective effect, so as to validate the *ultra vires* legislation.<sup>6</sup> Such law would be a valid 'law', with retrospective effect, for the purposes of constitutional provisions such as Art. 31 (1).<sup>6</sup>

### Whether an *ultra vires* law can be validated by another Legislature which is competent.

1. It would appear from the Supreme Court decision in *Sundararamier v. State of A. P.*,<sup>7</sup> that it is competent for a Legislature which is entitled to legislate with respect to a subject to validate, with retrospective effect, a law (relating to that subject) passed by another Legislature which was not competent to make such law, as an ancillary measure.<sup>8</sup>

2. Thus, Parliament can enact a validating Act to save a State law which has transgressed a specific limitation imposed upon the power of the State Legislature, such as Art. 286 (2),<sup>7-8</sup> as it stood before the Constitution (Sixth Amendment) Act, 1956. It is to be noted that Art. 286 (2) itself empowered Parliament to authorise a State Legislature to legislate with respect to matters outside its competence under the Legislative Lists.

### Power of competent Legislature to adopt law made by another Legislature.

1. A Legislature, in exercise of its legislative power with respect to its subject-matter, instead of enacting a measure of its own, extends to its own territory a law made by another Legislature. Thus, Parliament is competent to extend a law made by a State to a Union Territory.<sup>11</sup> Similarly, it is competent for a Legislature to adopt and incorporate an Act made by another State Legislature, relating to a subject with respect to which it has legislative power.<sup>10</sup>

2. When a law is thus extended, it becomes an Act of the extending Legislature itself, by incorporation.<sup>11</sup>

6. *West Raynaud Electric Dist. Co. v. State of Madras*, A. 1952 S.C. 1753.

7. *Sundararamier v. State of A. P.*, (1956) S.C.P. 1422 (1463).

8. *Ashok Leyland v. State of Madras*, A. 1951 S.C. 1433.

9. *Jadao v. Municipal Committee*, A. 1961 S.C. 1486.

10. A doubt was expressed at p. 101 of Vol. 4 of the 4th Ed. of the Author's *Commentary on the Constitution of India*, that, our Constitution being federal in nature, it was not open to the Union Legislature to validate a State legislation with respect to a matter beyond the legislative competence of the latter, under the Legislative Lists, in the absence of a specific provision such as Art. 286 (2). This view appears to have been supported by the majority in *Lakshmi Kant v. State of U. P.*, A. 1955 All. 420 (426-61) F.B. and also by the ratio in *Jawaharlal v. State of Rajasthan*, A.I.R. 1955 S.C. 764 (769).

11. *Mishra Lal v. State of Delhi*, A. 1958 S.C. 682 (685-6).

**CL. (1): 'Notwithstanding anything in cls. (2) and (3)'.**

These words lay down the principle of federal supremacy, viz., that in case of inevitable conflict between Union and State powers, the Union powers as enumerated in List I shall prevail over the State powers as enumerated in Lists II<sup>12</sup> and III, and in case of overlapping between Lists III and II, the former shall prevail.<sup>13,14</sup>

2. But the principle of federal supremacy laid down in Art. 246 (1) of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between Entries in the Union and State Lists. In the case of a seeming conflict between Entries in the two Lists, the entries should be read together without giving a narrow or restricted sense to either of them. Secondly, an attempt should be made to see whether the two Entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation cannot be effected by giving to the language of the Union Legislative List a meaning which, it less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non obstante clause in Art. 240 (1) shall operate only if such reconciliation should prove impossible.<sup>15</sup> Thirdly, no question of conflict between two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' (see under Sch. *post*), appears to fall exclusively under one List, and the encroachment upon another List is only incidental.<sup>16</sup>

**'With respect to'.**

It is in view of this expression that the doctrine of 'pith and substance' has been applied in the interpretation of the legislative powers of the Legislatures under the Constitution. When a question of error of any enactment is raised, it is to be seen whether, looking at the legislation as a whole, it can be said to be a legislation *substantially* with respect to any of the Entries in the List.<sup>17</sup> Once it is held that it does, the legislative power conferred by that Entry will extend to all *ancillary* matters which may fairly and reasonably be said to be comprehended in that topic of legislation.<sup>18</sup>

[See, further, under the Seventh Schedule.]

**CL. (2): Concurrent power.**

The Union and State Legislatures have concurrent power with respect to the subjects enumerated in List III. Hence, the State Legislature has full power to legislate regarding these subjects, subject only to the provision in cl. (2) of Art. 254, that is, provided the provisions of the State Act do not conflict with those of any Central Act on the subject.<sup>17</sup>

**CL. (3): 'For such State'.**

See "Extent of State Legislation", *ante*

In case of any conflict between Entries in Lists I and II, the power of Parliament to legislate under List I will supersede *pro tanto* the exercise of the power by the State Legislature.<sup>13</sup>

12. *Sudhir v. W. T. O.*, A. 1969 S.C. 59 (62).

13. *Subramaniam v. Muttuswami*, A. 1941 F.C. 47.

14. *Thangia v. Hanuman Bank*, A. 1958 Mad. 403 (409).

15. *State of Bombay v. Balara*, (1961) S.C.R. (1961-51); C.C. 308 (311). G. G. in Council v. Prov. of Madras, A. 1945 P.C. 98.

16. *United Provinces v. Atiqua*, A. 1941 F.C. 16 (25).

17. *Amalgamated Electricity Co. v. Ajmer Municipality*, A. 1969 S.C. 227 (234)

### CL (4): Power of Parliament in regard to Union Territories.

The effect of the present clause is to relieve Parliament of the limitations imposed upon its power by cis. (2) and (3), so far as Union Territories are concerned. It is, accordingly, competent to make laws with respect to such Territories even as regards matters included in the State List.<sup>18</sup> In the exercise of this power, Parliament is not fettered by the Entries in the State List or anything following therefrom.<sup>19</sup>

The inclusive definition of 'State' in s 3 (58) of the General Clauses Act is not to be applied to interpret that word in the present clause. If the inclusive definition of 'State' in Sec. 3 (58) of the General Clauses Act were to apply to Art. 246 (4), Parliament would have no power to legislate for the Union Territories with respect to matters enumerated in the State List and until a Legislature empowered to legislate on those matters is created under Art. 239-A for the Union Territories, there would be no Legislature competent to legislate on those matters, moreover, for certain territories such as the Andaman and Nicobar Islands no Legislature can be created under Art. 239-A.<sup>20</sup>

### 247. Notwithstanding anything in this Chapter, Parliament may by

Power of Parliament to provide for the establishment of certain additional courts.

law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

### 248. (1) Parliament has exclusive power to make any law with

Residuary powers of legislation. respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

### Art. 248: Residuary power of legislation.

1 Notwithstanding the great care with which the various Entries in the three Lists of *our Constitution* have been framed, there may be some legislative or taxing power which does not come under any of these Entries. In such a case, it is the Union Parliament which shall have power to legislate with regard to such matter or taxation, by virtue of the present Article. Resort to this residuary power should, however, be a matter of 'last refuge'—only when all the Entries in the three Lists are *absolutely exhausted*,<sup>20</sup> that is to say, only if the subject matter cannot be comprehended in any Entry in the three Lists.<sup>21</sup>

In a case where two constructions are possible, one of which will avoid resort to the residuary power and the other which will necessitate such resort, the former must be preferred.<sup>22</sup>

2. This Article applies to the Union *vis à vis* the States. So far as the Union Territories are concerned, the relevant provision is Art. 246 (4).<sup>19</sup>

3. As instances of laws passed under the residuary power may be mentioned—the Himachal Pradesh Assembly (Constitution & Proceedings) Validation Act, 1958;<sup>23</sup> the Gift Tax Act.<sup>24</sup>

18. Cf *Muthan Lal v State of Delhi*, A. 1958 S.C. 682 (685).

19. *Karnyan v. I. T. O.*, (1968) 1 S.C.J. 727.

20. *Subramaniam v. Mathiswami*, A. 1941 F.C. 47.

21. *Second G. T. O. v. Hazareth*, A. 1970 S.C. 899 (1001).

22. *Mannikchandaram v. Nayudu*, (1946) F.C.R. 67.

23. *Jaleel v. H. P. Administration*, (1960) 3 S.C.R. 755 (761).

**249. (1)** Notwithstanding anything in the foregoing provisions of this Chapter, if the Council or States has declared by resolution

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approved the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

**Art. 249: Power of Parliament to legislate with respect to a State subject, in the 'national interest'.**

The present Article of our Constitution empowers the Union Parliament to take up for legislation by itself any matter enumerated in List II, whenever the Council of States resolves, by a 2/3 majority, that such legislation is necessary or expedient in the national interest'. In other words, whenever any such resolution is passed, Art. 246 (3) will cease to be a fetter on the power of the Union Parliament, to the extent that the resolution goes. This power is to be distinguished from that conferred by Art. 250, for, under the present Article no emergency is necessary for the assumption of the State power by Parliament. 'National interest' is wide enough to cover any matter which has incidence over the country as a whole as distinguished from any particular locality or section of the people.<sup>24</sup>

**Instances of Acts passed under this article.** Supply and Prices of goods Act, 1950, Evacuee Interest (separation) Act 1951

**250. (1)** Notwithstanding anything in this Chapter, Parliament

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

24. See, further, C3, Vol. IV, p. 186-7.

**251.** Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by the Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States.

**252.** (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

#### CL (1): Power of Parliament to legislate for States by consent.

1. There are many subjects in the State List, e.g., public health, agriculture, forests, fisheries, which would require common legislation for two or more States. So, this Article makes it possible for Parliament to make such laws relating to State subjects, as regards such States whose Legislatures empower Parliament in this behalf by resolutions.

2. Even after the enactment of an Act by Parliament under this Article, it is open to any of the other States to adopt the Act for such State by merely passing a resolution 'to that effect in its Legislature.'<sup>25</sup> But the operation of the Act in such State cannot be from any date earlier than the date of the resolution passed in its Legislature adopting the Act.<sup>1</sup>

#### Some Acts passed by Parliament under Art. 252:

Prize Competitions Act, 1955.<sup>26</sup>

**253.** Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Legislation for giving effect to international agreements.

25. *R. M. D. C. v. State of Mysore*, A. 1962 S.C. 894.

1. *Venkataraman v. Controller of Estate Duty*, A. 1960 Mad. 205 (200).

**Art. 253: Legislation for giving effect to international agreements.**

This Article is in conformity with the object declared by Art. 51 (c), *ante*. Treaty-making, implementing of treaties, etc., is a subject of Union legislation, under Art. 14, List I, *post*. But it would have been difficult for the Union to implement its obligations under treaties or other international agreements if it were not able to legislate with respect to *State subjects* in so far as that may be necessary for that purpose. Hence, this Article, by the words 'notwithstanding the foregoing provisions', empowers the Union Parliament to invade List II, in so far as that may be necessary for the purpose of implementing the treaty obligations of India.

**"Notwithstanding anything in the foregoing provisions of this Chapter".**

These words mean that the distribution of legislative powers between the Union and States shall not restrict the power of Parliament to make laws under Art. 253; in other words, Parliament shall be competent to legislate on matters included in List II, in so far as the same may be necessary for the implementation of treaties or agreements.<sup>2</sup> But other provisions of the Constitution, such as the Fundamental Rights, cannot be violated in making such laws.<sup>3</sup> Again, no cession of Indian territory can be made without amendment of the Constitution.<sup>2,4</sup> But the settlement of a boundary dispute does not constitute cession and can be effected without either constitutional amendment or legislation.<sup>2</sup>

**254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which**

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State' . . . . . with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

2. *Maganbhai v. Union of India*, A. 1969 S.C. 783 (798).

3. *Ajait Singh v. State of Punjab*, A. 1962 Punt 309 (321) [reversed on other points, by *State of Punjab v. Ajait Singh*, A. 1963 S.C. 664].

4. *In re Berubari Union*, A. 1960 S.C. 845.

5. The words 'specified' . . . . . 'Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.



**Scope of Art. 254.**

Cl. (1) lays down a general rule. Cl. (2) is an exception to Cl. (1) and the Proviso qualifies that exception.<sup>6</sup>

**Cl. (1): Union law to prevail where State law is repugnant to it.**

The question of repugnancy arises in connection with the subjects enumerated in the Concurrent List<sup>7</sup> (List III of the 7th Schedule) as regards which both the Union and the State Legislatures have concurrent powers, so that the question of conflict between laws made by both Legislatures relating to the same subject necessarily arises.

Cl. (1) says that if a State law relating to a 'Concurrent subject'<sup>8</sup> is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void.

The following points should be noted in this connection:

1. The State law does not become void as soon as the Union Parliament legislates with respect to the same subject. There is nothing to prevent the State Legislature to legislate with respect to a Concurrent subject merely because there is a Union law relating to the same subject. Art. 254(2) is attracted only if the State law is 'repugnant' to the Union Act<sup>9</sup> which means that the two cannot stand together.<sup>10</sup> The doctrine of 'occupied field' has no application in the interpretation of the present article.<sup>10</sup>

2. There is no question of applying Art. 254, unless the State law is, in its 'pith and substance', a law relating to the Concurrent List. If it is covered by an Entry in the State List, but only touches the Concurrent List incidentally, there is no application of Art. 254.<sup>11</sup>

3. The onus of showing the 'repugnancy' and the extent thereof is on the party who attacks the validity of the State law.<sup>12</sup>

**'Repugnancy'.**

A State law may be 'repugnant' in any of the following ways—

(i) When there is direct conflict between the two provisions<sup>13</sup>. This may happen—

(a) Where one cannot be obeyed without disobeying the other.<sup>14</sup>

(b) Two enactments may also be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes do more than impose duties, they may, for instance, confer rights, and one statute is inconsistent with another when it takes away a right conferred by the other even though the right be one which might be waived or abandoned without disobeying the statute which conferred the right.<sup>15</sup> In other words, repugnancy is not confined only to the case where there is a direct conflict between two Legislatures, e.g., where the one says 'do' what the other says 'don't'. It may also arise where both laws operate in the same field and the

6. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648; *Premnath v. State of J. & K.*, A. 1959 S.C. 749.

7. *Mook Raj v. Alla Rakha*, A. 1947 P.C. 72; *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799; (1952-4) 2 C.C. 523 (526); *Ukha v. State of Maharashtra*, A. 1963 S.C. 1531 (1541, para. 20).

8. *Lakshmarayan v. Prov. of Bihar*, A. 1950 P.C. 59.

9. *Zaverbhai v. State of Bombay*, A. 1954 S.C. 752.

10. *Shyamkant v. Rambhajan*, A. 1939 P.C. 74 (83).

11. *Krishna v. State of Madras*, A. 1957 S.C. 297 (303).

12. *Tina Ramji v. State of U. P.*, (1956) S.C.R. 393; *State of Assam v. Harison Union*, A. 1967 S.C. 442.

13. *Mangaldas v. Radhakayam*, A. 1953 Pat. 14 (22).

two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over a State law, under Art 254 (2). The principle of implied repeal may be applied to determine repugnancy for the purposes of Art. 254(2).<sup>9</sup>

(ii) Though there may not be any direct conflict between the Union and the State legislation, where it is evident that the Union Parliament intended its legislation to be a complete and *exhaustive* code relating to the subject, it shall be taken that the Union law has replaced State legislation relating to the subject.<sup>12</sup>

But if the Union law itself permits or recognises other laws restricting or qualifying the general provision made in it, the special provisions of such State local law cannot be said to be repugnant to the Union law,<sup>14</sup> for instance, where the Central Act applies only where there is 'no local law to the contrary'.<sup>15</sup> The position is similar as regards these provisions of the State Act which deal with a subject matter other than that of the Central Act.<sup>16</sup>

(iii) Even where the Central Act is not exhaustive, repugnancy may arise if it *occupies the same field* as the State Act.<sup>17-18</sup> No question of repugnancy arises unless the law made by Parliament and the law made by the State Legislature occupy the same field.<sup>18</sup> If they deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise.<sup>17</sup>

Where the two Acts prescribe two different revising authorities but it is possible for them to co-exist, there is no repugnancy.<sup>19-20</sup> Similarly, there is no repugnancy where the State law prescribes *additional* disqualification<sup>21</sup> or additional rules of evidence,<sup>22</sup> provided the Central Act was not intended to be exhaustive.

(iv) The repugnancy which is alleged must exist *in fact* and not depend merely on a *possibility*.<sup>23</sup>

(v) When a question of repugnancy arises under Art 254, every effort should be made to reconcile the two enactments and to construe them so as to avoid their being repugnant to each other and care should be taken to see whether the two really operate in different fields without encroachment.<sup>23</sup>

There is no repugnancy unless the two Acts are wholly incompatible with each other or the two together would lead to absurd results.<sup>24</sup>

### 'Law made by the Legislature of a State'.

1. The above words in both cls (1) and (2) of Art 254 refer to post Constitution laws made by a State Legislature and that accordingly, neither clause has any application to pre Constitution Provincial laws.<sup>25</sup>

14. *Mosh Raj v. Illa Rajia* (1912) 46 CWN (FR) 61. *State of V. P. v. Morad ali* A. 1960 SC 795 (800).

15. *Hamid v. Arsh* A. 1936 Hyd 10 (12).

16. *Ahmedabad M. O. Assam v. Thakore* A. 1967 SC 1091 (1097).

17. *Tika Ramji v. State of U. P.* (1956) SCR 293. A. 1936 SC 676.

18. *Deen Chand v. State of U. P.*, A. 1959 SC 618 (665); *Tanukh v. Nilratan*, A. 1966 S.C. 1780.

19. *Ambala S. T. Co-op. Society v. State of Punjab* A. 1959 Punj 1 (7) FB.

20. *C. W. M. S. v. S. T. A. Tribunal*, A. 1958 Ker 19.

21. *Bramadathan v. Cochin Devaswam Bd* A. 1956 T.C 19.

22. *In re Krishna*, A. 1954 Mad 993.

23. *Shyamkant v. Rambhajan* (1979) F.C.R. 189 (212).

24. *Om Prakash v. State*, (1957) S.C.R. 423. A. 1957 S.C. 458; *Ukha v. State of Maharashtra*, (1964) 1 S.C.A. 56 (76).

25. *Catter v. Director*, A. 1960 Cal. 219 (222).

2. From the above, it has been concluded by the Madhya Bharat High Court<sup>1</sup> that the Madhya Bharat Act of 1949 could not be repealed or over-riden by the Central Act 48 of 1950 which extended the Industrial Disputes Act, 1947, to the State of M. B.<sup>2</sup>

This decision,<sup>3</sup> however, runs counter to that of the Supreme Court in *Zaverbhai v. State of Bombay*,<sup>4</sup> where the Court held that Act 36 of 1947 of the Bombay Legislature was impliedly repealed by the Essential Supplies (Temporary Powers) Amendment Act (LII of 1950) enacted by Parliament.

In view of the Supreme Court decision,<sup>5</sup> the view taken in the Madhya Bharat case<sup>2</sup> cannot be accepted as sound. The High Court, it is submitted, overlooked the provisions of s. 107 of the Government of India Act, 1935, which have been relied upon by the Supreme Court. The Provincial law, when it was enacted, was subject to s. 107 (1) of the Government of India Act, 1935, which provided that a federal law passed even subsequently relating to the same matter, would prevail. The repeal of the Government of India Act by Art. 395 could not release the Provincial Legislature from that disability, with retrospective effect.

3. But the operation of s. 107 of the Government of India Act, 1935 was, according to two of the Judges in *Subrahmanyam v. Muttuswami*,<sup>6</sup> confined to Central Acts made *after* the commencement of the Government of India Act, 1935, so that if the Central Act was passed prior to 1-4-37, it could not hit a Provincial law on the ground of repugnancy.<sup>4</sup>

4. It should be noted, in this connection, that the words 'Provincial law' in s. 107 (1) of the Government Act, 1935, meant a law made by a Provincial law enacted after 1-4-37.<sup>5</sup>

### 'Law made by Parliament'.

It means a post-Constitution Central law

### 'Which Parliament is competent to enact . . . . ?'

1. Cl. (1) speaks of a State law being repugnant to (a) a law made by a Parliament or (b) an existing law. A controversy has arisen whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (a) and (b) or (b) alone.

(A) It has been suggested<sup>6</sup> that the repugnancy between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as List I. According to this view, Art. 254(1) shall apply to make a Union law made under List I prevail if a State law made under List III is repugnant to it.

(B) The above view is *not* acceptable for reasons more than one—

(i) As explained at p. 290 of Vol. 2, Third Edition, of the Author's *Commentary*,—the question of 'repugnancy' arises only when both Legislatures are competent to legislate in the same field.<sup>7</sup> Hence, Art. 254(1) can possibly apply only when both the Union and the State Laws relate to a subject specified in the Concurrent List, and they occupy the same field.<sup>7</sup>

1. *Janardan v. Hukumchand Mills*, A. 1956 M.B. 199 (204).

2. *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799 [see p. 526, post].

3. *Subrahmanyam v. Muttuswami*, A. 1941 F.C. 47 [Sulaiman & Varadachariar J.J.].

4. *Calix v. Director*, A. 1960 Cal. 219.

5. *Ramachandra v. Dt. Board*, A. 1951 Orissa 1 (6).

6. A.L.R. Commentaries on the Constitution of India (1st Ed.), Vol. 3, Note 12 to Art. 254, relying on observations in *Sadanand v. Aman*, A. 1959 Pat. 53.

7. *The Ramji v. State of U. P.*, (1956) S.C.R. 395.

(ii) It is now settled that whenever the validity of a law is challenged whether on the ground that it is *ultra vires* or repugnant to a paramount law, the first thing that the Court has to do is to apply the doctrine of 'pith and substance' and to determine to which entry in the Legislative Lists the impugned law relates, in its pith and substance.<sup>8,9</sup> Thus if a State law is found to relate to a 'State subject' no question of *repugnance* to any Union law can possibly arise, because, the State Legislature has exclusive jurisdiction to enact the law, and it will prevail even if there is any conflict between any of its provisions and those of a Union law relating either to List I or List III.<sup>10</sup> The same principle will apply if a law made by a State Legislature under List III conflicts with some provision of a Union law relating to List I.

Of course, in interpreting the ambit of the Entries in the different Lists one has to remember the *non-obstante* clauses of Art. 246. But that is a different matter.

(iii) The words "subject to the provisions of clause (2)" in cl. (1) suggest that its scope is co-extensive with cl. (2), the latter being only an exception to the general rule enunciated in cl. (1).<sup>11</sup>

This view, expressed in *Bir Bikram v. Tojazzal*<sup>12</sup> and *Narayanaswami v. Inspector of Police*<sup>13</sup> and relied upon by the Author at p. 290 of Vol. 2 of the Third Edition of his Commentary now finds support from the observations of Subba Rao J. in *Deep Chand v. State of U. P.*<sup>14</sup> and also *Prem Nath v. State of J. & K.*<sup>15</sup>

#### 'Existing law'.

It has been held that in view of the definition in Art. 366 (1), 'existing law' in the present Article cannot be restricted to refer to Central laws only, but would also include Provincial laws existing at the commencement of the Constitution, provided they relate to a matter now enumerated in the Concurrent List.<sup>16,16</sup> Hence, if a State law relating to a Concurrent subject is repugnant to an existing Provincial law, the State law must be void unless it is made in accordance with the provisions of Art. 254 (2).<sup>16</sup>

#### Effect of repugnancy.

The Patna High Court<sup>17</sup> has interpreted the word 'void' in the sense of inoperative. This interpretation rests on the view that Art. 254 (1) does not take away the power of the State Legislature to legislate with respect to a subject in the Concurrent List, but simply invalidates the law in so far as it is 'repugnant' to a Central law relating to the same subject. Hence, when the repugnancy arises, the State law remains in abeyance but, if at any subsequent time, the repugnancy is removed for any reason (say, the repeal or expiry of the Central Act), the State law is revived.<sup>17</sup>

#### 'To the extent of the repugnancy'.

When a State Act is repugnant to a Central law within the meaning of this clause, what becomes void is not the entire Act but only in so far

8. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (665).

9. *Zaveribhai v. State of Bombay*, (1955) 1 S.C.R. 799 (807).

10. *Krishna v. State of Madras*, A. 1957 S.C. 297.

11. *Governor-General v. Prov. of Madras*, A. 1945 P.C. 98; *In re C. P. & Berar Taxation Act*, A. 1939 F.C. 1.

12. *Bir Bikram v. Tojazzal*, A. 1942 Cal. 587.

13. *Narayanaswami v. Inspector of Police*, A. 1949 Mad. 307.

14. *Prem Nath v. State of J. & K.*, A. 1959 S.C. 749 (763).

15. *In re Adilakshmi*, A. 1941 Mad. 533 F.B.

16. *Nambudripad v. C. D. Board*, A. 1956 T.C. 10 (23).

17. *Shrikant v. State of Bihar*, A. 1958 Pat. 496 (500).

as it is repugnant to the Central Act (subject to the doctrine of 'severability' *below*).<sup>18, 20</sup> Thus, in a case where they occupy the same field, the identity of the field may relate to the pith and substance of the subject-matter and also the period of its operation. When both coincide, the repugnancy is complete and the *whole* Act becomes void.<sup>19</sup> On the other hand, the operation of the Union law may be entirely *prospective* leaving the State law to be effective in regard to things already done, e.g., ss 68C-68E of the Motor Vehicles Act, 1939, inserted by Act 100 of 1950. Hence, though the U. P., Transport Service (Development) Act, 1955, is repugnant to the Amendment Act made by Parliament, the schemes framed under the U. P. Act prior to the coming into force of the Union Act remain unaffected.<sup>20</sup>

### Doctrine of Severability.

1 The words 'shall be void' are to be read subject to the doctrine of severability, as under Art. 13 [see pp 24-25, *ante*] The doctrine of severability has been elaborately restated by the Supreme Court in *R. M. D. C. v. Union of India*<sup>20</sup> thus—

(i) In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature which is the determining factor. The test to be applied is whether the Legislature would have enacted the valid part if it has known that the rest of the statute was invalid.

(ii) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

(iii) Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(iv) Likewise when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

(v) The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections, it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

(vi) If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.

(vii) In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

2 The principle is applicable where, though an enactment as a whole is within the legislative competence of a Legislature, particular provisions

18. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648.

19. *R. M. D. C. v. State of Mysore*, (1962) 1 S.C.A. 546. A. 1962 S.C. 804.

20. *R. M. D. C. v. Union of India*, A. 1957 S.C. 628.

of the enactment go outside the scope of the legislative Entry under which the Legislature enacted the law.<sup>21</sup>

### Doctrine of severability as applied to a taxing law.

1. Where an assessment is not for an entire sum, but for separate sums, each being earmarked to a separate assessable item, a Court can sever the sums and cut out one or more along with the sum attributed to it (as unlawful), while affirming the residue.<sup>22</sup>

But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component part (not admissible as '*de minimis*') is on any view not assessable and wrongly included, the assessment is wholly bad.<sup>23</sup>

2. The above principle is also applicable when the constitutionality of a taxing law is impeached,<sup>24</sup> and severability in this context would include separability in the enforcement of the tax.<sup>25</sup>

3. Where an assessment consists of a single undivided sum in respect of the pre-Constitution as well as post-Constitution periods, and the post-Constitution assessment is invalid for contravention of Art. 286, the entire assessment must fail.<sup>26</sup>

### Some State Acts held void for repugnancy, under Art. 254(2):

(i) Cl. (aa) to s. 74 (3), as inserted by the Assam Act 36 of 1964, in the Industrial Disputed Act, 1947.<sup>27</sup>

(ii) The material provisions of the Punjab Sales Tax Act, 1948.<sup>28</sup>

(iii) The U.P. Transport Service (Development) Act, 1955.<sup>29</sup>

### Cl. (2): Validation by President's assent.

1. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration (Art. 200), it will prevail notwithstanding its repugnancy to an earlier law of the Union.<sup>30</sup>

But, in such a case -

(i) The Central Act will give way to the State Act only to the extent inconsistency between the two<sup>31</sup> and no more.<sup>32</sup>

(ii) But the President's assent to an Amending Act cannot cure the repugnancy of the principal Act.<sup>33</sup>

(iii) The predominance of the State law may be taken away if Parliament legislates under the Proviso to Cl. (2).<sup>34</sup>

2. In the case of an Ordinance made by a Governor, the 'repugnancy' within the meaning of Art. 254 (2) would be cured if the Ordinance had been promulgated in pursuance of instructions from the President [Proviso to Art. 213 (3), *ante*]. Otherwise, the Ordinance will be invalid.<sup>35</sup>

21. *Cl. Ramakrishna Dalma v Tendolkar*, A 1958 SC 538.

22. *Bennett & White v. Municipal District*, (1951) A.C. 786 (816).

23. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1099) A 1953 SC 1069.

24. *Ram Narain v. Asstt. Commr.*, (1955) 2 S.C.R. 483 (497).

25. *State of Assam v. Horizon Union*, A 1967 SC 412 (443).

1. *Bhavani Cotton Mills*, A. 1967 SC. 1616.

2. *Deep Chand v. State of U. P.*, A. 1959 SC. 648.

3. *U. P. E. S. Co. v. Shukla*, A 1970 SC 237 (239).

4. *Ukha v. State of Maharashtra*, (1961) 1 S.C.A. 56 (75).

5. *Brij Bhushan v. S. D. O.*, A. 1955 Pat 1 (SB).

6. *Shopping v. State of Orissa*, A. 1960 Orissa 46 (57).

**Some instances of State acts validated by President's assent under Art. 254(2):**

- (i) Bihar Hindu Religious Trusts Act, 1951.<sup>7</sup>
- (ii) Ss. 27-28 of the Orissa Estate Abolition Act, 1952,—notwithstanding repugnancy to s. 23 of the Land Acquisition Act, 1894;<sup>8</sup> or ss. 20 (2) and 28 (3) of the same Act,—notwithstanding repugnancy to the provisions of the Transfer of Property Act.<sup>9</sup>
- (iii) Ss. 13-14 of the Assam State Road Transport Act, 1954,—notwithstanding repugnance to the Motor Vehicles Act, 1939.<sup>10</sup>
- (iv) U. P. Industrial Disputes Amending Act, 1957.<sup>11</sup>
- (v) Rajasthan Industrial Tribunal (Constitution & Proceedings) Validating Act, 1959.<sup>12</sup>
- (vi) Bombay Prohibition Amendment Act, 1959.<sup>13</sup>
- (vii) West Bengal Land Development & Planning (Amendment) Act, 1955.<sup>14</sup>
- (viii) Bombay Commissioners of Divisions Act, 1958.<sup>15</sup>
- (ix) Maharashtra Amendment Act 3 (Minimum Wages) of 1963.<sup>16</sup>
- (x) Madhya Pradesh Amendment Act 2 (Motor Vehicles) of 1963.<sup>17</sup>
- (xi) Madras Buildings (Lease and Rent Control) Act, 1960.<sup>18</sup>
- (xii) U. P. Industrial Disputes Act, 1957.<sup>19</sup>
- (xiii) Bombay Housing Board Act, 1948.<sup>20</sup>

**Proviso.**

1. The Proviso to Cl. (2) of the present Article empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent.<sup>20</sup>

2. Parliament may repeal, or amend the repugnant State law, either directly,<sup>12</sup> or by itself enacting a law repugnant to the State law, with respect to the 'same matter'.<sup>21</sup>

3. It has been held<sup>20</sup> that even though the subsequent law of Parliament does not expressly repeal the State law which was validated under Art. 254(2), the State law will become void as soon as the subsequent law of Parliament, creating repugnancy, is made,—that is to say, if the two cannot stand together.<sup>20</sup>

**Conditions for application of the Proviso.**

The power of Parliament to repeal a State law under Proviso is subject to certain limitations:

(a) The law made by Parliament (which seeks to repeal the State law) must be with respect to 'same matter' as the State law.<sup>20</sup>

7. *State of Bihar v. Bhabapritamanda*, A. 1959 S.C. 1078 (1080).

8. *Biswambhar v. State of Orissa*, A. 1957 Orissa 246 (254).

9. *Naik v. Kanhu*, A. 1954 Orissa 186.

10. *Bhiman v. State of Assam*, A. 1957 Assam 139 (142).

11. *Tellery & Sons v. Carpet Mazdoor Sabha*, A. 1961 All. 321 (324).

12. *Bhagwat v. State of Rajasthan*, A. 1964 S.C. 444 (448).

13. *Taha v. State of W. B.*, A. 1966 Cal. 359 (360).

14. *Sadraddin v. Patwardhan*, A. 1965 Bom. 224 (238).

15. *Nagpur Hotel Owners' Assn. v. State of Maharashtra*, A. 1965 Bom. 169 (171).

16. *Premchand v. State of M. P.*, A. 1965 M.P. 196 (201).

17. *Raval & Co. v. Ramchandran*, A. 1967 Mad. 57 (61).

18. *U. P. E. S. C. v. Shukla*, A. 1970 S.C. 237 (239).

19. *Ramraj v. State of Maharashtra*, A. 1969 Bom. 333 (337).

20. *Zaverbhai v. State of Bombay*, A. 1954 S.C. 753 (756-7); (1955) 1 S.C.R. 789.

(b) The State law in question must have been made by the State Legislature with reference to a matter in the Concurrent List containing provisions *repugnant to an earlier law made by Parliament* and with the consent of the President. It is only such a law that could be amended or repealed under the Proviso. Where the State law had been made covering a field not already occupied by Parliament, no question of exercising the power conferred by Parliament could arise.<sup>20</sup>

(c) The power of repeal conferred by the Proviso is, however, expressly vested in Parliament, so that this power cannot be delegated by Parliament to any executive authority, and any order made by virtue of delegated authority from Parliament cannot have the effect of repealing a State law under the Proviso.<sup>21</sup>

#### \* Effect of repeal.

When a State law is repealed expressly or by implication by a Union law, s. 6 and not s. 24 of the General Clauses Act applies as to things done under the State law which is so repealed, so that a scheme framed, under the State law before the repeal, is saved,<sup>22</sup> and also any rights and liabilities arising under the State Act, prior to the enactment of the repugnant Central Act.<sup>23</sup>

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

**255. No Act of Parliament or of the Legislature of a State \* \* \*, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—**

- (a) where the recommendation required was that of the Governor, either by the Governor or by the President.
- (b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;
- (c) where the recommendation or previous sanction required was that of the President, by the President.

#### Subsequent assent cures absence of previous sanction.

1. Thus, the absence of previous sanction to a Bill as required by the Proviso to Art. 304 does not invalidate an Act, if the Bill, as passed, received the assent of the President.<sup>24,25</sup>

2. The invalidity may also be cured by the Legislature re-enacting the provisions of the invalid statute and obtaining the assent of the President to the latter Act.<sup>24</sup>

3. But, by giving his assent to a subsequent Bill, the President cannot validate, with *retrospective* effect, an earlier Act which had failed for want of the President's assent under Art. 255, so as to validate acts done under the invalid statute, because it would amount to a declaration that non-compliance with Art. 255 was of no consequence, which is a declaration beyond the competence of the President.<sup>24</sup>

21. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393

22. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (669)

23. *State of Orissa v. Tulloch*, A. 1964 S.C. 1284.

24. *Jatoharnal v. State of Rajasthan*, A. 1966 S.C. 764 (769, 771).

25. *Mangalore Dike Works v. State of Mysore*, A. 1963 S.C. 588 (590) [want of recommendation for Money Bill].



## CHAPTER II.—ADMINISTRATIVE RELATIONS

*General*

**256.** The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Obligation of States and the Union.

**'Compliance with the laws'.**

The existence of a law sanctioning particular action is a pre-condition for enforcing this Article <sup>1-19</sup>.

**257. (1)** The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Control of the Union over States in certain cases.

**(2)** The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

**(3)** The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

**(4)** Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

**258. (1)** Notwithstanding anything in the Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

Power of the Union to confer powers, etc., on States in certain cases.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

### • Cl. (1): Delegation by President.

1 Under this clause, only executive functions of the Union may be delegated,—not judicial or legislative functions of the Union<sup>20</sup>

2. If, however, the power which is delegated is a power conferred by statute, there is no reason why the order of delegation shall not have the force of law.<sup>21</sup>

3 Cl. (1) enables the President to entrust to the State the functions which are *vested in the Union* and which are exercisable by the President on behalf of the Union: it does *not* authorise the President to entrust to any other person or body the powers and functions with which he is by the express provisions of the Constitution invested as President,<sup>22</sup> e.g. the powers under Arts 123, 121, 217, 268-270, 309, 310, 311(2) & Prov. (c) 338, 340, 344, 356, 360<sup>23</sup>

4 When, in exercise of the powers conferred by Cl. (1), the President authorises a State Government or its officer to exercise a power exercisable by the Central Government under a *statute*, such order, relating to a statutory power, cannot but be said to have the force of law<sup>24</sup> though, if the delegation is in respect of a non-statutory administrative power, it cannot be imputed any force of law<sup>25</sup>

5. When a function is so delegated to a State Government, the legality of an act done by the State Government in discharge of such delegated function can be challenged without challenging the validity of the notification by which the delegation was made by the President<sup>26</sup> because a wrongdoer cannot protect himself from personal liability on the ground that he committed the wrong under the directions of his principal.<sup>27</sup> The function which is discharged by the offices of the State Government, in such a case, is a function of the Central Government and not of the State Government.<sup>28</sup>

### Cl. (2): Delegation by Parliament.

(a) While under cl. (1) only executive functions may be delegated to a State, under cl. (2), the power of subordinate legislation may also be delegated.<sup>29</sup>

(b) Under cl. (1), the delegating authority is the President; under cl. (2), it is the Parliament, while making a law within its own competence.

20. *Jayantilal v. Rana*, A. 1964 S.C. 648 (666, per Subba Rao & Wanchoo JJ.: see also p. 656 of the majority judgment).

21. *Ibid.*, per majority (Gaiendranadkar, Shah and Dasal JJ.).

22. *Jayantilal v. Rana*, A. 1964 S.C. 648 (656; 658-9).

23. *T. D. Corpn. v. State of Assam*, A. 1961 Assam 133 (138).

24. *Mount Corpn. v. Director*, A. 1965 Mys. 143 (147).

(c) Under cl. (2), no consent of the State is required for the delegation, as under cl. (1).<sup>25</sup>

**258A.** *Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends*

#### Object of Art. 258A.

This Article has been inserted by the Constitution (Seventh Amendment) Act, 1956, for the following reason—

"While the President is empowered by article 258 (1) to entrust Union functions to a State Government or its officers, there is no corresponding provision enabling the Governor of a State to entrust State functions to the Central Government or its officers. This lacuna has been found to be of practical consequence in connection with the execution of certain development projects in the States. It is proposed to fill the lacuna by a new article 258A"<sup>1</sup>

#### Relationship created under the Article.

The Orissa High Court<sup>2</sup> has held that when functions are entrusted by a State Government to the Government of India, the latter does not become an 'agent' of the former Government. This view overlooks the fact that the only effect of Art. 258A is to make possible a *delegation* which would otherwise have been impossible owing to the federal distribution of powers. The Government of India, therefore, becomes a delegate of the State Government in respect of the functions which are delegated.

#### 259. Omitted<sup>3</sup>

**260.** The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

**261.** (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

<sup>25</sup> Inserted by the Constitution (Seventh Amendment) Act, 1956.

1. Statement of Objects and Reasons.

2. *Nibunta v. Darvadhan*, A. 1959 Orissa 58 (65).

3. Omitted by the Constitution (Seventh Amendment) Act, 1956.

**Cl. (1): Full faith and credit.**

This clause establishes a rule of evidence and not of jurisdiction.\*

**Cl. (3): 'Final judgment'.**

The words evidently include 'decree' though that word is specially mentioned in some other Articles.<sup>5-9</sup>

**'Civil Courts'.**

Cl. (3) has no application to orders of Criminal Courts.

**'Territory of India'.**

This expression, defined in Art. 1(3), *ante*, refers to a period after the commencement of the Constitution.

**\* 'According to law'.**

1. Under this clause a decree passed in any State is executable in any other State of India. But this is subject to the law of procedure of that State when execution is sought under this clause.<sup>10</sup>

2. If the decree was inexecutable in the latter State *when it was passed*, it cannot be executed because the Constitution has come into force at the time of execution, since Art. 261 (3) is not retrospective.<sup>11</sup>

**I. Decree of Indian State prior to 26-1-50.**

1. Art. 261 (3) refers to decrees or orders passed after the Constitution came into force.<sup>12</sup>

2. Hence, a decree passed by a Court of an Indian State prior to 26-1-50 must be regarded as a 'foreign decree' in Indian Courts, even after the commencement of the Constitution.<sup>12</sup>

3. An *ex parte* decree passed against a non-resident foreigner is to be regarded as a nullity by every other State. When, therefore, the *ex parte* decree of one State is sought to be executed in another, the defendant is entitled to question the jurisdiction of the Court which passed the decree, before the executing Court.<sup>12</sup>

4. The relevant point of time to determine whether a decree is a 'foreign decree' or not is the date of passing of the decree and the deciding factor is the status of the Court at that time.<sup>12-13</sup>

**II. Decree of Part B State Courts between 26-1-50 and 31-6-51.**

The Courts in the Part B States were 'foreign Courts' under the definition given in the law of Civil Procedure then obtaining in such States, until the amended definition in the Code of Civil Procedure was extended to the States from 1-4-51, by the Part B States (Laws) Act 1951.

The question has arisen whether a decree passed by such Court between the commencement of the Constitution and the commencement of this Act would be executable in other parts of the territory of India, by virtue of Art. 261 (3).

One view<sup>14</sup> is that on the commencement of the Constitution, the

4. *Ganbi Lal v. Jugal*, A. 1959 Punj. 265.

5-9. *Narsing v. Shankar*, A. 1958 All. 775 (785).

10. *Dwarkanadas v. Gokuldas*, A. 1952 Sau. 90.

11. *Kishendas v. Indo-Carnatic Bank*, A. 1958 A.P. 407; *Narsing v. Shankar*, A. 1958 All. 775; *Metal Corp. v. Colombi*, A. 1960 Mys. (5).

12. *Molaji v. Shankar*, A. 1962 S.C. 1737 (1741-3).

13. *Kishori Lal v. Shanti Devi*, A. 1953 S.C. 441.

14. *Ramdayal v. Shankarlal*, A. 1952 Hyd. 80 (F.B.); *Santhaji v. Chinmaya*, A. 1954 Mad. 1851; *Murari v. Bhawan Das*, A. 1955 J. & K. 5 (F.B.).

territory of the Part B States became part of the territory of India, according to Art. 1 of the Constitution, so that the Courts of these territories ceased to be foreign Courts in relation to the rest of India, and that anything to the contrary in the law of civil procedure applicable to such territory must be held to be *ultra vires*.

The other view<sup>15, 17</sup> is that though the territory of the Part B States became part of the territory of India, the Courts in those territories did not cease to be foreign courts until the Part B States (Laws) Act was enacted, applying the amended definition in the C. P. Code to such Courts. As regards Art. 261, it has been held that it would not come into operation of its own force until Parliament legislates under cl. (2) of that Article.<sup>16</sup>

The latter view does not appear to be correct in view of the observations of the Supreme Court<sup>18, 19</sup> that the crucial test for determining the character of a decree is the status of the Court which passed the decree on the date of its passing. Hence, a decree passed by a Part B State after 26-1-50 could not, on any account, be called a 'foreign decree'. If it was a decree passed by a Court within the territory of India, none of the incidents of a 'foreign decree' could be attracted to it. What particular law of civil procedure would apply as regards its execution is a different question.

#### *Disputes relating to Waters*

#### **262. (1) Parliament may by law provide for the adjudication of**

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

#### *Co-ordination between States*

Provisions with respect to an Inter-State Council.

**263. If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—**

- (a) inquiring into and advising upon disputes which may have arisen between States;
- (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or
- (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

15. *Augusthi v. Subramania*, A. 1958 Ker. 15 (18) F.B.

16. *Narsing v. Shankar*, A. 1958 All. 775 (783; 787).

17. *Metal Corpn. v. Colombi*, A. 1960 Mys. 1 (6).

18. *Molaji v. Shankar*, A. 1962 S.C. 1737 (1744).

19. *Kishori Lal v. Shanti*, A. 1963 S.C. 441.

## PART XII

### FINANCE, PROPERTY, CONTRACTS AND SUITS

#### CHAPTER I.—FINANCE

##### *General*

Interpretation.

**284.** In this Part, "Finance Commission" means a Finance Commission constituted under article 280.....<sup>1</sup>

**Amendment.**—Prior to the deletion of cls. (b) and (c) by the Constitution (Seventh Amendment) Act, 1956, the word 'State', as used in the various provisions of this Part, did not refer to 'Part C State', except in Arts. 264, 268, 269, 270, 286.<sup>2</sup>

Taxes not to be imposed save by authority of law.

**265.** No tax shall be levied or collected except by authority of law.

#### No taxation save by authority of law.

1. Art. 265 provides that not only *levy* but also the *collection* of a tax must be under the authority of some law. Where an executive authority has been empowered to collect a tax by an invalid law or rules made thereunder the Court is entitled to interfere.<sup>2a</sup>

2. Acquiescence cannot take away from a party the relief he is entitled to in case of contravention of Art. 265.<sup>3</sup>

#### 'Law'.

1. 'Authority of law' refers to a valid law, which means that—

(a) The tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax.<sup>4-5</sup>

The validity of the tax is to be determined with reference to the competence of the Legislature at the time when the taxing law was enacted and not by any subsequent changes.<sup>6</sup>

(b) The law must be validly enacted, i.e., by the proper body which has the legislative authority and in the manner required to give its acts the force of law.<sup>6-7</sup> Of course, there is a presumption that the prescribed procedure has been followed.<sup>8</sup>

(c) The law must not be a colourable use of, or a fraud upon the legislative power to tax.<sup>4,9</sup>

(d) The tax must not violate the conditions laid down in Art. 13;<sup>9</sup> in other words, it must not violate a fundamental right, such as that in Art. 14;<sup>9-10</sup> Art. 19 (1) (a),<sup>11</sup> Art. 19 (1) (f);<sup>12</sup> and Art. 19 (1) (g).<sup>12</sup>

1. Cls. (b) & (c) have been omitted by the Constitution (Seventh Amendment) Act, 1956.
2. *Commr. S. T. v. Hussain*, A. 1969 S.C. 549 (552).
- 2a. *Chhotabhai v. Union of India*, A. 1952 Nag. 133 (144).
3. *Amalgamated Coalfields v. Janapada Sabha*, A. 1961 S.C. 964 (965).
4. *Kunnath v State of Kerala*, A. 1961 S.C. 552; *Poona Municipality v. Dattaraya*, A. 1965 S.C. 555.
5. *Balaji v. I. T. O.*, A. 1962 S.C. 123 (128).
6. *Ghulam v. State of Rajasthan*, A. 1963 S.C. 479 (384).
7. *Bharat Kala Bhandar v. Dhamangoon Municipality*, A. 1966 S.C. 249 (262).
8. *Gopal v. State of U. P.*, A. 1964 S.C. 370.
9. *Jagannath v. State of U. P.*, A. 1962 S.C. 1563 (1570-2).
10. *Suraj Mal v. Viswanatha*, (1951) S.C.R. 448.
11. *Cl. Express Newspapers v. Union of India*, A. 1958 S.C. 578 (614).
12. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

Of course, by reason of Art. 31 (5) (b) (i), the constitutionality of a taxing law cannot be challenged on the ground of contravention of Art. 31 (2).<sup>13</sup>

(e) It must not also contravene the specific provisions of the Constitution which impose limitation on legislative power relating to particular matters, eg., Art. 27;<sup>14</sup> 276 (2);<sup>15</sup> 286;<sup>16</sup> 301.<sup>16</sup>

2. 'Law' in this context means an Act of the Legislature<sup>17</sup> and cannot comprise an executive order, or a rule without express statutory authority.<sup>17</sup> Art. 265 embodies the principle of 'no taxation without representation.' An executive order<sup>18</sup>,<sup>18</sup> or custom<sup>18</sup> thus, cannot justify an imposition. But it would include an order of the ex-Ruler of an Indian State which had the force of law.<sup>19</sup>

### **No bar against being retrospective.**

1. The Legislatures under *our* Constitution can legislate retrospectively [except in the matter of criminal laws; Art. 20 (1)] and taxing laws are no exception to this power.<sup>20,21</sup>

2. Where a Legislature has the power to levy a tax, it may, with retrospective effect, validate an illegal assessment of such tax made by the executive, without proper legislative sanction.<sup>21</sup>

3. But it cannot give retrospective operation to a tax in respect of an area over which it had no territorial jurisdiction during the period of the retrospective operation.<sup>22</sup>

4. There retroactivity does not render a taxing law an unreasonable restriction upon a right guaranteed by Art. 19 (1) (f)-(g),<sup>23</sup> though, of course, it is a relevant consideration in determining the reasonableness of such law.<sup>23</sup>

### **No bar against double taxation.**

Where more than one legislative authority, such as the State Legislature and a local or municipal body, possess the power to levy a tax, there is nothing in the Constitution to prevent the same person or object being subjected to both the State and municipal taxation.<sup>24</sup>

### **Tax.**

1. This word, as used in the present article, includes any 'unpost',—general, special or local [cf. Art. 367 (28)]. It would, thus, include not only 'taxes' but also duties, cesses or fees.<sup>21</sup> It is clear, therefore, that even a duty, cess or fee cannot be levied without specific statutory authority.

[As to the distinction between a 'tax' and a 'fee', see *post*].

13. *Chhotabhai v. Union of India*, A. 1962 S.C. 1006, (1962) Supp. (2) S.C.R. 1; *Ram Krishna v. State of Bihar*, A. 1963 S.C. 1667.
14. *Cf. Commr. v. Lakshmindra*, (1954) S.C.R. 1005.
15. *Cf. State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1077).
16. *Cf. Sainik Motors v. State of Rajasthan*, A. 1961 S.C. 1480 (1485); *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232 (243-9; 256).
17. *Maheshwari v. State of U. P.*, A. 1957 All. 282.
18. *State of Kerala v. Joseph*, A. 1958 S.C. 296.
19. *State of M. P. v. Gwalior Sugar Co.*, (1962) 2 S.C.R. 619.
20. *Union of India v. Madangopal*, (1954) S.C.R. 841.
21. *Muhammaddhai v. State of Gujarat*, A. 1962 S.C. 1517 (1524).
22. *Ananthanarayana v. Agricultural I. T. O.*, A. 1959 Ker. 183 (188).
23. *Astt. Commr. v. B. & C. Co.*, A. 1970 S.C. 170 (181).
24. *Contentment Board v. Western India Theatres*, A. 1954 Bom. 261; *Satyannarayana v. East Godavari Market Committee*, A. 1959 A.P. 398 (404).

2. Any compulsory levy by the State (not based on contract) will, therefore, be invalid, unless authorised by law.<sup>25</sup>

### 'Levied'.

1. The words 'levy and collection' are used in this Article in a comprehensive sense and are intended to include the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen.<sup>1</sup> What the Article enjoins is that every stage in this entire process must be authorised by the law.<sup>1</sup>

2. The increase of an existing duty constitutes the 'levy' of an impost and must equally be made under the authority of law in the manner prescribed by it.<sup>2,3</sup>

But no enhancement of a tax is involved where the substitution of one coinage is made by another coinage of equivalent value.<sup>2,4</sup>

3. After a rule has been declared *ultra vires*, it can no longer be invoked as authority for the levy or collection of a tax.<sup>5</sup>

### Validity of subordinate legislation.

1. Taxation, in order to be valid, must not only be authorised by a statute, but must also be levied<sup>6</sup> or collected in strict conformity with the statute, which authorises it.<sup>7</sup>

(a) No tax can be imposed by any bye-law, rule or regulation, unless the statute under which the subordinate legislation is made specifically authorises the imposition.<sup>7</sup>

(b) Where the taxing power of the State Legislature is limited by the Constitution, a Municipality or other local authority created by the State Legislature cannot transgress these limitations.<sup>8</sup>

(c) Where the statute authorises the imposition of a fee for certain services to be rendered, the subordinate legislation cannot provide for the imposition of a tax, unrelated to the services, in the name of a fee.<sup>9</sup>

(d) Where the statute prescribes that the tax is to be assessed according to a particular basis, it cannot be assessed on a different basis. Thus, where the statute authorises imposition of a tax upon the income from profession, the authority cannot impose the tax upon the total income of the assessee within the prescribed area, including his income from property as well as profession.<sup>10</sup> Similarly, where a State Act authorises a municipality to levy a fee on the 'registration of cattle', it cannot levy a fee graduated according to the price at which each cattle is sold.<sup>11</sup>

(e) The procedure prescribed by the statute must be followed.<sup>12</sup> Thus, where a statute provides that a duty could be imposed by framing

25. *Surajuddin v State of M P* A 1960 MP 129

1. *Ravalasema Constructions v Dy Commercial Tax Officer* A 1959 Mad 382

2. *Mangalore Ganesh Bredi Works v State of Mysore* (1962) SC [CA. 191/62].

3. *State of Kerala v Jagesh* A 1958 SC 296

4. The Author submits, with respect, that if in the process of conversion to the nearest unit of the next coinage a burden heavier than before can be demonstrated that would amount to an enhancement of the tax so as to attract Art. 265. Whether that Article has been actually complied with is a different question.

5. *Dinesh v. Board of Revenue*. (1965) 19 STC 221 (Cal.).

6. *Cf. Ghulam v State of Rajasthan* A 1963 SC 379 (384).

7. *Gopal Narain v State of Bihar* A 1964 SC 370 (376).

8. *Joshi Timber Mart v Calicut Municipality* A. 1970 SC 285 (266).

9. *Cf. Baiyantal v. Commr. of Taxes*, A. 1959 Assam 216 (220).

10. *Phani v. Prov. of Bengal*. (1959) 54 CWN. 173 (180).

11. *Jagesh v Asst. Excise Commr.* A. 1954 TC 146

12. *Kharai Municipality v. Kamal Kumar*, A. 1965 SC, 1321 (1325).



rules under the Act, no duty can be imposed by an executive order without making rules under the Act and complying with the procedure prescribed by it.<sup>13</sup>

But there being a presumption that a statutory authority has followed the prescribed procedure, this plea will not be allowed to be raised at the hearing in the absence of specific allegation in the pleading in which respect the procedure has not been followed.<sup>14</sup>

(f) Where the statute specifies the taxable commodities, the subordinate authority has no power to add to that list, and the power conferred by the statute must be strictly construed.<sup>15</sup>

(g) Where the statute provides that the subordinate authority can levy an imposition only with the sanction of a specified authority, an imposition made without such sanction is invalid.<sup>16</sup>

(h) Except where the statute confers the power to give retrospective effect to subordinate legislation, a rule or notification cannot confer any authority with retrospective effect.<sup>17</sup>

2 It is competent for the Legislature to validate, with retrospective effect, a subordinate legislation which had contravened Art. 265.<sup>18</sup>

### Arts. 31 and 265.

As there is a special provision in Art. 265 of the Constitution that no tax shall be levied or collected except by authority of law, cl (1) of Art. 31 of the Constitution must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax.<sup>19</sup>

### Constitutional Limitations upon the taxing power.

Apart from the limitation imposed by the division of the taxing power between the Union and State Legislatures by the relevant Entries in the legislative Lists, the taxing power of either Legislature is particularly subject to the following limitations imposed by particular provisions of our Constitution:

(i) It must not contravene Art. 13.<sup>20, 21</sup>

(ii) It must not deny equal protection of the laws (Art. 14).<sup>22, 23</sup>

(iii) It must not constitute an unreasonable restriction upon the right of property [Art. 19 (1) (f)].<sup>24, 25</sup>

(iv) No tax shall be levied the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination (Art. 27)

(v) A State Legislature or any authority within the State cannot tax the property of the Union (Art. 285)

(vi) The Union cannot tax the property and income of a State (Art. 289).

(vii) The power of a State to levy tax on sale or purchase of goods is subject to Art. 286.

(viii) Save in so far as Parliament may by law otherwise provide, a State shall not tax the consumption or sale of electricity in the cases specified in Art. 287.

13. *I. T. O. v. Poonose*, A. 1970 S.C. 385 (387-8).

14. *Muhammadbhai v. State of Gujarat*, A. 1962 S.C. 1517 (1530).

15. *Laxmanappa v. Union of India*, (1955) 1 S.C.R. 769; A. 1955 S.C. 3.

16-17. *Kunnathat v. State of Kerala*, A. 1961 S.C. 552.

18. *State of Kerala v. Kuthy*, A. 1969 S.C. 378.

19. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

20. See 'Reasonableness of Taxing Laws' at pp. 88-90, *supra*.

(ix) No income tax shall be imposed on the privy purse of a Ruler where the payment of it, free of tax, has been guaranteed by a Pre-Constitution covenant or agreement (Art. 291).

### Remedy for violation of Art. 265.

1. Not being included in Part III of the Constitution, Art. 265 does not confer a 'fundamental right'. Hence, an application under Art. 32 does not lie in case of an imposition not authorised by law.<sup>21</sup>

2. But an application under Art. 226 (e.g., *mandamus*) would lie for quashing an imposition made without authority of law or *ultra vires* the law under which the imposition is purported to be made;<sup>22</sup> for, the power under Art. 226 is exercisable not only for the enforcement of fundamental right but for 'other purposes' as well.

### Remedy for unconstitutional tax.

1. An unconstitutional tax must be distinguished from a tax imposed without the authority of law.

2. When some fundamental right is violated by the tax, a writ under Art. 32 or 226<sup>19</sup> is available, e.g., when a licence fee being imposed without the authority of law, necessarily violates Art 19 (1) (g),<sup>20</sup> or a sales tax which contravenes Art 285 also offends against Art 19 (1) (g).<sup>22, 23</sup>

3. Even where no fundamental right is infringed but the taxing law is *ultra vires* for contravention of any other provision of the Constitution, a writ under Art. 226 will be available<sup>23</sup> to quash the assessment.

### Refund of tax subsequently declared *ultra vires*.

1. S 72 of the Contract Act includes payment made either under mistake of law and that payment of a tax which is *ultra vires* or unconstitutional comes under its scope. Hence, when the tax is subsequently declared by a Court to be *ultra vires* or unconstitutional, the party is entitled to have a refund of it from the Government, whether he had paid it under protest or not.<sup>24</sup>

2. Unless time-barred, the refund cannot be refused on the ground that the assessment was not challenged by way of appeal or revision,<sup>25</sup> or that the assessment was 'final' under the terms of the taxing statute,<sup>1</sup> or that it was acquiesced in for a long time.<sup>2</sup>

3. A direction for refund may be made in a proceeding for *mandamus*, under Art. 226.<sup>3</sup>

### Validation of a tax declared illegal by Court.

When a tax is declared illegal by a Court because the statute or the rules thereunder which authorise the imposition is *ultra vires* or unconstitutional, the Legislature may validate its imposition or collection by passing

21. *Ranjilal v. Income Tax Officer*, A 1951 S.C. 97. (1950-51) C.C. 242
22. *Union of India v. Madanagopal*, (1952) S.C.R. 537. *Madharakrishnaiah v. I. T. O.*, (1954) S.C.R. 537. *Himmattal v. State of M. P.* (1954) S.C.R. 1122.
23. *Bengal Immunity Co. v. State of Bihar*, (1955) S.C.A. 1140 (1152-3). (1955) 2 S.C.R. 303; *Himmattal v. State of M. P.*, (1954) S.C.R. 1122, *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1077)
24. *S. T. O. v. Kanhaiva Lal*, A 1959 S.C. 135
25. *Orient Paper Mills v. State of Orissa*, A. 1957 Orissa 240
1. *Rajalaxma Constructions v. Dy. C. T. O.*, A 1959 Mad. 382 (386).
2. *Amalgamated Coalfields v. Janpada Sabha*, A. 1961 S.C. 964 (965).
3. *Orient Paper Mills v. State of Orissa*, A. 1961 S.C. 1438.

a validating statute, with retrospective effect,<sup>4</sup> if the following conditions are fulfilled:

(i) The Legislature must possess the legislative competence<sup>5</sup> to impose the tax which has been declared illegal

(ii) The validation cannot be effected by merely declaring that the decision of the Court shall not be binding, because the Legislature cannot directly reverse a judicial decision, for, that would be an exercise of judicial power by the legislative body. The validation can be effected only by removing the cause of the defect which led the Court to declare it to be invalid. This may be done by providing in the validating Act any or all of the following things:

(a) conferring jurisdiction where jurisdiction had not been properly invested;

(b) re-enacting retrospectively, a valid and legal taxing provision and then, by fiction, making the tax already collected to stand under the re-enacted law;

(c) giving a legislative interpretation with retrospective operation to the provision which had been interpreted by the Court otherwise, so that the foundation of the judgment would be removed

**266. (1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the**

Consolidated Funds and public accounts of India and of the States.

**assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by the Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenue received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".**

**(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.**

**(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.**

**'Revenues received by the Government of a State'.**

Where a tax is levied for the purposes of a local authority and allocated by the taxing authority to the funds of that local authority, it could not be deemed to be revenue received by the State and need not, therefore, go into the Consolidated Fund of the State<sup>6</sup>

**267. (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be**

Contingency Fund.

<sup>4</sup> *Shinde Bros. v. Dy. Commr.*, A. 1967 S.C. 1512 (1525).

<sup>5</sup> *P. C. Mills v. Brach Municipality*, A. 1970 S.C. 192 (195).

<sup>6</sup> *Shanmuga Oil Co. v. Market Committee*, A. 1960 Mad. 160 (165).

determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under article 115 or article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law and the said Fund shall be placed at the disposal of the Governor of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under article 205 or article 206.

*Distribution of Revenues between the Union and the States*

Duties levied by the Union but collected and appropriated by the States

268. (1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected -

- (a) in the case where such duties are leviable within any Union Territory, by the Government of India, and
- (b) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

Taxes levied and collected by the Union but assigned to the States.

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely:—

- (a) duties in respect of succession to property other than agricultural land;
- (b) estate duty in respect of property other than agricultural land;
- (c) terminal taxes on goods or passengers carried by railway, sea or air;
- (d) taxes on railway fares and freights;
- (e) taxes other than stamp duties on transactions in stock-exchanges and futures markets;
- (f) taxes on the sale or purchase of newspapers and on advertisements published therein.
- <sup>a</sup>(g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to

- 7. The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.
- 8. Substituted by the Constitution (Seventh Amendment) Act, 1956.
- 9. Added by *ibid*.

*Union Territories* shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) *Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.*

#### **Amendment.**

(a) In cl. (1), sub-cl. (g) has been added by the Constitution (Sixth Amendment) Act, 1956. (b) Cl. (3) has also been added by the same Act. (c) In cl. (2) for the words 'States.....Schedule' have been substituted the words "Union territories" by the Constitution (Seventh Amendment) Act, 1956.

#### **Cl. (3): When a sale or purchase takes place in the course of inter-State trade or commerce.**

In exercise of the power conferred by the present Clause, Parliament has enacted s. 3 of the Central Sales Tax Act, 1956, which lays down the principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce. [See below].

#### **Tax on sale or purchase taking place in the course of inter-State trade or commerce.**

1. The power to impose taxes on the sale or purchase of goods where such sale or purchase has taken place in the course of inter-State trade has been given exclusively to Parliament by Art. 269 (1) (g) and Entry 92A of List I, as inserted by the Constitution (Seventh Amendment) Act, 1956. In exercise of this power, Parliament has provided for the levy of a sales tax on inter-State sales, by Chapter III of the Central Sales Tax Act, 1956.

2. Cl. (3) of this Article confers upon Parliament the power also to lay down the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce, so as to be liable to the Union sales tax imposed under Art. 269 (1) (g). In exercise of this power Parliament has enacted s. 3 of the Central Sales Tax Act, 1956, which says—

"A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

- (a) occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of the title to the goods during their movement from one State to another.

*Explanation 1.*—Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

*Explanation 2.*—Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

3. An interpretation of the above provision is important from the point of view of the States inasmuch as it constitutes a limitation upon their legislative competence.

**"Sale".**

Sale is defined in sec. 2 (g) of the Central Sales Tax Act as meaning,—

"Any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of goods on the hire-purchase or other system of payment by instalment, but does not include a mortgage or hypothecation of or a charge or pledge on goods."

This means that a transaction or sale is subject to tax under the Central Sales Tax only on the completion of the sale and that a mere contract of sale is not within the definition of sale in sec. 2 (g).<sup>10</sup> On the other hand, there may be a 'sale' where goods are supplied to a person under a purported appointment as 'marketing agent', if there is no relationship of principal and agent and the latter has complete decision in the matter of selling the goods supplied by the manufacturers.<sup>10</sup>

**Clauses (a) & (b):**

The two clauses of sec. 3 are mutually exclusive and it is not intended that any sale which is taxable under one clause should also be taxable under the other.<sup>10</sup>

Under clause (a), the transfer of property by way of sale becomes taxable if the movement of goods from one State to another is under a covenant or incident of the contract of sale and the property in goods passes to the purchaser otherwise than by transfer of document of title when the goods are in movement from one to another.

A sale contemplated by clause (b) is one which is effected by transfer of document of title to the goods *during* their movement from one State to another. Where the property in the goods has passed before the movement has commenced, the sale will evidently not fall within clause (b), nor will the sale in which the property in the goods passes after the movement from one State to another has ceased, be covered by the clause. Accordingly, a sale effected by transfer of documents of title *after* the commencement of movement and before its conclusion as defined by the two termini set out in Explanation<sup>10</sup> and any other sale will be regarded as an inter-State sale under sec. 3 (b).

Clause (a) of sec. 3 covers sales other than those included in cl. (b) in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale and property in the goods passes in either State.<sup>10</sup>

**'Occasions the movement.....'**

A sale would not come within the purview of cl. (a) of s. 3 unless the contract itself<sup>10</sup> involves the movement of the goods from the seller or the manufacturer across the border, from one State to another.<sup>11 12</sup>

**'Movement of goods'.**

1. It is clear from the above that the *physical* movement of the goods from one State to another is necessary to constitute 'inter-State trade or commerce', for the purposes of taxation of sales. This test takes no cognisance of the fact whether the consignee of the goods is a consumer or a trader.

10. *Tata Iron & Steel Co. v. Sarkar*, (1961) 1 S.C.R. 379 (389).

11. *Cement Marketing Co. v. State of Mysore*, A. 1963 S.C. 563.

12. *Singareni Collieries v. State of A. P.*, A. 1966 S.C. 563.

13. *Mohandal v. State of M. P.*, (1965) 2 S.C.R. 509 (514).

14. *State Trading Corpn. v. State of Mysore*, A. 1963 S.C. 548.

2. A sale which occasions<sup>10</sup> such inter-State movement of the goods is deemed to take place in the course of inter-State trade or commerce.

(a) No sale *anterior* to the actual movement of the goods is to be deemed to have taken place 'in the course of' inter-State trade or commerce unless the inter-State movement takes place *in pursuance of the contract of sale*,<sup>15</sup> i.e., either under a covenant or as an incident of the contract of sale.<sup>12</sup>

The question of *intention* of the parties either at the time of the sale or at the time of the transportation is immaterial for the purpose. The test of sale in the course of inter-State trade or commerce is the inter-State movement taking place as a part of the contract of sale or as a necessary ingredient of the sale.<sup>16, 17</sup>

(b) The same principle will apply to sales taking place after the termination of the inter-State movement.<sup>18</sup>

3. Any sale taking place *during* such inter-State movement of the goods, by transfer of documents of title would also be deemed to be a sale in the course of inter-State trade or commerce. For the purposes of this rule, the concept of duration of the movement is enlarged by the addition of the period of custody of the goods in the hands of a carrier or bailee for the purpose of transmission to and delivery at the other State. Expl. I, which provides for this enlargement, follows the principle in s. 51 of the Sale of Goods Act. The result is, that any sale which takes place while the goods are on their 'inter-State journey', i.e., from the moment of delivery to the carrier or bailee by the consignor until they are unloaded by or on behalf of the consignee in the other State, is a sale 'in the course of inter-State trade or commerce'. In the case of transportation by other means, e.g., floating logs down a river, the inter-State journey should end when the logs are taken over by the owner in the other State.

4. To constitute an inter-State movement, the two termini of the journey of the goods must be in two different States. This is provided in Expl. II. If the two termini are in different parts of the same State, the fact that the goods have to pass through another State in order to reach its destination will not make an inter-State movement for the purpose of sales taxation.

**270. (1) Taxes on income other than agricultural income shall be**

Taxes levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union Territories<sup>19</sup> or to taxes payable in respect of Union emoluments; shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes

15. This follows the view of Venkatarama J. in *Bengal Immunity v. State of Bihar*, (1955) 2 S.C.R. 603 (785).

16. *Cf. Commr. v. Husenali*, A. 1959 S.C. 887 (893).

17. *Indian Coffee Board v. State of Madras*, A. 1956 Mad. 449.

18. Venkatarama J. in *Bengal Immunity v. State of Bihar*, (1955) 2 S.C.R. 603.

19. Substituted by the Constitution (Seventh Amendment) Act, 1956.

payable in respect of Union emoluments shall be deemed to represent proceeds attributable to *Union Territories*.<sup>19</sup>

(4) In this article—

(a) "taxes on income" does not include a corporation tax;

(b) "prescribed" means—

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(c) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

**Cl. (2): Income tax.**—Income-tax attributable to Union Territories shall form part of the Consolidated Fund of India. It is not necessary to make any distribution of income-tax with respect to Union Territories as they are Centrally administered through the President. Therefore, it cannot be contended that in the absence of a provision for such distribution Parliament cannot make a law or President cannot make a regulation, extending the Income-tax Act to the Union Territories.<sup>20</sup>

**271. Notwithstanding anything in articles 269, and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.**

Surcharge on certain duties and taxes for purposes of the Union

**'At any time'.**

These words indicate that Parliament is empowered to levy a surcharge from time to time and merely because Parliament has imposed surcharge in one shape, it is not precluded from imposing a surcharge in another shape to cope with varying circumstances, during the subsistence of the previous one.<sup>21</sup>

**272. Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.**

Taxes which are levied and collected by the Union and may be distributed between the Union and the States.

**'Collected by the Government of India'.**

These words do not debar the Government of India from collecting the taxes through some other authority, acting as its agent.<sup>22</sup>

20. *Kanniyen v. I. T. O.*, A. 1968 S.C. 637 (1642)

21. *Vad Vyas v. I. T. O.*, A. 1965 All 37.

22. *Aluminium Corp. v. Coal Board*, A. 1969 Cal. 222 (231).



**273. (1)** There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in article 270.

**274. (1)** No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(a) tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

**275. (1)** Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purposes of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State;

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of

the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule; and

- (b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the rest of the areas of that State.

<sup>22</sup>(1A) On and from the formation of the autonomous State under article 244A,—

- (i) any sums payable under clause (a) of the second proviso to clause (1) shall, if the autonomous State comprises all the tribal areas referred to therein, be paid to the autonomous State, and, if the autonomous State comprises only some of those tribal areas, be apportioned between the State of Assam and the autonomous State as the President may, by order, specify,

- (ii) there shall be paid out of the Consolidated Fund of India as grants in aid of the revenues of the autonomous State sums, capital and recurring equivalent to the costs of such schemes of development as may be undertaken by the autonomous State with the approval of the Government of India for the purpose of raising the level of administration of that State to that of the administration of the rest of the State of Assam.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament:

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

276. (1) Notwithstanding anything in article 246, no law of the

Taxes on professions, trades, callings and employments.

Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings

or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments, the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made

22. Cl. (1A) inserted by the Constitution (Twenty Second Amendment) Act, 1969 w.e.f. 25-9-69.

either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

#### Art. 276: Taxes on professions, trades, callings and employments.

This Article authorises a State or other local authority in a State to levy a tax on professions etc., for which the corresponding legislative Entry is 60 of List II.<sup>24</sup> Now, when imposed on a person it would virtually amount to a tax on 'income' but income-tax (other than on agricultural income) is an exclusively Union subject [Entry 82, List I]. Hence, express provision is required in this Article to empower the State to levy a tax on professions etc., declaring that such a tax will not be invalid on the ground that it is a tax relating to income,<sup>25</sup> provided it is kept within the limit imposed by Cl. (2). Cl. (3) makes a corresponding reservation in favour of Parliament to impose income-tax on incomes arising from professions etc.

#### Cl. (1): 'Tax in respect of professions, trades, callings or employments'.

1. This expression is very wide. The tax may be imposed on professions and employments, including service, even though the employee is already paying income-tax. It may be imposed on trades or calling, *e.g.*, on persons carrying on the trade of husking, milling or grinding of grains,<sup>1</sup> or on the *subject-matter* of the trade, *e.g.*, each bale of ginned cotton,<sup>2</sup> or on the *income* arising from trade or profession.<sup>3</sup>

2. A tax on the manufacturing process does not cease to be so because it is levied upon the manager of the factory and not upon the owner of the commodity which is manufactured.<sup>3</sup>

3. But a tax on a commodity, without regard to any profession or trading activity cannot be a tax on professions or trade.<sup>4</sup> The basis of a tax under Art. 276 is either the occupation or the income derived from it.<sup>4</sup> On the same principle, though a tax levied on a factory on the basis of the cloth or yarn produced therein may be a tax on trade, a fee payable on the number of persons employed in a factory and the horse-power installed therein, under rules framed under s. 6 of the Factories Act, can in no sense be said to be a tax on trade so as to attract the provisions of cl. (2) of the present Article.<sup>4</sup>

Even where the tax is levied upon the commodity produced by or related to the trading activity, the amount of tax levied on the person carrying on the trade per annum cannot exceed the maximum amount limited by Art. 276 (2), and, in case of an excess demand, the Court will reduce it to the permissible amount.<sup>5</sup>

24. *Bangalore Woollen Mills v. Bangalore Comm.*, A. 1962 S.C. 562 (565).

24. *District Board v. U. I. Sugar Mills*, A. 1957 All 527.

1. *District Council v. Kishorilal*, A. 1949 Nag. 190.

2. *Municipal Committee v. N. P. I. Press*, A. 1948 Nag. 971; *Municipality of Chonla v. Motilal A.* 1938 Bom 497.

3. *W. U. P. Electric Power Co. v. N. E. I. Press*, A. 1945 Nag. 971.

4. *Abraham v. State of T. C.*, A. 1958 Ker. 129 (134).

**'Trade'.**

1. The word 'trade' in this Article is not used in the primary sense of an exchange of goods for money but in the wider sense of any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned profession or agriculture.<sup>8</sup> It thus includes a skilled occupation which involves the application of manufacturing process to a commodity submitted to the person carrying on the occupation such as pressing or ginning cotton<sup>2</sup> or husking, milling or grinding grains.<sup>1</sup>

2. The following have been held not to constitute tax on 'trade'—

An octroi duty or a tax on the entry of goods into a local area for consumption, use or sale therein, under Entry 52 of List II.<sup>24</sup>

**Tax on entertainment and tax on calling.**—See under Entry 62, List II, *post*.

**Cl. (2): The maximum limit.**

It is a condition of the validity of a tax under this article that the imposition should not exceed Rs. 250. Where therefore, a tax is imposed on the basis of a *percentage*, without fixing the maximum limit so that it is possible to levy more than Rs. 250 in any case, the imposition will be invalid.<sup>5, 6</sup>

Where, however, an existing tax below the constitutional maximum is sought to be enhanced above that limit, the enhancement will be unconstitutional and a suit for refund of the amount recovered in excess of that limit will lie.<sup>6, 8</sup>

This clause huts not only recovery but also assessment in excess of the specified limit.<sup>6</sup>

**Proviso to cl. (2).**—The tax levied under ss. 108 and 144 of the U. P. District boards Act comes under this Proviso and is, accordingly, saved from the bar imposed by the main paragraph of Art. 276 (2).<sup>9</sup>

An imposition which was invalid for contravention of s. 142A (2) of the Government of India Act, 1935, would not be revived by the present Proviso. An imposition in excess of Rs. 50/- per annum was invalid if made after 31-3-39.<sup>10</sup>

But an imposition in excess of Rs. 50/-, if made prior to 31-3-39 was rendered valid and allowed to continue by the Proviso to s. 142A (2). The life of such imposition is extended further by the present Proviso, provided it was in force on 26-1-50. Thus, if a local authority had imposed a profession tax @ Rs. 2000/- per annum in the year 1928, it can be levied and collected, even after 26-1-50, by the same local authority or its successor, if the identity of the tax is maintained.<sup>11</sup>

**Refund of unconstitutional levy.**

1. It is now established that a suit lies to recover any tax which may been collected in excess of the maximum specified in Art. 276 (2).<sup>12</sup>

5. *Shrikrishna v. Ujjain Municipality*, A. 1953 M.B. 145; *Choolakhal v. Excise Commr.*, A. 1965 Ker 9 (10); *Bankim v. Panchayat Officer*, A. 1965 Cal. 463 (469).

6. *Bharat Kala Kendra v. Municipal Committee*, A. 1965 S.C. 555.

7. *Ram Krishna v. Janpad Sabha*, A. 1962 S.C. 1073.

8. *Lakhani v. Malkapur Municipality*, A. 1970 S.C. 1072 (1003).

9. *K. K. Samaj v. Nagpur Corpn.*, A. 1956 Nag. 152 (156).

10. *Ahet Municipality v. Manilal*, A. 1967 S.C. 1201 (1204).

11. *Cf. K. R. Engineering Co. v. Zilla Parishad*, A. 190 All. 316.

12. *Bharat Kala Bhandar v. Municipal Committee*, A. 1966 S.C. 249.

2. An order for refund may also be made in the proceeding under Art. 226, as an ancillary relief, where the Petitioner challenges the constitutionality of the levy.<sup>13</sup>

Where the constitutional prohibition has been violated, the taxing authority is without jurisdiction and the aggrieved taxpayer cannot be asked to resort to his remedy prescribed by the statute where the levy is merely in contravention of the provisions of a statute which also prescribed the remedy for such contravention.<sup>14</sup>

**277. Any taxes, duties, cesses or fees which immediately before the commencement of this Constitution, were Savings, being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.**

#### Art. 277: Savings.

1. This Article saves existing taxes levied by State or local authorities on subjects which may have been transferred by the Constitution from the State List to the Union List. For example, the power to impose duty on medicinal and toilet preparations containing alcohol belonged to the Provincial Legislature under Item 40 of List II of the Government of India Act, 1935, but it has been denied to the State Legislature by Entry 84 of List I and Entry 51 of List II of the Constitution. By reason of Art. 277, any such duty imposed by the Provincial Legislature and levied immediately before commencement of the Constitution shall continue to be levied until Parliament legislates to the contrary.<sup>15</sup>

2. The object of this article and its predecessor, s. 143 (2) of the Government of India Act, 1935, is to prevent a dislocation of the finances of local Government and authorities by reason of the coming into force of new constitutional enactments distributing heads of taxation on lines different from those which prevailed before the commencement of such constitutional changes.<sup>16</sup>

3. The scope of the Article is limited and it has no application where there has been no shifting in the allocation of power as between the Union and the State under the Constitution, from that under the Government of India Act, 1935,<sup>16</sup> or a change in the legislative power of the local Governments or authorities by reason of the passing of the Government of India Act, 1955.<sup>17</sup>

4. The power conferred by the present Article or s. 143 (2) of the Government of India Act, 1935 is simply to *continue to levy the pre-existing tax* and not a plenary power to legislate on those topics which have been taken away from its legislative competence, until the Central Legislature or Parliament chooses to legislate on those topics.<sup>17</sup> Hence, by virtue of this Article, the State Legislature or local authority is *not* competent:—

(a) to impose a *fresh tax*;<sup>17</sup>

13. *Lakhani v. Mahapur Municipality*, A. 1970 S.C. 1002 (1003).

14. *Cf. Radha Kishan v. Ludhiana Municipality*, A. 1963 S.C. 1547.

15. *Ram Krishna v. Janpad Sabha*, A. 1962 S.C. 1073.

16. *Liberty Cinema v. Calcutta Corp.*, A. 1959 Cal. 45 (54).

17. *Cf. Ram Krishna v. Janpad Sabha*, A. 1962 S.C. 1073 (1078); *Amraoti Municipality v. Ramchandra*, A. 1964 S.C. 1166.

- (b) to increase the *rate* of the existing tax;<sup>17</sup>
- (c) to alter the *identity* of the tax, including the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purposes for which the utilisation is to take place;<sup>17</sup>
- (d) to alter the *incidence* of the tax, i.e., the subject-matter of the tax, the taxable event as well as the rate of the duty.<sup>17</sup>

5. On the other hand, the Supreme Court has held<sup>17</sup> that the words 'may continue to be levied' in Art. 277 (or s. 143 (2) of the Government of India Act, 1935) confers a limited legislative power upon the local Legislature, subject to the overriding power of the Central Legislature to discontinue the levy. This limited legislative power of the local Legislature is "to express a desire to continue or not continue the levy," which includes the power—

- (a) to discontinue the tax or to repeal the taxing law;<sup>17</sup>
- (b) to reduce the rate of the tax;

(c) to legislate for the continuance of the tax if the other conditions of the Article are satisfied and such legislation may be given a *retrospective* effect so as to cover any gap or period (subsequent to the commencement of the Constitution or the Government of India Act, 1935, as the case may be) during which the levy may have actually been discontinued.<sup>17</sup>

### Conditions for application of the Article.

The conditions which must be satisfied before Art. 277 may be applied are<sup>17</sup> :—

- (i) that there is a tax which was lawfully levied by a local authority for the purposes of a local areas at the commencement of the Constitution;
- (ii) that the identity of the tax is not altered,
- (iii) that the incidence of the tax is not altered

### Identity of the tax.

1. As stated *above*, identity of the tax includes the identity of :—

- (i) the body that collects the tax.
- (ii) the area for whose benefit the tax is to be utilised;
- (iii) the purposes for which the utilisation is to take place.<sup>17</sup>

2. But the identity of the body collecting the tax would not be lost—

- (a) by a mere change in the composition of a local authority;
- (b) by a splitting up of the local area for being administered by a plurality of authority of the same nature.<sup>17</sup>

### 'Were being lawfully levied'.

1. This expression means 'was actually levied'.<sup>18</sup>

Hence, if a Provincial Act, passed prior to the commencement of the Constitution, imposed a duty, but the Act was to come into force on a date subsequent to the commencement of the Constitution, the levy of that duty is not continued by Art. 277.<sup>18</sup>

18. *Town Municipal Committee v. Ramchandra*, (1964) 53 I.T.R. 444 (S.C.); *Rajagopalachari v. Corpn. of Madras*, (1964) 53 I.T.R. 454 (S.C.): A. 1964 S.C. 1172.

2. The protection of this Article is obviously not available if the pre-Constitution law is replaced by a new Act after the Constitution,<sup>19</sup> or a new duty is imposed under the pre-Constitution Act, after the commencement of the Constitution,<sup>20</sup> as distinguished from merely increasing the rate of an existing tax.<sup>20</sup>

3. It also means that the pre-Constitution tax was being 'lawfully levied'. Art. 277 would not raise a tax which was not continued by s. 143 (2) of the Govt. of India Act, 1935.<sup>21</sup>

### **'Continue to be levied'.**

Art. 277 authorises the levy of 'existing taxes', etc. until provision to the contrary is made by Parliament by law. There is nothing in the Article to preclude Parliament from providing for such levy or collection by a new machinery.<sup>21</sup>

### **'Until provision to the contrary is made'.**

The power of the State Legislature to levy a tax by virtue of this Article will cease as soon as Parliament has made a law to the contrary.<sup>22</sup> Any levy made by a State thereafter would be *ultra vires*.<sup>22</sup>

But a legislation by Parliament cannot be said to be 'contrary' to an existing law unless it expressly repeals the latter or amounts to an implied repeal thereof.<sup>23</sup>

### **Instances of such laws made by Parliament.**

Medicinal and Toilet Preparations (Excise Duties) Act, 1955.<sup>22</sup>

### **Distinction between a tax and a fee.**

1. The distribution of the power to levy a tax is not identical with that of the power to levy a fee. Taxes are specifically distributed as between the Union and State Legislatures by various Entries in Lists I and II and the residuary power to levy a tax which is not enumerated in any of these Entries belongs to Parliament, under Entry 97 of List I.

On the other hand, there is an Entry relating to 'fees' at the end of each of the three Lists,—I, II and III, and the Entry is to this effect—"Fees in respect of any of the matters in the List. . . .". The result is that each Legislature has the power to levy a fee which is co-extensive with its power to legislate with respect to substantive matters and that either Legislature may, while making a law relating to a subject-matter within its competence, levy a fee with reference to the services that would be rendered by the State under such law.

It follows, accordingly, that whenever the question of the legislative competence or validity of an imposition is raised, the Court has to enquire into its real nature, according to the tests discussed above. Thus, even though an imposition is labelled as a fee if it appears to the Court that it is not a 'fee' but a 'tax', the next question to be determined is whether the power to levy such specific tax has been assigned to that Legislature by

19. *Nageswara v. State of Madras*, A. 1954 Mad. 643 (649); See contra, *Municipal Corpn. v. Sohna*, A. 1950 Punj. 497 (500).

20. Question not decided, in *Amalgamated Coalfields v. Jampada Sabha*, A. 1961 S.C. 964 (967).

21. *Madhavakrishnaiah v. I. T. O.*, (1954) S.C.R. 537; (1952-4) 2 C.C. 535.

22. *Sakti Ousadhalaya v. Union of India*, A. 1963 S.C. 622; *H. C. & P. Works v. State of A. P.*, A. 1964 S.C. 1670.

23. *Asma Begum, Ernakulam Municipality*, A. 1968 Ker. 31.

the Entries in the Lists over which its power extends; if not, the Court must declare the imposition as *ultra vires*.<sup>24</sup>

2. A tax is an imposition made for a public purpose, without reference to any services rendered by the State or any specific benefit to be conferred upon the tax-payer.<sup>25</sup> The object of the levy is to raise the general revenue.<sup>26</sup>

3. A fee is a payment levied by the State in respect of *services* performed by it for the benefit of the individual. It is levied on a principle just opposite to that of a tax. While a tax is paid for the *common* benefits conferred by the Government on all tax payers, a fee is a payment made for some *special* benefit, enjoyed by the payer and the payment is usually proportional to the special benefit.<sup>27</sup> The money raised by a fee is set apart and appropriated specifically for the performance of the service for which it has been imposed<sup>1</sup> and is not merged in the general revenues of the State.<sup>2</sup>

4. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area, the fact that in benefiting the specified class or area, the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee.

Where, however, the specific service is indistinguishable from public service, and in essence, is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences.<sup>3</sup>

5. While in the case of a tax, there is no *quid pro quo* between the tax-payer and the State, there is a necessary co-relation between the fee collected and the service intended to be rendered.<sup>4</sup> The amount of fee is based upon the expenses incurred by the State in rendering the services (though in the case of a particular fee, the amount may not be arithmetically commensurate with the expense). In any case, in assessing a fee, no account is taken of the varying *abilities* of the different assessee; where the quantum of imposition of a tax upon a tax payer depends generally upon his capacity to pay,<sup>5</sup> where no attempt is made to assess the fee on a *quid pro quo* basis, it cannot be upheld as a 'fee'.<sup>6</sup>

6. On the other hand, a levy in consideration of rendering service of a particular type will not be regarded as a tax merely because of—

- (a) the absence of uniformity in its incidence;<sup>4</sup> or
- (b) compulsion in the collection thereof;<sup>4</sup> or

24. *Commr. H R E v Iakshmindra A* 1951 SC 382 (296) (1954) S.C.R. 1075.

25. *Commr. H R E v Iakshmindra* (1951) S.C.R. 1005 *Hingir Rampur Coal Co. v State of Orissa*, A. 1961 S.C. 459 (461).

1. *Ch. Jaganath v. State of Orissa*, (1954) S.C.R. 1046, *Ratilal v. State of Bombay*, (1954) S.C.R. 1055.

2. As has been pointed out in *Gopi Prasad v State of Punjab*, A. 1957 Punj. 45 (48), this is not a sure test in all cases, since under Art 266, all the revenues of the State, whether derived from taxes, duties or fees are to form one 'Consolidated Fund'. Thus, court-fees realised under Arts. 146 (3) and 229 (3) are 'fees' even though they form part of the general revenues [*Rachana v. S D. O.*, A. 1960 All. 462]. Of course, a separate Fund is sometimes constituted by the legislation imposing a fee [Cf. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055]. But even then the imposition has to be held to be a tax and not a fee, if the '*quid pro quo*' is absent or the levy is 'exclusive' [cf. *Kutti Keya v. State of Madras*, A. 1954 Mad 621].

3. *Municipal Council v. Mansoor*, A. 1966 Mad. 20 (21).

4. *Hingir-Rampur Coal Co. v. State of Orissa*, A. 1961 S.C. 459.



(c) some of the contributories not obtaining the same degree of service as others may.<sup>4</sup>

7. Cases may arise where under the guise of levying a fee the Legislature may attempt to impose a tax. In the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the services and the levy or whether the levy is excessive to such an extent as to be a pretence of a fee and not a fee in reality.<sup>4</sup>

8. Where the law provides that the surplus, if any, after meeting the expenses of the service rendered, shall be spent for *general purpose*, other than the cost of maintenance of the service, the imposition cannot be treated as a fee.<sup>5</sup>

### **Tax and Cess.**

1. A cess is a tax confined to a local area for a specific object or a particular purpose<sup>6-9</sup>. It is a form of taxation and the word 'tax', used in its generic sense in Arts 265-6, includes a cess.<sup>10</sup>

2. Since draftsmen often use the terms 'tax' and 'cess' rather indiscriminately, the validity of an imposition is to be determined with reference to its nature and not whether it is labelled as a 'tax' or a 'cess'.<sup>9</sup>

3. A cess being a tax and not a fee, no *quid pro quo* between a service rendered and the levy is necessary to maintain its validity<sup>11</sup>. Even though the proceeds of a cess go to a local fund, if the levy is not in respect of any particular service rendered it is a tax<sup>12</sup>.

### **278. Omitted<sup>13</sup>**

#### **Agreement under Art. 278.**

It has been held that Art 277 was subject to repealed Art 278, see that upon an agreement had been entered into under Art 278, an existing tax ceased to be operative under Art 277<sup>13a</sup>.

**279. (1) In the foregoing provisions of this Chapter, "net proceeds"** means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

6. *Mahendraraja v. State of Mysore*, A. 1960 Mys. 18 (23).  
 6-9. *Balaram v. Hyderabad Municipality*, A. 1960 AP 234 (241).  
 10. *Commr. H. R. E. v. Lakshminidra*, A. 1954 S.C. 272 (296).  
 11. *Shanmugasu Oi Mili v. Market*, A. 1960 Mad 160 (164).  
 12. *Habibullah v. State of Bombay*, A. 1959 Bom. 43 (46).  
 13. Art. 278 has been omitted by the Constitution (Seventh Amendment) Act, 1956.  
 13a. *Union of India v. Kishanpersh Mills*, A. 1961 S.C. 683; *S. J. Corp. v. Board of Revenue*, A. 1964 S.C. 307.

**280. (1)** The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the distribution between the Union and the State of the not proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants-in-aid of the revenue of the States out of the Consolidated Fund of India;

“(c) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

**281.** The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Recommendations of the Finance Commission.

#### *Miscellaneous Financial Provisions*

**282.** The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

Expenditure defrayable by the Union or a State out of its revenues.

#### **Scope of expenditure by Union or State.**

This Article provides that the spending power of the Union or a State Legislature is not limited to the legislative powers conferred upon it. In other words, though the lists in the 7th Schedule define the legislative powers of the Union and the State in the matter of *expenditure*, neither is circumscribed within the lists assigned to it. The only limit to the power of the Union or a State to spend on a purpose not included within its legislative power is that the purpose must be ‘public’. By virtue of the Article, it will be possible for a State to make grants in favour of the institutions and Universities specified in Entries 63-4 of List I.

In view of the provisions of Arts. 25-7, the exercise of religion is a ‘private’ purpose under our Constitution and the State cannot make expendi-

14. Sub-cl. (c) of Cl. (3) has been omitted and sub-cl. (d) has been re-lettered as sub-cl. (c), by the Constitution (Seventh Amendment) Act, 1956.

ture of public revenues for the establishment of any religion or for the promotion thereof. When, however, the State takes over the management or superintendence of the properties of a religious institution or endowment in the interests of 'public order, morality or health' or to control its secular activities, the expenditure of money for the purposes of such administration is not an expenditure for the purposes of any religion but for regulation by the State of secular activities, which is a 'public purpose' within the meaning of Art. 282.<sup>18</sup>

**283. (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.**

**(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor<sup>15a</sup> of the State.**

**284. All moneys received by or deposited with—**

- (a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or**
- (b) any court within the territory of India to the credit of any cause, matter, account or persons,**

**shall be paid into the public account of India or the public account of the State, as the case may be.**

**285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.**

**(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.**

<sup>18</sup> *cf. Narayana v. State of Madras*, A. 1954 Mad. 385 (389).

<sup>15a</sup> The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

### **Exemption of property of the Union from State Taxation.**

The system of double government set up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another.

Our Constitution embodies this principle in Arts. 285 and 289. The present Article deals with immunity of the property of the Union from State taxation.

#### **Cl. (1): Property.**

The expression "property" in this Article has been used in a perfectly general sense and would include land, building, chattels, shares, debts and in fact everything that has a money value in the market and comes within the purview of any taxing statute.<sup>16</sup> Naval, Military and Air Force works, specified in List I (6), would come within this expression.

The ownership of land and the building standing thereon may belong to different persons.<sup>16</sup> Hence, the liability of the building to taxation may be different from that of the land.<sup>17</sup>

#### **'Property of the Union'.**

1. No tax can be levied upon the property of the Union, whatever be the mode of assessment.<sup>17</sup>

2. It is competent for the State Legislature to impose a tax directly on the interest of a lessee or occupier of Union property, but if the property is valued and assessed as a whole as the basis of the tax and then the liability is apportioned between the owner and the occupier, it is a tax on property, and the Union property must be exempted.<sup>18</sup>

#### **"Save in so far as Parliament may by law otherwise provide".**

These words suggest that Parliament<sup>18</sup> may by law permit a State or any authority within a State to impose a tax on Union property. The object of Cl. (1), thus, is not to prevent State or local taxation of Union property altogether, but to bring it under control of Parliament.

#### **"All taxes".**

The word "tax" in this context is to be interpreted in a wide sense, including any imposition or levy in the nature of a tax. For, otherwise, the State Government would be able to do something indirectly what it cannot do directly. This also follows from Art. 306 (28). *post*

#### **"Any authority within a State".**

This expression makes it clear that the exemption relates not only to taxes imposed by the State itself, but also by subordinate bodies like Municipalities and other local authorities<sup>19</sup> who cannot possibly have a larger power than the State itself by which they are created.

#### **Cl. (2): "Liable or treated as liable".**

These words mean that in order to come within the Proviso, the property

16. *Corporation of Calcutta v. St. Thomas' School*, (1948) 53 C.W.N. 231, affirmed by (1949) F.C.R. 368.
17. *Turf Properties v. Corp. of Calcutta*, A. 1957 Cal. 431 (437).
18. Under the corresponding provision in s. 154 of the Government of India Act, 1935, the Central Legislature made the Railways (Local Authorities' Taxation) Act, 1941 [*Union of India v. Municipal Commr.*, A. 1959 Pat. 216 (218); *Union of India v. Sahibganj Municipality*, A. 1966 Pat. 223].
19. *Cf. Governor-General in Council v. Corporation of Calcutta*, A. 1948 Cal. 116 (122), affirmed by *Corporation of Calcutta v. St. Thomas' School*, (1949) F.C.R. 368.

must have been in physical existence immediately before the commencement of the Constitution. There could have been no ability attached to a non-existent thing; nor could there have been any treatment of a non-existent thing. New buildings and structures erected on the land after the aforesaid date are therefore exempt from tax though the land on which they have been erected may be liable to tax under Cl. (2).<sup>19</sup>

Four conditions are necessary to bring a property within Cl. (2) in order to make it liable to taxation:

(a) Physical existence of the property immediately before the commencement of the Constitution;

(b) Liability of the property to the tax on that date;

(c) Physical existence of the property now, i.e., at the time when the tax is sought to be levied;

(d) Liability of the property to tax now.<sup>20</sup>

### "Treated as liable."

These words, as an alternative to 'liable', have been evidently used to obviate the contention that any taxes which had in fact been collected before the commencement of the Constitution, were not legally payable.<sup>21,22</sup> All taxes which were *in fact* collected prior to the commencement of the Constitution will continue, unless the Union Parliament enacts any law to the contrary.<sup>23</sup>

### "Immediately before the commencement of Constitution."

Cl. (2) says that properties which were liable or treated as liable to tax before the commencement of the Constitution, will continue to be so liable, until the Union Parliament legislates to the contrary. The effect of this clause, read with the Proviso to s. 154 of the Government of India Act, 1935 is—

If a property was not liable to taxation under the Government of India Act, 1935, it is evident that it was not 'liable at the commencement of the Constitution'. Hence, any property which was non-existent on 1-4-37 and has been subsequently acquired or created would not be liable to be taxed under cl. (2) of Art. 285.

Thus, a building constructed after 1-4-37 cannot be made liable to taxation under cl. (2) of this Article.<sup>24</sup> In *G. G. in Council v. Corporation of Calcutta*,<sup>25</sup> Ormond J. went further and opined that even capital improvements and alterations made to an existing building after 1-4-37 would be exempted from the operation of the Proviso to s. 154 of the Government of India Act, 1935 [to which cl. (2) of Art. 285 corresponds].

But the fact that on 1-4-37 the ownership of the property belonged to a party other than the Government is immaterial provided the property belonged to the Union Government at the commencement of the Constitution and was liable to the taxation on that date.<sup>26</sup>

20. There was a divergence of judicial opinion [cf. *Bell v. Municipal Commrs.*, (1902) 25 Mad. 457; *Secy. of State v. Mathura*, (1890) 14 Bom. 213], prior to the Government of India Act 1935 as to whether the properties of the Crown could be bound by taxing statutes. In order to obviate such controversy, the words 'treated as liable' were inserted in s. 154 of the Government of India Act, 1935, and continued in the present article of the Constitution.

21. *Corporation of Calcutta v. St. Thomas' School*, (1948) F.C.R. 368, affirming *G. G. in Council v. Corporation of Calcutta*, (1948) 53 CWN. 231.

22. *G. G. in Council v. Corpn. of Calcutta*, (1948) 53 C.W.N. 231, Ormond J.

23. *Corp. of Calcutta v. Union of India*, A. 1987 Cal. 448.

**'That tax'.**

The authority conferred by cl. (2) is to continue to levy 'that tax', i.e., the incidental tax, having regard to its nature and character and *not its quantum or rate*. So long as it remains the same, there is nothing to prevent the State or local authority to increase or reduce its rate, in the usual manner, and according to its needs or to revise the valuation of the property which is subject to the tax. The variation of the quantum or rate does not affect its power to continue to levy the tax so long as it remains 'that tax', on its nature, character or species. So long as the tax remains the same, it is only Parliament which can prevent the continuance of levy of that tax by the State or local authority.<sup>24-25</sup> Of course, if additional structures are constructed after the commencement of the Constitution, they would not be covered by Art. 285 (23).<sup>26</sup>

**286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—**

Restrictions as to imposition of tax on the sale or purchase of goods

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) *Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).*

(3) *Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.*

**Amendment.**— The Constitution (Sixth Amendment) Act, 1956<sup>2</sup> has made the following changes in the Article—

(a) In cl.(1), the *Explanation*, which ran thus, has been omitted:

*"Explanation.—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."*

(b) Cl. (2), which was as follows, has been substituted—

*"(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or otherwise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:*

*Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951."*

24. *G.G. in Council v. Corporation of Calcutta*, (1947) 52 C.W.N. 173.

25. *Union of India v. Lucknow Municipality*, A. 1957 All. 452 (455).

1. *Explanation to Clause (1)* omitted by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 1-11-56.

2. Came into force on 11-9-56.

(c) Cl. (3) has also been substituted. The original cl. (3) was as follows:

'(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent'.

### Objects of Amendment.

1. The Explanation, which introduced a legal fiction to determine the situs of a sale, led to difference of opinion in the Supreme Court itself<sup>3-4</sup> as to the scope of the Explanation. In order to obviate such controversy, the Explanation has been omitted and power has been given by the new Cl. (2) to Parliament to lay down the principles for determining when a sale shall be deemed to have taken place within a State within the meaning of Cl. (1) (a). In pursuance of this power, Parliament has enacted the Central Sales Tax Act, 1956, s. 4 of which provides a simple test of the physical location of the goods for determining the situs of a sale as between more than one States.

2. Cl. (2) did not altogether take away the legislative competence of the States to impose a tax on sales taking place in the course of inter-State trade or commerce, but subjected it to legislation by Parliament. By Entry 92A of List I, introduced by the Constitution (Sixth Amendment) Act, 1956, the legislative power to tax sales taking place in the course of inter-State trade and commerce has been vested exclusively in Parliament. Hence, the original cl. (2) has become unnecessary.

3. Instead of the 'essential' goods, the new cl. (3) deals with goods declared by Parliament to be of special importance in inter-State trade. This provision has been necessary in order to render effective the exclusive power of Parliament to tax sales taking place in the course of inter-State trade or commerce. Even though a sale does not take place in the course of inter-State trade or commerce, State taxation shall be subject to Parliamentary control if the sale relates to goods which are of special importance in inter-State trade as declared by Parliament. This is another provision devised to eliminate State barriers to the free flow of inter-State transactions.

### Art. 286: Restrictions upon imposition of sales tax by a State.

1. The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State [Entry 54, List II]. But 'taxes on imports and exports' [Entry 84, List I] and 'taxes on inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Art. 286 is intended to ensure that sales taxes imposed by the States do not interfere with imports and inter-State trade and commerce, which are matters of national concern, and the taxation of which is beyond the competence of the State. Hence, the present Article lays down certain limitations upon the power of the States to enact sales legislation.

These are—

(a) No tax shall be imposed on sale or purchase which takes place *outside the State* [Cl. (1) (a)].

3. *State of Bombay v. United Motors*, (1953) S.C.R. 1069.

4. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

5. This left a scope for ingenious arguments as in *Mysore Spinning Co. v. Dy. Commercial Tax Officer*, A. 1967 Mad. 368 (371).

(b) No tax shall be imposed on sale or purchase which takes place *in the course of import into or export out of India* [Cl (1) (b)].

2. In connection with inter-State trade and commerce, there are two limitations—

(a) The power to tax sales taking place 'in the course of inter-State trade and commerce' is within the exclusive competence of Parliament [Art. 269 (1) (g); Entry 82A of List I]

(b) Even though a sale does not take place 'in the course of inter-State trade or commerce', State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to goods decared by Parliament to be of *special importance* in 'inter-State trade and commerce' [Cl (3)].

### Cl. (1): 'Law of a State'.

1. It has been held<sup>6</sup> that this expression included a law made by the Legislature of a Part C State as it existed prior to the Constitution (Seventh Amendment) Act, 1956

### A Tax on sale or purchase.

1. As to the nature and incidence of this tax, see under Entry 54, List II, *post*. The transaction that is taxed is the transaction of sale which means the transfer of ownership from one person to another. The above expression means that the tax may be imposed upon *either* party to the transaction

S. 2 (g) of the Central Sales Tax Act, 1956 defines a 'sale' as follows—

"Sale", with its grammatical variations and cognate expressions means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments but does not include a mortgage or hypothecation of or a charge or pledge on goods."

'Goods' are defined by S. 2 (d) as follows—

"Goods" includes all materials articles, commodities and all other kinds of movable property, but does not include *newspapers*, actionable claims, stocks, shares and securities."

2. Where a sales tax is passed on to the buyer and the sale price includes the amount payable as sales tax it is competent for the Legislature to include the amount of tax in the 'turnover' being the aggregate amount for which goods are bought and sold and to tax the turnover. Such tax on the turnover does not constitute a 'tax on tax' but a tax on sale within the ambit of Entry 54 of List II, because the amount of the tax which the dealer recovers from the buyer goes into his common bill and he may use it for his business as any other part of his assets till he actually pays the tax to the Government.

**Sale.**—See under Entry 54, List II, *post*

### Sub-cl. (a): 'Outside the State'.

1. This means outside the State seeking to impose the tax. The object of this sub-clause is to prevent multiple taxation of a single transaction.

2. In exercise of the power conferred by amended cl. (2), Parliament has formulated the principles of determining when a sale or purchase takes

<sup>6</sup> *Commr. of Sales Tax v Hussain*, A. 1965 M.P. 11 (13)

<sup>7</sup> *George Oakes v. State of Madras*, A. 1962 S.C. 1352.



place outside a State, by enacting the Central Sales Tax Act (74 of 1956), s. 4 of which says—

“(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State—

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such an appropriation.

*Explanation.*—Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.”

3. S. 3 of the Act lays down when a sale or purchase is said to take place in the course of inter-State trade or commerce. This means that a transaction comes under s. 3, it cannot be said to have taken place ‘inside’ any State.

### **Situs of the sale.**

1. The Explanation to Cl. (1) (a), which has been omitted by the Constitution (Sixth Amendment) Act, 1956, provided for the determination of the situs of the sale according to legal fiction, namely, that of actual delivery as a direct result of the sale for the purpose of consumption in a State.<sup>8</sup> This resulted in a difference of opinion<sup>9-10</sup> in the Supreme Court itself, as to what constituted ‘actual delivery’ and ‘consumption’ read with the Explanation.

2. In order to obviate such controversy, the Central Sales Tax Act has adopted the simple test of the physical location of the goods for determining the situs of the sale. For this purpose, the Act makes a distinction between ‘ascertained’ and ‘unascertained’ goods (which terms are obviously used in the same sense as in the Sale of Goods Act, 1930).

(a) In the case of the sale of *ascertained* goods, the material point of time is when the contract of sale is made. The sale will be deemed to have taken place in that State where the goods are *physically* located at that point of time.

(b) In the case of unascertained goods, the location of the goods at the time of their *appropriation* to the contract of sale would be the test.

What is meant by ‘appropriation to the contract’ will be clear from s. 23 of the Sale of Goods Act, 1930, which says—

“(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose

<sup>8</sup> *State of Bombay v. United Motors*, (1954) S.C.R. 1039.

<sup>9</sup> *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661; (1955) 2 S.C.R. 603.

<sup>10</sup> *Compt. & S. T. v. Fawcett*, (1930) 1 S.C.A. 58 (77).

of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The point of time which is relevant under this head is not the *ascertainment* but the *appropriation* of the goods to the contract of sale, which results, generally speaking, in the passing of the goods.

It is clear from the language of s. 23 itself, that the appropriation may be by the seller with the assent of the buyer or by the buyer with the assent of the seller, that assent to appropriation may be express or implied and that it may be given after the appropriation or in advance before such appropriation.<sup>11</sup>

3. In some cases of the sale of unascertained or future goods it may happen that the seller or the buyer may make an appropriation of the goods without the assent of the other party and put them into the course of transit. It may in such cases happen that the location of the goods when the assent of the buyer or seller is given to the appropriation is different from their location at the time when the seller or the buyer made the appropriation. In order to provide for them s. 4(2) (b) of the Act lays down that the location of the goods at the time of the appropriation by the seller or the buyer irrespective of their location at the time when the assent of the other party is given to the appropriation should be the decisive factor in determining the situs of the sale. Under s. 4 (2) (b), the time of appropriation is the relevant time and the consent of the other party may be subsequent to the appropriation.

'Location of the goods', of course, means the location of the goods in the form which constituted the subject matter of the agreement.<sup>12</sup>

4. In order to avoid any controversy, s. 4 (1) of the Act makes it clear that as soon as a sale is deemed to have taken place within a State it shall be deemed to have taken place outside all other States.

5. The Explanation to s. 4 provides that where goods situated in two or more States were sold under one contract of sale, the contract should be deemed to be divisible and regarded as separate contracts (for the purposes of Sales Tax), relating to goods located in each State.

6. The words 'subject to the provisions of s. 3' exclude sales in the course of inter State trade and commerce from the concept of sale 'inside a State'.

### **CL. (1) (b): No tax on sales in course of import into or export out of India.**

1. This sub-clause prevents a State from levying a sales tax so as to interfere with the Union's legislative powers with respect to import and export across customs frontiers (Entry 41, List I) and duties of customs including export duties (Entry 83 of List I).

2. As explained by the Supreme Court<sup>13</sup> the object underlying the exemption from sales taxation given by the present clause is also to avoid double taxation of the foreign trade of the country which is of so great importance to the nation's economy. The double taxation sought to be avoided consisted in the imposition of export duty by the Central Government and the imposition of sales-tax by the State Government in its different aspects as an export and as a sale. Such double taxation is avoided by exempting the export-sale and the import-purchase from the levy of sales-tax by the State.

11. *State of T. C. v. Shanmugha Cashewnut Factory* (1964) S.C.R. 53  
S.C.I.—81

3. The ban imposed by sub-cl. (a) and (b) are independent and each one of these bans has to be surmounted before a State can impose a tax on the sale or purchase of goods.<sup>12</sup>

4. The onus to show that his case comes under Art. 286 (1)(b) is upon the assessee who claims exemption under that provision.<sup>13</sup>

### 'In the course of import or export'.

1 S. 5 of the Central Sales Tax Act, 1956, enacted in pursuance of the power conferred by amended cl. (2) of this Article, lays down the principles for determining when a sale or purchase takes place in the course of import or export. It says—

"(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

2. According to the foregoing section, a transaction of sale or purchase may take place in the course of export or import in one or two ways as suggested in the second *Travancore-Cochin case*,<sup>14</sup> viz —

(i) Where a sale or purchase occasions<sup>15</sup> an import into or an export out of the territory of India;

(ii) Where a sale or purchase by transfer of shipping documents takes place before or after (as the case may be) the goods have crossed the customs frontiers of India.<sup>16</sup>

These two classes of cases may now be explained

#### 1. Sale or purchase which occasions the export or import

The expression 'occasions the export or import' implies that—

(i) the movement of goods across the border is caused by a covenant in the contract, or,<sup>17-19</sup> in other words, the contract itself involves such movement;

Following the majority decision in *State of T. C. v. Shanmugha*,<sup>14</sup> the Central Sales Tax Act lays down that a transaction which directly or immediately leads to the export or import takes place 'in the course of' export or import. Hence,

(i) Export sales of commodities to foreign buyers on c.i.f. or f.o.b. terms fall within the scope of exemption under this clause.<sup>18</sup>

The reason is that in an f.o.b. contract, in the absence of a special agreement, property in the goods does not pass until the goods are actually put on board the ship.<sup>20</sup>

12. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661.

13. *S. T. O. v. Shiv Ratan*, A. 1956 S.C. 142 (144).

14. *State of T. C. v. Shanmugha Cinnamon Factory*, (1954) S.C.R. 53 (63, 96).

15. *Endrapuri v. State of Orissa*, (1962) 1 S.C.R. 314.

16. *Cf. Narasimham v. State of Orissa*, A. 1961 S.C. 1344.

17. *Tata Iron & Steel Co. v. Sarkar*, A. 1961 S.C. 65 (72); (1961) 1 S.C.R. 379 (391).

18. *Cement Marketing Co. v. State of Mysore*, A. 1963 S.C. 980 (983).

19. *Cf. Mohan Lal v. State of M. P.*, (1953) 2 S.C.R. 509; A. 1955 S.C. 778.

20. *Wadeyar v. Dandathram*, A. 1961 S.C. 311; (1961) 1 S.C.R. (Supp.) 924.

(a) A contract of sale with a foreign buyer under which the goods may be delivered by the seller to a common carrier would be a sale in the course of export, whether the delivery to the common carrier is effected directly or through agents.<sup>21</sup>

(b) In the case of a sale direct by the exporter to the foreign buyer, even where the property in the goods passes to the foreign buyers and the sale is thus completed within the State<sup>22</sup> before the goods commence the outward journey, the sale must, nevertheless, be regarded as having taken place in the course of the export trade, and are, therefore, exempt under Art. 286 (1) (b). That clause, indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes 'in the course of the export' of goods concerned.<sup>23</sup>

On the other hand—

(i) The last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or exported to be received subsequently in the ordinary course of business, is *not* a sale 'in the course of export'.<sup>24</sup> It is immaterial for the application of this rule whether the commodity which is exported is the same<sup>25</sup> as that which was purchased from the internal market or it has been subjected to some further process since then,<sup>26</sup> or the commodity so purchased is specially packed and marked 'for export only'.<sup>27</sup> The fact that the exporter has a license from the Government and that the manufacturer who manufactures for the purpose of export is obliged to sell only to the license-holder, by reason of a Government Control Order, does not alter the situation. The license-holder cannot be deemed to be the agent either of the foreign buyers or of the manufacturers. The sale by the manufacturers to such licensed exporters cannot, therefore, claim exception under Art. 286 (1) (b).<sup>28</sup> A person who registers himself as a 'dealer' and submits return as such, cannot be regarded as the agent of the exporter in respect of the purchases made by him as a dealer and then sold to the exporter, even though the goods are then shipped to a foreign buyer on the instruction of the exporter, instead of delivering them to the exporter.<sup>29</sup>

(ii) All sales preceding the one that occasions the export are taxable even if the goods are manufactured with the object of export.<sup>30</sup> Thus, a sale by auction to agents of foreign buyers does not itself occasion the export and is, therefore, not exempt from sales-tax.<sup>31</sup>

(iii) To apply cl. (1) (b), it is not sufficient that the goods merely moved out of the territory of India, but it is further necessary that the goods are *intended* to be transported to a destination beyond India.<sup>32</sup> Thus, the sale of coal for the consumption of steamers at an Indian port is not a sale 'in the course of export', even though such steamers may be going abroad.<sup>33</sup>

In short, any transaction of sale prior to the export of the commodity is not necessarily a sale 'in the course of export' unless there is an integral bond between such sale and the actual exportation: the contract of sale must

21. *Ben Gorm Plantations v. S. T. O.*, A. 1964 S.C. 1752 (1756)

22. *National Carbon Co. v. S. T. C.*, A. 1969 All. 275 (F.B.).

23. *State of T. C. v. Bombay Co.*, (1032) S.C.R. 112 (1120)

24. *State of Madras v. Gurniah*, A. 1956 S.C. 158 (161).

25. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 53.

1. *State of Mysore v. Mysore Spinning & Mfg. Co.*, A. 1958 S.C. 1002.

2. *Gandhadas v. Banerjee*, A. 1958 S.C. 1005.

3. *Ct. Burma Shell v. U. T. O.*, A. 1961 S.C. 315; *East India Tobacco Co. v.*

*State of A. P.*, A. 1962 S.C. 1733 (1737); (1963) 1 S.C.R. 404.

4. *State of Kerala v. Cochin Coal Co.*, (1961) 2 S.C.R. 219.

be such that there is an *obligation* (either contractual or statutory) to export on the part of the buyer; a mere *knowledge* on the part of the buyer that the goods are being purchased with the intention of exporting is not enough.<sup>5-7</sup> Hence, a purchase by a local firm doing business of export would not be a purchase in the course of export even though it is made with a view to export,<sup>8</sup> and even though the seller knew that the buyer was acting on behalf of a foreign principal, provided there is nothing in law to prevent the goods being diverted to internal consumption on.<sup>7</sup>

(iv) Import purchases are similarly exempted from sales-tax.<sup>9</sup>

It is now clear that a sale in the course of export or import shall *not* include the first sale after import or the last purchase preceding the export.<sup>10</sup>

(a) The fact that the importer effects the sale through commission agents resident in another State does not alter the position if the goods are purchased *on behalf of* the importer and delivered direct from the foreign country into the State of the importer.<sup>11,12</sup>

(b) 'Export', in this context, does not merely mean 'taking out of the country'. The test of export is that the goods must have a *foreign destination* where they can be said to be imported. It matters not that there is no valuable consideration from the receiver at the destination end.<sup>13</sup>

(i) If the goods are sent to a foreign destination where they would be received as imports, a sale or purchase in the course of that export is exempted under sub-clause (b).<sup>14</sup>

(ii) On the other hand, where there is no foreign destination, there is no export at all within the meaning of the sub-clause.<sup>15</sup> A mere movement of goods out of the country without any intention of their being landed in specie in some foreign port does not involve an export.<sup>11,13</sup>

## II. Sale or purchase by transfer of documents of title

Sales or purchases effected within the State by the exporter or the importer by transfer of shipping documents *while the goods are beyond the customs frontier* are also within the exemption conferred by the present sub-clause.<sup>13a</sup>

The reason is that the expression 'in the course of' implies a movement and includes transactions taking place while the goods are in transit or movement in the course of export or import. This movement in the course of export out of or import into the territory of India *does not commence or terminate until the goods cross the customs frontier*. Thus, if the property in the goods passes to the buyer *after* they have, for the purpose of export to a foreign country crossed the customs frontier, the sale has taken place 'in the course of export'.<sup>14</sup>

(a) Of course, so far as the export trade is concerned, where the goods are transported pursuant to a contract of sale, already contracted with

5-7. *Ben Gorm Plantations v. S. T. O.*, A. 1964 S.C. 1752 (1756-8).

8. *East India Co. v. State of A. P.*, A. 1962 S.C. 1733.

9. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661.

10. The Act follows the majority view in preference to that of Das J. in *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 52 (71).

11. *Cf. Burmah Shell v. C. T. O.*, A. 1961 S.C. 315; *East India Tobacco Co. v. State of A. P.*, A. 1962 S.C. 1733 (1739).

12. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 53; A. 1953, S.C. 333.

13. *State of Kerala v. Cechin Coal Co.*, A. 1961 S.C. 408.

13a. *Gopal & Co. v. Asstt. Collector*, (1960) 2 S.C.R. 852.

14. *Wadeyar v. Dandatram*, (1961) S.C.R. 924 (927), affirming *Dandatram v. Wadeyar*, A. 1958 Bom. 120.

a foreign buyer and the shipping documents have already been forwarded to him, any further sale of such goods by the Indian seller is impossible, and where the export trade is conducted through representatives or branch offices, the sale by the latter of the exported goods usually takes place abroad and would not then be subjected to tax by the State in India. Hence, the question of imposing sales-tax on transfer of goods *in the course of export* would not often arise in practice.

(b) But sales or purchases by transfer of shipping documents while the goods are in transit are a characteristic feature of foreign trade, and such transactions, taking place where the goods are beyond the customs frontiers of India, are within the exemption provided by the present sub-clause.<sup>15</sup>

III. The following transactions cannot be said to have taken place 'in the course of import or export' and are not covered by the exemption of cl. (1) (b).

(a) The last purchase of goods made by the exporter *for the purpose of exporting* them to implement orders received from a foreign buyer or expected to be received subsequently in the course of business.<sup>16</sup>

It follows, therefore, that when a merchant in India purchases (for the purpose of export to foreign country) goods from another Indian merchant or manufacturer,<sup>17</sup> the transaction is a home transaction; but when he resells the goods to a buyer abroad, such resale is an export transaction.

In short, a purchase which precedes the sale under which the export is made does not fall under the purview of Art. 286 (1) (b) even though it is made with a view to export.<sup>18</sup>

(b) The same reasoning applies to the first sale *after import* which is a distinct local transaction effected *after* the goods have crossed the customs frontier, *i.e.*, after the importation of the goods into the country has been completed, and having no integral relation with it.<sup>19</sup>

IV. In order that exemption from sales-tax may be claimed in respect of any transaction of sale or purchase of any goods taking place 'in the course of export or import', it must be established that these goods are the same as are exported.<sup>4</sup> If any transformation of the goods by any process takes place, the identity is lost and no exemption can be claimed.<sup>20</sup>

**CL. (3): Restrictions and conditions in regard to State taxation of sales of goods of special importance in inter-State trade.**

#### **Effect of Amendment.**

The effect of amendment of this clause in 1956 was that if, after 11-9-56, Parliament (a) declared any goods to be of special importance to inter-State trade or commerce, and also (b) specified restrictions and condition in regard to the imposition of sales tax on the sale or purchase of such goods, a State Legislature could impose sales tax on such goods only subject to such restrictions and conditions as Parliament so specified.<sup>21</sup>

#### **'Law imposing a tax'.**

A law dealing with taxation is not necessarily a law 'imposing taxation'. A law would come within the expression only if it creates the liability to pay the tax.<sup>22</sup>

15. *State of T. C. v. Shanmugha Cashewnut Factory*. (1954) S.C.R. 53 (94).

16. *State of Mysore v. Mysore Spinning Co.*, A. 1958 S.C. 333; *State of Madras v. Gerviah*, A. 1956 S.C. 158; *East India Tobacco Co v State of A. P.*, A. 1962 S.C. 1733 (1737).

17. *Dilip Kumar v. C. T. O.*, A. 1965 Cal. 498

18. *Chettiar & Co. v. Dy. C. T. O.*, A. 1959 Mad. 317.

### 'Sale in the course of inter-State trade and commerce'

1. A sale could be 'in the course of inter-State trade and commerce' only if two conditions occur—(i) a sale of goods, and (ii) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied there can be no sale in the course of inter-State trade and commerce.<sup>19,20</sup> Movement of goods across a State border is essential for inter-State trade and commerce,<sup>21,22</sup> and that must take place under the contract of sale.<sup>22,23</sup> In other words, it must be stipulated that the deliveries should be outside the State.<sup>24,25</sup>

2. The sale of a thing 'in the course of inter-State trade or commerce' and the inter-State sale of a thing which is of special importance to inter-State trade or commerce are not identical transactions.<sup>1</sup>

### "Declared by Parliament."

1. Under clause (3) as it stood before the amendment of 1956, it has been held that the clause would apply only if there is a pre-existing declaration made by Parliament in regard to the essential character of a commodity, at the time when the impugned law of the State was passed.<sup>2</sup>

The same interpretation must be made as to the words "declared by Parliament by law to be of special importance in inter-State trade or commerce."

2. In exercise of the power conferred by this Clause, Parliament has, by s. 14 of the Central Sales Tax Act, 1956 declared certain goods to be of special importance to inter-State trade and commerce, such as coal, cotton, hides and skins, cotton yarn.

The restrictions and conditions subject to which a State may impose sales tax on the sales of such goods taking place within such State are laid down in s. 15<sup>3</sup> of the Act which says—

*"Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely,—*

*(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall be levied in respect of the last sale or purchase inside the State and shall not exceed two per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;*

*(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State."*<sup>4</sup>

19. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661.

20. *State of J. & K. v. Caltex*, A. 1966 S.C. 1350 (1353).

21. *Moharaj v. State of M. P.*, A. 1955 S.C. 886; (1955) 2 S.C.R. 509.

22. *Cement Marketing Co. v. State of Mysore*, A. 1963 S.C. 960.

23. *Eadupuri v. State of Orissa*, (1961) 12 S.T.C. 282.

24. *Singam Collieries v. State of A. P.*, A. 1966 S.C. 563.

25. *State Trading Corp. v. State of Mysore*, (1963) 14 S.T.C. 188.

1. *Dilip Kumar v. C. T. O.*, A. 1965 Cal. 498 (505). [The effect of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 explained].

2. *Firm of Gopalshankar v. S. T. O.*, A. 1966 S.C. 883; *Indore Iron & Steel Assn. v. State of M. P.*, (1962) 2 S.C.R. 924.

3. As amended by Act 31 of 1958.

4. S. 15 came into force only on 1-10-58 [Not. no. G. S. R. 897/23-9-58]. The earlier notifications, such as S. R. O. 4029 S. O. 319, G.S.R. 521, were superseded before they came into operation.

The maximum permissible limit of tax under cl (a) of s 15 above is 2%. This limit cannot be exceeded' by imposing tax on sales of the same commodity by more than one Acts"

3. On the other hand, the following have been held not to be 'law' for the purposes of Art. 286 (3).

Essential Supplies (Temporary Powers) Act 1916<sup>1a</sup>

**287.** Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is

Exemption from taxes on electricity

(a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railways by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway, and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quality or electricity.

**288.** (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river-valley.

*Explanation*—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

**289.** (1) The property and income of a State shall be exempt from Union taxation.

1. *Mahendra v. C. T. O.*, A 1965 Cal 203 (205).

6. *Kotturi v. Dy. Commr.*, A. 1962 Mys 1

8. *Kotturi v. State of Hyderabad*, A 1958 SC, 756



(2) Nothing in clause (1) shall prevent the Union from imposing,

Exemption of property and income of a State from Union taxation.

or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Govern-

ment of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

**Scope of Art. 289.**—Arts. 285 and 289 provide for the immunity of the property of the Union and the State from mutual taxation, according to the federal principle. While Art. 285 provides that property of the Union shall be exempted from the State or local taxation, Art. 289 declares that the property and income of a State shall be immune from Union taxation, excepting commercial undertakings carried on by the State, unless such undertakings are declared by Parliament to be incidental to the ordinary functions of Government.

While Cl. (1) of Art. 289 exempts from Union taxation any income of a State, whether it is derived from governmental or non-governmental activities, Cl. (2) provides an exception, namely, that income derived by a State from trade or business would be taxable, provided a law is made by Parliament in that behalf. Cl. (3) is an exception to the exception prescribed by Cl. (2) and provides that the income derived from a particular trade or business may still be immune from Union taxation if Parliament declares that said trade or business is incidental to the ordinary functions of Government.<sup>7</sup>

#### • Cl. (1): 'Property'.

A majority of the Supreme Court has held<sup>8</sup> that the immunity conferred by Cl. (1) is only in respect of a tax 'on property'.

The immunity did not extend to all taxes. The Union Government could impose taxes "in relations to" property. A tax by way of import or export duty was a tax not on property but on the fact of importing or exporting goods into or out of the country. Similarly, an excise duty was not a tax on property but a tax on production or manufacture of goods. Even though the measure of the tax might have reference to the value, weight or quantity of the goods, in essence import or export duties or excise duties were not taxes on property, including goods, as such, but on the happening of a certain event in relation to goods, namely, import or export of goods, or production or manufacture of goods.<sup>9</sup>

Art. 289, therefore, does not debar the Union from levying customs and excise duties on goods imported or manufactured by a State, irrespective of whether they were used or not used for purposes of trade and business, so as to attract cl. (2).<sup>9</sup>

#### 'Income of a State'.

No exemption can be claimed under cl. (1) if the income in question is of some authority other than the State, e.g., a statutory corporation, which is a separate juristic entity,—even though its shares are owned by the State itself,<sup>9</sup> or the corporation is State controlled.<sup>9</sup>

7. *A. P. S. R. T. C. v. I. T. O.*, A. 1964 S.C. 1486 (1419).

8. *Ref. re Sea Customs Act*, A. 1963 S.C. 1760.

9. *A. P. S. R. T. C. v. I. T. O.*, A. 1964 S.C. 1486 (1491, 1493).

It would be an income of the State if the trade or business is carried on by the State either departmentally or through its agents appointed for that purpose who carry on the trade entirely on behalf of State.<sup>9</sup>

**Cl. (2): 'Business of a State'.**

1. A business carried on by a State is not exempt from Union taxation unless Parliament has declared such business to be incidental to the functions of Government, under cl. (3).<sup>10</sup> Any activity undertaken by the Government with a profit motive would apparently come under this expression, even though it may be public utility service.<sup>10</sup>

2. Since the exemption under Cl. (1) is confined to property or income of a State, business carried on by a statutory corporation cannot claim exemption under Cl. (3).<sup>11</sup>

**290. Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—**

Adjustment in respect of certain expenses and pensions.

(a) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State; or

(b) in the case of a charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

**290A.** A sum of forty five lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund, and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Madras every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin.

**291.** Where under any covenant or agreement entered into by the Privy purse sums of Ruler of any Indian State before the commencement of this Constitution, the payment of any

10. *Cf. Satya Narain v. Dt. Engineer*, A 1965 SC 1160 (1163).

11. *APSRTC v. ITO.*, A 1964 SC 1486 (1491).

12. Inserted by the Constitution (Seventh Amendment) Act 1956.

12a. The Constitution (Twenty-Fourth Amendment) Bill, 1970, to omit Arts. 291, 363 and 366 (22), to do away with the Privy Purse and other privileges of the ex-Rulers, after having been passed in the House of the People, has been defeated in the Council of States on 5-9-70. Government is determined to pursue it [see under Art. 366 (22), post].

sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

\* \* \* \*

### Privy Purse.

1. It is a sum intended to provide for the expenses of a Ruler of an erstwhile Indian State out of the revenues of India. It is in the nature of a 'political pension' within the meaning of s 60 (1) (g) of the C. P. Code,<sup>13</sup> and is thus protected from execution.

2. At the same time, though assured by Arts 291 and 362 of the Constitution, the Privy Purse or any other right secured by a Covenant between the ex-Ruler and the Dominion of India, is not enforceable in a Court of law, by reason of Art 363(1) of the Constitution.<sup>14</sup> The Covenant was an act of State, and any violation of its terms cannot form the subject of any action in any municipal court. The guarantee given by the Government of India was in the nature of a treaty obligation contracted with the sovereign Rulers of Indian States and cannot be enforced by action in municipal courts. Its sanction is political and not legal. On the coming into force of the Constitution of India, the guarantee for the payment of periodical sums as privy purse is continued by Art 291 of the Constitution but its essential political character is preserved by Art 363 of the Constitution, and the obligation under this guarantee cannot be enforced in any municipal court.<sup>15</sup>

3. Recognition of a 'Ruler' by the Government of India is a political act and a matter of status. It does not affect 'property'.<sup>16</sup> Similarly, Privy Purse is not an item of private property.<sup>17</sup>

4. Cl. (b) exempts from income tax the Privy Purse of a Ruler but not his other property.<sup>18</sup>

**292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of the Government of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.**

**293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be fixed.**

**(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under article 292 are**

13. Cl. (2) has been omitted by the Constitution (Seventh Amendment) Act, 1956.

14. *Umanah v. Sagar Mal*, A. 1965 S.C. 1798 (1807), reversing A. 1962 M.P. 320 (325).

15. *Rajendra Singh v. Union of India*, (1969) 3 S.C.C. 150.

16. *Cf. Sudhansu v. State of Orissa*, (1961) 1 S.C.R. 779.

not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

### CHAPTER III PROPERTY, CONTRACTS, RIGHTS LIABILITIES, OBLIGATIONS AND SUITS

#### 294. As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

#### Cl. (b): Devolution of rights, liabilities and obligations.

1. The rights, liabilities and obligations of the East India Co. devolved on the Government of India under the Government of India Act, 1935, and these passed on to the Dominion of India and the Provinces (so far as relating to the Dominion of India) under the Indian Independence Act, 1947. Under Art. 294 these pass on to the Union and the States, respectively.

2. It follows that the grant of the right to run a ferry with any interest in lands, appertaining thereto, granted by the East India Co. is binding upon the appropriate State unless taken away by competent and valid legislation.<sup>16a</sup>

3. The object of the clause is only to transfer the liabilities to the appropriate Government. It does not operate as a fetter upon the competence of the appropriate Legislature to legislate on the subject of liabilities itself;<sup>17</sup> nor does it suggest that those obligations must be fulfilled even though they were not binding on the successor Government.<sup>18</sup>

16a. *Krishan v. State of U. P.* A. 1957 All 455

17. *Rangildas v. Collector of Surat*, (1961) 1 S.C.R. 951 (954); *Umegh Singh v. State of Bombay*, (1965) 2 S.C.R. 164.

18. *Union of India v. G. R. Silk Mfg. Co.*, A. 1964 S.C. 1903 (1915).

**295. (1) As from the commencement of this Constitution—**

- (a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and
- (b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

**CL (1) (b): Rights, liabilities and obligations of Indian States.**

1. Art. 295 deals merely with the devolution of liability, not the basis of liability, for which we are to refer to Art. 300.<sup>19</sup> Nor does Art. 295 affect the legislative competence of the appropriate Legislature to modify such rights or liabilities.<sup>18-19</sup>

2. By virtue of the present sub clause, the liabilities of an Indian State existing prior to the commencement of the Constitution shall be the liabilities of the Government of India, provided the purposes for which such liabilities or obligations were incurred are purposes of the Union, according to List I of the Constitution. But—

(i) There are certain liabilities which will not be justiciable in a Court of law in view of Art. 363 of the Constitution. Thus, though a *Covenant* entered into by an Indian State, and guaranteed by the Dominion of India, at the time of the merger of such States into a Union of States, is binding upon the Government of India, no action in respect of a liability arising out of such Covenant will lie in a Court of law,<sup>21,22</sup> unless the claim available against the Indian State is recognised by the new sovereign,<sup>21,23</sup> expressly or impliedly,<sup>24,25</sup> e.g., by providing that the old laws would continue until repealed. There cannot, however, be any implication of recognition where the new Sovereign has enacted a law which negatives such recognition.<sup>24,1</sup>

19. *State of Rajasthan v. Vidyawati*, A. 1962 S.C. 933 (936).

20. *Umaid Mills v. Union of India*, A. 1963 S.C. 963.

21. *State of Rajasthan v. Shyam Lal*, A. 1964 S.C. 1496.

22. *Sudhansu Sekhar v. State of Orissa*, A. 1961 S.C. 196.

23. *Dalmia Cement Co. v. I. T. Commr.*, A. 1958 S.C. 816.

24. *Amar Singhji v. State of Rajasthan*, A. 1955 S.C. 504 (523).

25. *Amar Chand v. Union of India*, A. 1964 S.C. 1658 (1663).

1. *State of Rajasthan v. Shyam Lal*, A. 1964 S.C. 1496 (1500).

(ii) This Clause does not cast any obligation on the Government of India to fulfil the contracts irrespective of whether they were binding on the original State with which they were made and whether they can be affected by law validly passed after the Constitution came into force.<sup>2</sup>

(iii) Parliament is competent to abrogate or wipe out any contractual obligation which has devolved upon it by virtue of the present article.<sup>3</sup> In other words, Art. 295 speaks only of devolution of the liability; it does not act as a limitation upon the legislative competence of the Union or a State Legislature.<sup>4</sup>

### **'Subject to any agreement'.**

Such agreement must not necessarily be one entered into prior to the commencement of the Constitution. There is nothing to prevent a Part B State to retain a property even though it relates to a matter enumerated in the Union List, by agreement with the Government of India, subsequent to the commencement of the Constitution.<sup>5</sup>

### **Cl. (2): 'Subject as aforesaid'.**

This means that only those rights or liabilities are to devolve on the successor Government which were available in favour of or against the previous Governments.<sup>2a</sup> Thus, where no suit lay against a Ruler for a cause of action, no suit can be brought against the succeeding State under the Constitution in respect of a similar matter taking place prior to the Constitution.<sup>5</sup>

### **Cls. (1) (b) and (2).**

(a) If the liability of the Indian State was for a purpose which is included within the Union List, viz, trade with a foreign country, the liability will devolve on the Government of India.<sup>6</sup>

(b) If, however, the liability was for a purpose outside the Union List the liability will devolve on the State which corresponds to that Indian State under the Constitution.<sup>6</sup>

**'State in Part B'.** See p. 1, ante, and C3, Vol. II, pp. 178-182, 636-641.

**'Indian State'.** - See Art. 360 (15), post

### **'Corresponding Indian State'.**

This expression refers not to the old Indian States which existed in British days, but the new Indian States which were formed by merger or agreement (after the Indian Independence Act, 1947) and as they existed immediately before the commencement of the Constitution,<sup>6</sup> e.g., it refers to the 'United State of Rajasthan' and not any of the Covenanted States which formed the United State of Rajasthan.<sup>6</sup>

**296. Subject as hereinafter provided, any property in the territory of India which, at this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse,**

Property accruing by escheat or lapse or as bona vacantia.

2. *Union of India v. G. R. Silk Mfg. Co.*, A. 1964 S.C. 1903 (1915); *Jaspal Udyot v. C. I. T.*, A. 1965 Raj. 162 (167).
3. *Umard Mills v. Union of India*, A. 1963 S.C. 953, *Associated Stone Industries v. Union of India*, (1961) S.C. [C.A. 58/61, d. 27-11-61].
4. *Tanden v. State of Punjab*, (1960) S.C. [C.A. 102/60]
5. *Umargh Singh v. State of Bombay*, A. 1955 S.C. 540.
6. *State of Rajasthan v. Madanswarup*, A. 1960 Raj. 138 (146)

or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

*Explanation*—In this article, the expressions “Ruler” and “Indian State” the same meanings as in article 363.

**Escheat.**—It is an incident of sovereignty, according to which all property, movable or immovable, vests in the Government, in the absence of an heir or successor.<sup>7</sup> The English feudal law according to which it vested in the landlord is not applicable in India.

### **Bona vacantia.**

The doctrine would be applied to the assets of a dissolved company.<sup>8</sup>

**297. All lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf<sup>9-10</sup> of India shall vest in the Union and be held for the purposes of the Union.**

Things of value lying within territorial waters to vest in the Union

### **Ownership of the ‘territorial waters’.**

What Art 297 vests in the Union is the bed of the territorial waters and things of value underlying such waters, and not the waters themselves.<sup>11</sup> As regards territorial waters, the position remains the same as under the Government of India Act, 1935 (*see above*), viz., that the several coastal States have dominion over the territorial waters as part of their territory from which the marginal sea takes off.<sup>12</sup>

### **‘Continental shelf’.**

The ‘continental shelf’, in short is the seabed beyond the limit of the territorial waters to which the sovereignty of a State extends by the rules of International law. Unlike the ‘territorial waters’ the ‘continental shelf’ has no conventional limit; it extends up to the extent of the shallow waters, the bed of which can be utilised by a State for the purpose of extracting minerals and other sub-soil properties.

**298. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purposes.**

Power to carry on trade, etc.

*Provided that—*

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which

7. *Bombay Dyeing & Mfg. Co. v. State of Bombay*, A. 1958 S.C. 328 (339).

8. *Leslie & Co. v. Wapshare*, A. 1969 S.C. 843 (850).

9-18. Inserted by the Constitution (Fifteenth Amendment) Act, 1963.

19. *A. M. S. S. V. v. State of Madras*, I.L.R. (1953) Mad. 1175 (1191-2),

20. Substituted by the Constitution (Seventh Amendment) Act, 1956.

*Parliament may make laws, be subject in each State to legislation by the State; and*

*(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.*

**Object of Amendment.**—The original Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, with the following object—

"To make it clear that the Union Government, as well as the State Government, are competent to carry on any commercial or industrial undertaking, whether or not it is related to a matter within the legislative competence of the Union, or, as the case may be, of the State. Similarly the holding, acquisition and disposal of property and the making of contracts by the Union or a State could be for any purpose without constitutional impropriety. At the same time, the revised Article provides that this extended executive power of the Union and of the States will be subject, in the former case, to legislation by the State, and in the latter case, to legislation by Parliament'.<sup>21</sup>

### Scope of Art. 298.

The Article, as substituted, is intended to supplement the meaning of 'executive power' in Arts 73 and 162, *ante*.

### Power to carry on trade etc.

Since these functions are expressly declared as included in 'executive' power, it is clear that no legislative sanction is necessary for the exercise of these functions.<sup>22</sup> It is thus competent for the Government to take up the business of banking<sup>23</sup> or the exploitation of mineral resources in the exercise of its executive powers,<sup>24</sup> and as a competitor of private traders.<sup>24a</sup>

**299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor . . . . .** of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor . . . . . by such persons and in such manner as he may direct or authorise.

**(2) Neither the President nor the Governor . . . . .** shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

### Rationale behind Art. 299.

Contracts by Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons.

21. Statement of Objects and Reasons.

22. *Kotaiah v State of A. P.*, A. 1959 Punj 440 (187).

23. *Tilakram v. Bank of Patiala*, A. 1959 Punj. 440 (146).

24. *Kotiah v. State of A. P.*, A. 1959 A.P. 485.

24a. *Ramchandra v. State of Orissa*, (1956) S.C.R. 28; *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225; *Narayanappa v State of Mysore*, (1960) 3 S.C.R. 743 (749).

25. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.



Thus, there should be a definite procedure according to which contracts must be made by its agents, in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant.<sup>1</sup> That is why it has been provided that the State should not be saddled with liability for contracts which do not show on their face that they are made on behalf of the State.<sup>2</sup>

### CL. (1): Formality of contracts on behalf of Government.

1. The words 'expressed to be made' and the word 'executed' suggest that there must be a deed for a formal written contract executed by a person duly authorised under this Article.<sup>3-4</sup> A contract by a correspondence or an oral contract is accordingly, not binding upon the Government.<sup>5</sup> The contract also fails if the person who executes it is not authorised in that behalf under the present Article, by the President or Governor, as the case may be.<sup>6-8</sup>

2. It is evident that in order to comply with the requirements of the article, the contract—

(a) must be executed by a person duly authorised<sup>9</sup> by the President, or Governor as the case may be;

(b) must be executed by such person 'on behalf of'<sup>10</sup> the President or Governor as the case may be;

(c) must be 'expressed to be made by'<sup>11</sup> the President or Governor as the case may be.

3. But a contract by tender and acceptance may be valid if the acceptance is by a duly authorised person and on behalf of the President.<sup>12</sup> But where there is no proof of such authorisation, an acceptance of tender by a telegram cannot constitute a contract under this Article.<sup>13</sup>

4. On the other hand, no contract can be 'implied' under this Article, e.g., from the fact that the Petitioner successfully bid at a public auction held by the Government.<sup>14</sup>

### 'By such persons . . . . . as he may direct or authorise'.

The Article does not prescribe any particular mode in which the authority must be conferred by the President or the Governor. Hence, it may be conferred either by a general order or by an *ad hoc* order upon a particular officer for the purpose of a particular contract. Such order may be noticed in the Official Gazette or established by other evidence.<sup>15-17</sup>

### Effects of non-compliance with the requirements of Art. 299 (1).

1. The provisions of this clause are mandatory.<sup>18-19</sup>

2. If any of the foregoing conditions<sup>20</sup> are not complied with, the contract is not binding on or enforceable by or against the Government,<sup>21, 22</sup> though a suit may lie against the officer who made the contract, in his personal capacity<sup>23</sup> (if the contract be otherwise valid).

1. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817 (835).
2. *Bhikraj v. Union of India*, A. 1962 S.C. 113 (1962) 2 S.C.R. 880.
3. *Karamshi v. State of Bombay*, A. 1964 S.C. 1714 (1721).
4. *New Marine Coal Co. v. Union of India*, A. 1964 S.C. 152.
5. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817.
6. *Union of India v. Rallia Ram*, A. 1963 S.C. 1685.
7. *State of M. P. v. Ratanlal*, (1966) S.C. [C.A. 357/65, d. 10-3-66].
8. *K. P. Chowdhury v. State of M. P.*, A. 1967 S.C. 203.
9. *State of W. B. v. B. K. Mondal*, A. 1962 S.C. 779 (783); *New Marine Coal Co. v. Union of India*, A. 1964 S.C. 152 (155).
10. *Bhikraj v. Union of India*, A. 1962 S.C. 113; *Chowdhury v. State of M. P.*, A. 1967 S.C. 203.

3. But though no suit lies against the Government *on the basis of such defective contract*, the other party to the contract may obtain relief against the Government on the basis of benefit or service received under the agreement under s. 65<sup>11</sup> or 70<sup>o</sup> of the Indian Contract Act, which is founded on equitable principles of restitution.<sup>12</sup>

The claim to restitution or compensation under s. 65 of the Contract Act, however, does not extend to benefits received *after* the agreement is discovered to be void.<sup>13</sup>

4. The rule of estoppel by the representation of a public official has also been applied against the Government, even though the promise was not recorded in the form of a contract under Art. 299,<sup>14</sup> and even though the terms of s. 115 of the Evidence Act were not fulfilled.<sup>14</sup>

But in another case,<sup>2</sup> without noticing the earlier one,<sup>1</sup> it has been held that there cannot be any estoppel against the mandatory requirement of Art. 299 (1).<sup>15</sup>

5. A contract made in contravention of Art. 299 (1) being absolutely void,<sup>9</sup> it is not capable of being ratified by the Government,<sup>7,12</sup> as was supposed in some cases, relying on certain observations in *Chaturbhuj v. Moreswar*.<sup>16</sup>

6. But—

(a) Such contracts are not void for collateral purposes.<sup>16</sup>

(b) The fact of the contract being void as against the Government for non-compliance with Art. 299 (1) would not stand in the way of reliefs or consequences which are independent of the formality of contracts as laid down in Art. 299 (1).<sup>9</sup> But such contract cannot be treated as a contract even for collateral purposes where the Government has, in fact, *refused* to ratify it.<sup>17</sup>

### Service Contracts.

A single Judge of the Calcutta High Court<sup>18</sup> held that employment in Government service also comes within the purview of Art. 299 (1) and that, consequently, a person who has not been employed under a contract which complies with the requirements of the Articles has no right enforceable in a Court of law.

Of course, where the appointment takes place under a formal contract, it must comply with the formal requirements of Art. 299, but it would be too much to say that all appointment by the Government must take place by a formal contract, otherwise, they would be invalid. In fact, most of the appointments take place by the issue of a letter of appointment, followed by acceptance. Perhaps it would detract from the principle of 'holding office during pleasure' of the Government (Art. 310), if it be held that there cannot be any appointment without a formal contract. This view of

11. *Dharmeswar v. Union of India*, A. 1955 A. am 86 (94); *Union of India v. Ramnagins*, (1951) 89 C.L.J. 342 (357); *Dominion of India v. Preety Kumar*, A. 1958 Pat. 203 (207-9); *Sankaran v. State of Kerala*, A. 1963 Ker. 278 (F.B.).

12. *Mulamchand v. State of M. P.*, A. 1968 S.C. 1218; *State of M. P. v. Ratantol*, (1966) S.C. [C.A. 357/65, d. 10-3-65].

13. *Purabhatika v. Union of India*, A. 1955 Assam 33 (43).

14. *Union of India v. Anglo-Afghan Agencies*, A. 1968 S.C. 718 (727).

15. *Mulamchand v. State of M. P.*, A. 1968 S.C. 1218 (1222). [This view is in accord with the consensus of authority and is preferable].

16. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817.

17. *Lalit Kumar v. Baleswar*, A. 1966 S.C. 580 (585).

18. *Saboo v. O'Callaghan*, A. 1953 Cal. 319; *Lakshmi Narayan v. Puri*, A. 1954 Cal. 338.

the Author, expressed at p. 417 of Vol. II of the 3rd Edition of the Commentary, now finds support from subsequent decisions<sup>19</sup> which hold that no formal contract is necessary for appointment to the regular service of the Government whose conditions of service are laid down in the constitution and the Rules made under Art. 309 and that outside art. 310 (2), a formal contract would confer no rights upon the employee. Art. 299 would be called into operation only where the Rules made under Art. 309 require a formal contract to be executed for appointment.

**The defence of non-compliance must be pleaded.**

1. In view of O. VI, r. 8 and O. VIII, r. 2 of the Civil Procedure Code, the question of invalidity of the contract on the ground of non-compliance with Art. 299 will not be allowed to be raised at the hearing unless it is specifically pleaded in the written statement.<sup>20</sup>

2. But where the non-compliance is patent from the allegations in the plaint or the evidence adduced by the plaintiff himself, the Court will not uphold the defective contract simply because the defect has not been pleaded.<sup>21</sup>

**Cl. (2): Personal immunity of officers for Government contracts.**

Excepting the present clause, there is no provision in *our* Constitution to exempt officials from personal liability for acts done or purported to be done in the exercise of their official duties. The present clause, following English law, exempts officials as well as the Executive heads from personal liability for contracts made or executed 'for the purposes of this Constitution', or under any of the Government of India Acts.

It is to be noted that the officer will be personally immune only if the contract duly complies with the formalities laid down in cl. (1) of Art. 299. In short, where the Government is not bound for want of due compliance with Art. 299 (1), the personal liability of the officer who executed the contract remains.

**300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.**

**(2) If at the commencement of this Constitution**

**(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and**

19. *Bedi v. Govt. of Patiala*, A. 1953 Pepsu 196; *Ranjit v. State of W. B.*, A. 1958 Cal. 551; *Union of India v. Jyotirmoyee*, A. 1967 Cal. 461 (463) D.B.; *P. N. Sarkar v. State of Bihar*, A. 1960 Pat. 366 (370); *State of Bombay v. Advani*, A. 1963 Bom. 13 (16).
20. *Kalyanpur Lime Works v. State of Bihar*, (1954) S.C.R. 952.
21. *Dominion of India v. Bhikharaj*, A. 1967 Pat. 506 (602); *State of Assam v. Debí Dutta*, A. 1963 Assam 197 (199).

- (b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

### Scope of Art. 300: Suits and proceedings by or against the State.

This Article does not give rise to any cause of action, but merely says that the State can sue or be sued, as a juristic personality,<sup>22</sup> in matters where a suit would lie against the Government had not the Constitution been enacted, subject to legislation by the appropriate Legislature.

#### (A) Contract.

In India, direct suit had been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right.<sup>23</sup> The Government of India Acts (Sec. 30 of the Act of 1919 and Sec. 175 of the Act of 1935) expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution in Art. 299 (1) maintains that position.

Subject to the formalities prescribed by Art. 299 and to statutory conditions or limits, thus, the contractual liability of the State, under our Constitution, is the same as that of an individual under the ordinary law of contracts.<sup>24</sup>

#### (B) Torts.

The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. As will appear from below, the state of the law is unnecessarily complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation of the sovereignty of the Crown, both of which have become archaic, owing to changes in history and in law.

Following certain observations in the *P & O Steam Navigation Co. v. Secy of State*,<sup>25</sup> Courts in India have, generally, drawn a distinction between the sovereign and non-sovereign functions of the Government and held that the Government could not be sued for torts committed by the Government or its officers in the exercise of its 'sovereign' functions.<sup>27</sup>

Hence, so long as Parliament or the State Legislature does not legislate in the matter, the liability of the Union or a State Government to be sued is to be determined with reference to the 'law as it stood at the commencement of the Constitution.' (Owing to the historical developments, again, the pre-Constitution law relating to the subject related back to the position of the East India Co., prior to the Government of India Act, 1935.<sup>28</sup>)

Shorn of these technicalities, the liability of the Government to be sued under the existing law may be summarised as follows:

(A) No action lies against the Government for injury done to an individual in the course of exercise of the *sovereign functions* of the Government, such as the following:

22. *State of Punjab v. O. G. B. Syndicate*, A. 1964 S.C. 669 (679)

23. *Cj. Rangachari v. Secretary of State*, (1937) 64 I.A. 40, *Venkata v. Secretary of State*, (1937) 64 I.A. 55.

24. *P. C. Biswas v. Union of India*, A. 1956 Assam 85 (90).

25. *P. & O. Steam Navigation Co. v. Secy. of State*, (1861) 5 Bom. H.C.R. App. A.

1. *Kasturi Lal v. State of U. P.*, A. 1965 S.C. 1039.

(i) Commandeering goods during war;<sup>2-19</sup> (ii) making or repairing a military road; (iii) administration of justice; (iv) improper arrests,<sup>20</sup> negligence<sup>1</sup> or trespass by Police officers,<sup>21</sup> (v) wrongful refusal by officers of a Revenue Department to issue licence to the plaintiff, causing him damage, (vi) negligence of officers of the Court of Wards in the administration of an estate under its charge,<sup>22</sup> (vii) wrongs committed by officers in the performance of duties imposed upon them by the Legislature<sup>1</sup> unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed,<sup>2</sup> or the wrongful act was expressly authorised or ratified by the State,<sup>3</sup> (viii) loss of moveables from Government custody owing to negligence of officers;<sup>1,4</sup> (ix) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of officer in the exercise of statutory powers, where Government does not derive any benefit from such transaction,<sup>4-6</sup> e.g., by a Treasury Officer paying money to a wrong person on a forged cheque owing to negligence in performing his statutory duty to compare the signature;<sup>6</sup> (x) wrongful seizure or confiscation of goods, in the purported exercise of statutory powers;<sup>7</sup> (xi) injury caused by the driver of a military car on duty.<sup>8</sup>

The Supreme Court has, however, laid down<sup>9</sup> that in order to claim immunity for a tortious act committed by its servant, the State must show not only that it was done in the course of his employment but that the particular act which caused the injury was done in the course of exercise of 'sovereign' functions. In this case,<sup>9</sup> it was held that the State could claim immunity for injury caused to an individual by the negligent driving of a Government jeep not merely on the ground that the jeep was owned by the Government but also on showing that when the occurrence took place the car was being used for the performance of a sovereign function.<sup>7</sup> Since it was established that at that time the car was returning from a garage after repairs, it could not be said that the injury was caused in connection with the exercise of sovereign powers or functions and, accordingly, the State would be liable in damages.<sup>9</sup>

(B) 1. On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in,<sup>10</sup> such as the following:

(i) Injury due to the negligence of servants of the Government employed in a dockward<sup>10</sup> or a railway; (ii) trespass upon or damage done to private

2-19. *Kesotam v. Secretary of State*, (1926) 54 Cal. 939

20. *Secretary of State v. Cockraft*, (1914) 39 Mad. 351.

21. *Mata Prasad v. Secretary of State*, (1929) 5 Luck 157; *Baleswari Prasad v. Secy. of State*, A. 1937 All. 158.

22. *Gurucharan v. Prov. of Madras*, A. 1944 F.C. 41.

23. *Shivabhajan v. Secretary of State*, (1904) 28 Bom 314, *Ross v. Secretary of State*, (1913) 37 Mad. 55.

24. *Nobin v. Secretary of State*, (1875) 1 Cal. 11.

25. *Secretary of State v. Sreegovinda*, (1932) 36 C.W.N. 606

1. *Secretary of State v. Ram*, (1933) 37 C.W.N. 957; *Ros v. Secretary of State* (1913) 37 Mad. 55; *Shivabhajan v. Secretary of State* (1904) 28 Bom 314 (325); *Dist. Board v. Prov. of Bihar*, A. 1954 Pat. 529.

2. *Secretary of State v. Hari*, (1882) 2 Mad. 273.

3. *Sankissendras v. Dominion of India*, A. 1957 Cal. 617 (623).

4. *Ram Ghulam v. U. P. Government*, A. 1950 Cal. 205.

5. *Uday Chand v. Prov. of Bengal*, (1947) 2 Cal. 141; *Dist. Board v. Prov. of Bihar*, A. 1954 Pat. 529.

6. *Union of India v. Ayed Ram*, A. 1958 Pat. 439; *Dist. Board of Bhagalpur v. Prov. of Bihar*, A. 1954 Pat. 529.

7. *Kasturi Lal v. State of U. P.*, A. 1965 S.C. 1039.

8. *Union of India v. Harbans Singh*, A. 1959 Panj. 39.

9. *State of Rajasthan v. Vidhyawati*, A. 1962 S.C. 823 (935).

10. *P. & O. Steam Navigation Co. v. Secy. of State*, (1861) 5 Bom. H.C.R. App. A.

property in the course of a dispute as to a right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers;<sup>12</sup> (iii) whenever the State has benefited by the wrongful act of its servants whether done under statutory powers or not, the State is liable to be used for restitution of the profits unlawfully made, just as a private owner,<sup>7, 10</sup> e.g., where Government retains property or moneys unlawfully seized by its officers<sup>13</sup> a suit lies against the Government for its recovery,<sup>14</sup> with interests;<sup>15</sup> (iv) defamation contained in a resolution issued by Government;<sup>16</sup> (v) injury done by vehicles maintained for the service of its employees.<sup>7, 17</sup>

(C) There are certain actions which cannot possibly lie against the Government. Thus—

1. Since the State cannot be said to commit a crime, no proceedings for criminal contempt of court lies against the State, nor can the State be impleaded as represented by an officer who is alleged to have committed the contempt.<sup>18</sup> The remedy lies against that particular officer.<sup>19</sup>

The position is, however, different in the case of a *civil* contempt committed for disobedience to a temporary or a permanent injunction granted by a civil court against the State as a party.<sup>19</sup>

2. The Government has absolute immunity for 'Acts of State', i.e., acts which are done against aliens, not under the sanction of any municipal law, but in the exercise of the sovereign powers of the State. But the plea of 'act of State' is available only against *aliens* and not against subjects.<sup>20</sup>

### Whether a statute is binding on the Government.

1. As regards the applicability of a municipal statute to a governmental duty, such as the distribution and rationing of food, the Supreme Court, in an earlier case,<sup>21</sup> refused to hold by implication that the Government was also bound by that statute. It was accordingly held that the Director of Rationing could not be prosecuted for failure to obtain a licence for storing rice etc. But this decision has been *overruled* by 8:1 majority in *State of West Bengal v. Corporation of Calcutta*,<sup>22</sup> and the law now established is that, in Republican India, the State will be bound by a statute *unless expressly excluded*.<sup>22-24</sup> The Government was accordingly held liable to be prosecuted under the Calcutta Municipal Act for running a market without obtaining a trade licence.<sup>22</sup>

2. The use of words such as 'person', 'residing', and the like is not conclusive to exclude the State.<sup>23, 24</sup>

11. Cf. *Rangachari v. Secretary of State*, (1937) 64 I.A. 40; *Venkata v. Secretary of State*, (1937) 64 I.A. 55.

12. *P. C. Biswas v. Union of India*, A. 1956 Assam 85 (90).

13. Unlawful detention of goods by Government Railway [*Rambhrama v. Dominion of India* A. 1968 Cal 183].

14. *Kailas v. Secretary of State*, (1912) 40 Cal. 452; *Shivabharan v. Secretary of State*, (1904) 28 Bom. 314.

15. *Warappa v. Secretary of State* (1915) 40 Bom. 200.

16. *Jehantir v. Secretary of State*, 6 Bom. L.R. 131, *Vidvats v. Lohmul*, A. 1957 Raj. 305.

17. *Union of India v. Sugrabai*, A. 1969 Bom 13.

18. *Kailas v. Secretary of State*, (1912) 40 Cal. 452; *Shivabharan v. Secretary of State*, (1904) 28 Bom. 314, *Union of India v. Ayed Ram*, A. 1958 Pat 439; *Tarafatulla v. S. N. Maitra*, A. 1952 Cal. 919.

19. *State of Bihar v. Sonabati*, A. 1961 S.C. 221 (228).

20. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415 (436).

21. *Director of Rationing v. Corpn. of Calcutta*, A. 1960 S.C. 1355; (1961) 1 S.C.R. 158.

22. *State of W. B. v. Corpn. of Calcutta*, A. 1967 S.C. 997.

23. *Union of India v. Jubbi*, A. 1968 S.C. 360 (364).

24. *State of Punjab v. O. G. B. Syndicate*, A. 1964 S.C. 669 (679).

On this principle the following provisions have been held to be binding upon the Government—

(i) O. 39, r. 2 (3) of the C. P. Code,—For, where a Court is empowered by statute to issue an injunction against any defendant even if the defendant be the State—the provision would be frustrated and the power rendered ineffective and unmeaning if the machinery for enforcement specially enacted did not extend to every one against whom the order of injunction is directed.<sup>25</sup>

(ii) S. 13 of the Displaced Persons (Debts Adjustment) Act, 1951, which provides—

“Claims by displaced persons against persons who are *not displaced* debtors. — At any time. . . , any displaced creditor claiming a debt from any *other person who is not a displaced person* may make an application . . . to the Tribunal. . . .

*Held*, a claim under the above provision could be made against the Government of the Union or of a State, for, otherwise, the object of the statute would be defeated.<sup>26</sup>

#### CL (2): Effect of substitution.

The object of the substitution is the representation of the Government as a party, by operation of law. The fact of substitution does not preclude the succeeding State from contending that the right, if any, is not binding upon it.<sup>25a</sup>

### PART XIII

#### TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

Freedom of trade, commerce and intercourse. **301. Subject to the other provisions of this Part, trade commerce and intercourse throughout the territory of India shall be free.**

##### Scope and object of Art. 301.

1. Art. 301 imposes a limitation upon the exercise of legislative power, whether by the Union or by a State.<sup>1</sup>

2. The object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken up by internal barriers.<sup>2-3</sup>

##### Arts. 19 (1) (g) and 301.

Prima facie, it seems that there is some over-lapping between Art. 19 (1) (g) and Art. 301, because both aim at the freedom of trade or business, and if *either* of the provisions is infringed, the aggrieved individual can seek his remedy from the Court against the offending legislative or executive action.

Of course, there are two obvious points of distinction, namely, that—

(a) While Art. 19 (1) (g) confers a fundamental right, Art. 301 confers a justiciable right<sup>2</sup> but it is not ‘fundamental’.

(b) While Art. 19 (1) (g) is confined to citizens, Art. 301 extends to all individuals.

25. *State of Bihar v. Sonabati*, A. 1961 S.C. 221 (230).

25a. *Vineyuk v. State of Bombay*, A. 1961 Bom. 11 (19).

1. *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1405 (1418).

2. *Atiabari Tea Co. v. State of Assam*, (1961) 1 S.C.R. 809; A. 1961 S.C. 232 (247).

3. *State of Bombay v. Chamorbaugwala*, A. 1957 S.C. 699.

But still a common ground is left where the two articles are bound to overlap; some basis of distinction has, therefore, to be found out, particularly when the infringement of either provision gives justiciable rights to the individual (see *above*).

(I) Prior to the Supreme Court decision in the *Automobile case*,<sup>1</sup> the consensus of opinion in the High Courts, broadly, was that while Art. 19 (1) (g) looked at the freedom from the point of view of the individual, Art. 301 looked at it from the point of view of geographical barriers or restrictions against the movement of goods, that is, while Art. 19 (1) (g) lays down the rights of the citizen in the matter of profession, trade or business, Art. 301 deals with *how* the trade, commerce and intercourse is to be carried on between one place and another, whether the two places are situated in two States or are inside the same State.<sup>4</sup>

(II) The majority in the *Automobile case*,<sup>1</sup> have held that the distinction is not so simple. It was not correct to say that while Art. 19 (1) (g) guaranteed an individual's right to carry on his trade, Art. 301 guaranteed a free flow of the volume of trade against geographical barriers. Art. 301, according to the majority, *also* aimed at the freedom of the individual from restrictions, not necessarily geographical,—but since *regulatory measures* were outside the purview of Art. 301, the scope of the two provisions was not identical. In short, if the impugned law is merely regulatory, its reasonableness will have to be determined under Art. 19 before it can be held to be valid, but so far as Art. 301 is concerned, no complaint can, *prima facie*, be made under that Article unless, of course, it is a colourable exercise of the regulatory power, aimed at the restriction of the free flow of trade, commerce and intercourse. But if the freedom of trade, commerce and intercourse is violated by a non regulatory law, the individual who is affected may have his remedy in a Court of law.

### 'Trade, commerce'.

1. Though the word 'business' is ordinarily more comprehensive than the word 'trade', the one is used synonymous with the other. So used, trade or business would mean some real, substantial and systematic or organised course of activity or conduct with a set purpose.<sup>5,6</sup>

2. In *State of Bombay v. Chamarbaugwala*,<sup>5</sup> the Supreme Court held that the protection offered by Art. 301 is confined to such activities as may be regarded a lawful *trading* activity and does not extend to an activity which is *res extra commercium* and cannot be said to be 'trade'. It cannot include activities which are inherently pernicious, such as trafficking in women; hiring of goondas for committing crimes,<sup>7</sup> gambling, and that, accordingly, there is no question of the application of Art. 301 or 304 to laws made for the suppression of such activities.<sup>7</sup>

The Author respectfully protested against this view at p. 456 of Vol. 4 of the 4th Edition of his Commentary on the Constitution of India. That view now gains support from the observations of the Court in *Krishan Kumar v. State of J & K*,<sup>8</sup> which, though made in relation to Art. 19, would also be applicable to Arts. 301-4, because they deal with the general concept of 'trade' or 'business' under the Constitution. These observations may profitably be reproduced:

"The learned Advocate-General contended that dealing in liquor was not business

4. *Moti Lal v. Uttar Pradesh Govt.*, A. 1951 All. 25 (270). Malik C.J.

5. *State of Bombay v. Chamarbaugwala*, (1957) S.C.R. 874.

6. *Chabe v. Palmitkar*, A. 1954 Hyd. 207 (F.B.).

7. *Atiabari Tea Co. v. State of Assam*, (1961) 1 S.C.R. 809 (860).

8. *Narain Warming Mills v. Commr. of Excess Profits*, (1955) S.C.R. 962 (961).

9. *Krishan Kumar v. State of J. & K.*, A. 1967 S.C. 1366 (1371).



or trade, as the dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals. The acceptance of this broad argument involves the position that the meaning of the expression 'trade or business' depends upon and varies with the general acceptance of the standards of morality obtaining at a particular point of time in our country. Such an approach *leads to incoherence in thought and expression.*

Standards of morality can afford guidance to impose restrictions, but cannot limit the scope of the right. So too, a Legislature can impose restrictions on or even prohibit the carrying on of a particular trade or business and the Court, having regard to the circumstances obtaining at a particular time or place, may hold the restrictions or prohibition as reasonable....".

The better view, therefore, would be to treat even a dangerous trade to be a trade coming within the scope of Art. 301, but subject to the restrictions that may be imposed under Arts. 302-304.

### **'Intercourse'.**

This word is used to give the freedom declared by Art. 301 the largest import. It thus, includes the freedom to import things for personal or non-commercial use.<sup>10</sup>

### **'Throughout the territory of India'.**

These words extend the freedom not only to *inter-State* but also to *intra-State* transactions and movements.<sup>11</sup>

### **'Shall be free'.**

'Freedom' in this Article does not mean absolute freedom<sup>12</sup> but freedom from *all* restrictions *except* those which are provided in other articles of Part XIII,<sup>13</sup> as well as regulatory and compensatory measures. The power of the Union or the State to exercise legitimate regulatory control is independent of the restrictions imposed by Arts. 302-5.<sup>12</sup>

### **When is freedom of trade and commerce impaired.**

I. There is a violation of the freedom guaranteed by Art. 301 only where a legislative or executive act operates to restrict trade, commerce or intercourse, *directly and immediately*, as distinct from creating some indirect or inconsequential impediment which may be regarded as remote.<sup>8, 11</sup>

II. It follows from the foregoing proposition that regulatory or compensatory measures cannot be regarded as violative of the freedom.<sup>11</sup>

Such measures as traffic regulation, licensing of vehicles, charging for the maintenance of roads,<sup>14</sup> marketing and health regulations, price-control, economic and social planning, prescribing minimum wages,<sup>15</sup> instead of hampering trade do, in fact, facilitate the free movement of trade or commerce. But these cannot be challenged as interfering with the freedom guaranteed by Art. 301,<sup>11</sup> unless they are colourable measures to restrict the flow of trade, commerce and intercourse.<sup>11</sup>

III. Subject to the preceding condition, the freedom of trade, commerce and intercourse may be impaired by fiscal<sup>16</sup> as well as non-fiscal measures.

IV. Once it is held that a restriction is not regulatory but directly and immediately interferes with the flow of inter-State trade or commerce, it will offend against the freedom guaranteed by Art. 301, whether such restriction is imposed at the frontier of a State or at any stage prior or subsequent.<sup>11</sup>

10. *Choe v. Palmiker*, A. 1964 Hyd. 207 (F.B.).

11. *State of Madras v. Navaraja*, A. 1969 S.C. 147.

12. *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1406: (1963) 1 S.C.R. 491.

13. *State of Assam v. Labanya Probha*, A. 1967 S.C. 1274 (1978).

V. Art. 301 guarantees freedom not only from geographical barriers but also from restrictions imposed upon the individual to carry on trade or business, other than mere regulatory measures.<sup>12</sup>

### Taxation and Art. 301.

1. It is now settled that tax laws are not outside the purview of Part XIII of the Constitution.<sup>12, 14</sup>

2. But it is only such taxes as *directly* and *immediately* restrict trade that fall within the purview of Art. 301.<sup>14</sup>

3. In determining whether a tax directly offends against Art. 301, it is the *movement* of the goods which are the subject of the trade that has to be borne in mind.<sup>12, 14</sup>

If a tax is imposed solely on the basis that the goods are *carried* or *transported*, that directly affects the freedom of trade as contemplated by Art. 301.<sup>14</sup>

4. A tax imposed by a State cannot be said to violate Art. 301 if the tax does not affect the movement of the persons or goods in so far as it is outside that State, *e.g.*, where a tax on passengers and goods is based on the fare and freight proportionate to the route in so far as it lies within the State.<sup>16</sup>

5 (a) Sales tax which discriminates between the goods of one State and another is such a tax and will offend against Art. 301 unless saved by Art. 304 (a).<sup>17</sup>

(b) A tax on a thing used in inter-State trade or commerce may offend against Art. 301 if it is so excessive and prohibitive as to become an impediment in the free flow of trade and commerce,<sup>14</sup> *e.g.*, as excise duty on foreign liquor.<sup>18</sup>

But the following would not constitute infringement of the freedom guaranteed by Art. 301:

(i) Regulatory measures<sup>14</sup> which promote trading facilities, *e.g.*, police measures, with or without compensation.

(ii) Compensatory taxes for the use of trading facilities.<sup>14</sup>

### Remedies for infringement of Art. 301.

1. Not being a fundamental right, the infringement of Art. 301 cannot be challenged by a petition under Art. 32.<sup>19</sup> This does not mean, however, that the individual has no remedy if Art. 301 is infringed. Either an individual or a State can challenge any legislative<sup>15</sup> or executive action which offends against this Article, by other proceedings, *e.g.*, under Art. 226.<sup>12, 18</sup>

2. The doctrine of 'severability' applies where a statutory provision or order violates the provisions of Art. 301 or 304.<sup>14a</sup>

### Restrictions upon the freedom.

1. The limitations imposed upon inter-State freedom of trade, commerce intercourse, by the other provisions of Part X II are—

(a) It is subject to non-discriminatory restrictions imposed by Parliament, in the public interest [Art. 302].<sup>15</sup>

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [Art. 303 (2)].

14. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232; *State of Madras v. Nataraja*, A. 1969 S.C. 147; *Venkataraman v. State of Madras*, (1969) 2 S.C.C. 299 (302); *State of Kerala v. Abdul Kadir*, (1969) 2 S.C.C. 363.

14a. *State of Rajasthan v. Mangal*, (1969) 2 S.C.C. 710 (713).

15. *Dr. Collector v. Ibrahim & Co.*, A. 1970 S.C. 1275 (1278).

(c) Non-discriminatory taxes may be imposed by States on imported goods similarly as on intra-State goods [Art. 304 (a)].<sup>16</sup>

(d) Reasonable restrictions may be imposed by a State "in the public interest" [Art. 304 (b)].

(e) Restrictions imposed by "existing law" to continue except in so far as provided otherwise by order of the President [Art. 305]. Existing laws relating to any matter referred to in Art. 19 (b) (ii) are also protected.

2. The freedom cannot be restricted by mere executive order.<sup>17</sup>

#### A. Instances of laws held invalid:

(i) Assam Taxation on Goods carried by Roads or Inland Waterways Act, 1954.<sup>18</sup>

(ii) Provisos to Rule 2 made under the Mysore Forest Act, 1900.<sup>19</sup>

#### B. Instances of Acts not held to contravene Art. 301:

(i) Rajasthan Motor Vehicles Taxation Act, 1951.<sup>14</sup>

(ii) Assam Motor Vehicles Taxation (Amendment) Acts, 1953, 1966.<sup>20</sup>

(iii) S 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961.<sup>21</sup>

Power of Parliament to impose restrictions on trade, commerce and intercourse.

**302. Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.**

#### Instances of legislation under Art. 302.

(i) Essential Commodities Act, 1955,<sup>22</sup> and Orders made thereunder

(ii) Defence of India Act, 1962 and the Rules made thereunder.<sup>23</sup>

#### Regulation and Restriction.

It is now established that even apart from the specific provisions in Arts. 302-5, the Union as well as State Legislatures have the power to exercise legitimate regulatory control over the freedom of trade and commerce, which does not amount to a 'restriction'. In fact, legitimate regulation does not infringe the freedom declared by Art. 301.<sup>24</sup>

It is therefore necessary to distinguish a regulation from 'restriction', which term is used in Arts. 302, 304 (b): While restrictions obstruct the freedom of movement of inter-State transactions, regulations promote it.<sup>10, 25</sup>

The following measures have thus been held to be *regulatory*—

(a) Police regulations, such as provisions for lighting, rules of the road etc., which facilitate the movement rather than retard it.<sup>26</sup>

(b) Licensing provisions with compensatory fees.

(c) Provision for necessary services to enable the free movement, whether charged for or not.<sup>23</sup>

16. *Sainik Motors v. State of Rajasthan*, A. 1961 S.C. 1480 (1485).

17. *Mehrab v. State of Madras*, A. 1963 S.C. 928.

18. *Kalyani Stores v. State*, (1966) 1 S.C.R. 865 (872, 874).

19. *State of Mysore v. Sanjeeviah*, A. 1967 S.C. 1189 (1192).

20. *State of Assam v. Labanya Probha*, A. 1967 S.C. 1575 (1578).

21. *Andhra Sugars v. State of A. P.*, A. 1968 S.C. 599 (608).

22. *Shobha v. State*, A. 1963 All. 29; *Bankidass v. State of Rajasthan*, A. 1966 Raj. 105 (111); *Ganeshilal v. State*, A. 1967 Raj. 90 (97).

23. *Suroj v. State*, A. 1969 All. 566 (565).

24. *Sarajmal v. State*, A. 1967 Raj. 104 (110).

25. *Automobile Transport Ltd. v. State of Rajasthan*, A. 1962 S.C. (1400).

B. On the other hand, the following have been held to be 'restriction' rather than regulation:

(i) A rule which *totally prohibits* movement of certain goods during a specified period.<sup>1</sup>

(ii) Anything which directly hinders the free flow of trade, commerce and intercourse between any two parts of India constitutes a 'restriction' within the meaning of Arts. 302, 304, e.g. prohibition of any class of commercial or financial transactions relating to any goods, such as forward contracts.<sup>2</sup>

A restriction may be valid only if it conforms to the terms of Art. 302 or 304 (b), as the case may be.

**303. (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.**

Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

**304. Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law**

(a) impose on goods imported from other States or territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

Restrictions on trade commerce and intercourse among States

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest;

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

**'State may be law.'**

1. This expression which governs both (a) and (b) refers to laws made by the State Legislature<sup>3</sup> and includes rules where the statute provides that 'the rules shall have effect as if enacted in the Act' but not otherwise,<sup>4</sup> because rules made by the Executive in exercise of authority delegated by the State Legislature cannot be held to be a law made by the Legislature of the State.<sup>5</sup>

1. *State of Mysore v Sanjeeviah*, A. 1967 SC 1190.

2. *Kotisar v K. R. B. Co.*, A. 1969 SC 504 (510).

3. Added by Constitution (Seventh Amendment) Act, 1956.

4. *State of Mysore v Sanjeeviah*, A. 1967 SC 1189 (1192).

5. *Mehtab v State of Madras*, A. 1963 SC. 928.

2. These words also indicate that the Article is prospective.<sup>6</sup>

### Object of Cl. (a).

1. By this clause, the principle of freedom of inter-State trade and commerce declared in Art. 301 is subordinated to the State power of taxing goods imported from sister States provided only no discrimination is made in favour of similar goods of local origin. It enables the State Legislature to impose taxes on goods from other States, provided similar goods are produced within the State are subjected to similar taxes.<sup>6-8</sup>

2. It is not correct to say that this Clause refers only to imposts at the border, i.e., taxes which are levied at the point of entry into the State. It applies to all taxes on goods, including sales tax.<sup>5,7</sup>

3. In other words, it validates a taxation which undoubtedly fetters inter-State trade or commerce, provided such taxation is non-discriminatory.<sup>8</sup>

### Non-discriminatory taxation of import.

1. The effect of the imposition upon the imported goods is to be taken into consideration in determining whether it has been subjected to a tax higher than that imposed on local goods.<sup>5,9</sup> If there is a single area or any class of producers in a State who are exempted from any tax, that tax cannot be levied upon imported goods, and such taxing law must be held to be invalid so far as imported goods are concerned.<sup>10</sup>

2. It was held by the Bombay High Court<sup>11</sup> that, for the purpose of applying Art. 304 (a), it was immaterial whether similar goods are actually manufactured in the taxing State or not, the State Legislature would be entitled under Art. 304 (a), to tax imported goods if producers of similar goods within the State would be equally liable to the same tax.

The above view appears to be *overruled* by the majority of the Supreme Court in the *Kalyani Stores case*,<sup>6</sup> holding that exercise of the power under Art. 304 can only be effective if the tax or duty imposed on goods imported from other States and the tax or duty imposed on *similar goods manufactured or produced in the State* are such that there is no discrimination against imported goods. Hence, if there is no foreign liquor produced within a State, it cannot, under Art. 304 (a), read with Entry 51 of List II, impose any duty on imported foreign liquor.<sup>6</sup> But no question of the application of Art. 304 can arise until it is held that the tax in question offends against Art. 301.<sup>12</sup>

3. There cannot be any discrimination where the relevant commodities are commercially different commodities.<sup>12a</sup>

### 'Goods so imported and goods so manufactured'.

The question of discrimination under this Clause will arise only if the goods which are imported and those which are manufactured locally are of the same kind. The similarity, however, is in the nature of the quality and kind of the goods and not with respect to whether they were subject to a tax already or not.<sup>13</sup>

### Proviso: Sanction of President required for State law under cl. (b).

I. The Proviso says that though a State Legislature is empowered by

6. *Kalyani Stores v. States of Orissa*, A. 1966 S.C. 1686 (1691); *State of Rajasthan v. Mangilal*, (1969) 2 S.C.C. 710 (712).

7. *State of M. P. v. Abedali*, A. 1963 S.C. 1237.

8. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1081).

9. *Abdul Shukoor & Co. v. State of Madras*, A. 1964 S.C. 1729 (1733).

10. *Siddiq v. M. B. State*, A. 1966 M.B. 214 (281).

11. *State of Bombay v. Chamarbongalia*, A. 1956 Bom. 1 (18).

12. *State of Kerala v. Abdul Kadir*, (1969) 2 S.C.C. 363 (371).

12a. *Yendataraman v. State of Madras*, (1969) 2 S.C.C. 299 (304).

13. *Mahesh v. State of Madras*, A. 1963 S.C. 924.

cl. (b) to impose reasonable restrictions upon the freedom of trade, commerce or intercourse in the public interests, no law or amendment for this purpose may be introduced in the State Legislature without the previous assent of the President.

The defect owing to want of previous assent may, however, be cured if the Bill subsequently receives the assent of the President,<sup>14</sup> by reason of Art. 255.

II. Not only a Bill but also an amendment which seeks to introduce a restriction within the meaning of Art. 304 (b) requires the President's sanction.

But where an existing law<sup>15</sup> or an order<sup>16</sup> made under it has already imposed such restrictions, an amendment of the law or the order, *in other respects*, will not require sanction even though such amendment takes place after the commencement of the Constitution.

III. It is evident that the proviso is applicable to Bills introduced or moved in the State Legislature after the commencement of the Constitution and not to existing laws enacted prior to the Constitution.<sup>17</sup>

**Cl. (b): Regulation and Restriction.**—See p. 666, *ante*.

**'Reasonable restrictions'.**

1. The same tests which are applicable to determine reasonableness under Art. 19 (6) are also applicable to determine reasonableness under Art. 304 (b).<sup>18</sup> The word 'reasonable' enables the Court to interfere where the State, under the pretence of preventing injury to the welfare of the citizens, intends to prevent the flow of legitimate articles of inter-State commerce or to impose needlessly burdensome conditions so as 'to substantially obstruct the commerce'.<sup>19</sup>

2. Reasonableness of the restriction would have to be judged in the light of the *purpose* for which the restriction is imposed, that is, 'as may be required in the public interest'. Without an exhaustive categorisation, it may be said that restrictions which may be validly imposed under Art. 304 (b) are those which seek to protect public health, safety, morals and property within the territory.<sup>18</sup>

3. An imposition, coming within the purview of Art. 304 (b), cannot be held to be unreasonable *merely* on the ground that it is retrospective in operation, validating a levy held illegal by the courts<sup>19</sup> or that such retrospective operation covers a considerable length of time, during which proceedings relating to the validity of the imposition had been pending in the courts<sup>20</sup> or that it is no longer possible for an owner of carriers to recover the tax from the passengers in respect of the past period or for a dealer to recover the sales tax in respect of the past period from purchasers.<sup>20</sup>

4. On the other hand, the following cannot be held to constitute 'reasonable' restrictions:

An imposition or enhancement of an existing tax which is purely fiscal in its object.<sup>21</sup>

14. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232 (253); *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1460 (1416).

15. *Bapubhai v. State of Bombay*, A. 1956 Bom. 21 (26).

16. *Tika Ramji v. State of U. P.* (1956) S.C.R. 393.

17. *Cf. Soma Singh v. State of Pepsu*, (1954) S.C.R. 955.

18. *Kalyani Stores v. State of Orissa*, A. 1966 S.C. 1686 (1691).

19. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232 (253; 912).

20. *Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667 (1675-6).

21. *Kalyani Stores v. State of Orissa*, A. 1966 S.C. 1686 (1691).

### Applicability of the Proviso to tax laws.

I. In a number of High Court cases,<sup>22</sup> it had been held that no question of violation of Art. 301 arises where the Legislature is exercising its legislative power other than that relating to trade, commerce or intercourse. In this view, the freedom guaranteed by Art. 301 could be interfered with only where the law has been enacted in exercise of the power conferred by Entry 41 or 42 of List I; Entry 26 of List II; Entry 33 of List II.

II. The above theory has, however, been demolished by the majority of the Supreme Court in the *Automobile case*.<sup>23</sup>

According to the majority,<sup>24</sup> Art. 301 constituted a limitation upon legislative power in general and was not confined to the Entries relating to trade and commerce. Any law made under any Entry in any of the three Lists, including taxing laws, may, accordingly, interfere with the freedom guaranteed by Art. 301, subject to certain conditions. Consequently, a State Bill or amendment relating to any of the Entries in List II and III may require the sanction of the President, if any of those conditions are present. These conditions, as explained elsewhere, are—

(a) that it imposes a restriction *directly* and *immediately* upon the flow or movement of persons, animals or goods;

(b) that the impugned law is *not merely regulatory* or compensatory in nature and the *burden* imposed is excessive;

III. It is clear, therefore, that a sales tax,<sup>1</sup> an octroi duty<sup>2</sup> or a tax on goods and passengers carried by road or inland waterways,<sup>3</sup> though expressly authorised by the Constitution as heads of State taxation, may have to be justified under Art. 304 (b), if they are challenged as excessive in amount, to such an extent that they really operate as a restriction upon the movement of goods or persons or they impose a burden upon the instrumentalities of commerce or activities which are an integral part of the flow of commerce in such manner that they must be held to be direct impositions upon the freedom of trade and commerce.

### Reasonableness of taxing laws.

1. As under Art. 19, so under Art. 304(b), the reasonableness of the restriction imposed by a taxing law is open to judicial review.<sup>2</sup>

2. A tax cannot be held to be unreasonable or confiscatory merely because—

(i) It is imposed at a flat rate, though its object is to raise funds for the improvement of roads;<sup>2</sup> or

(ii) It seeks to recover taxes, by validating an earlier law which had been declared invalid.

22. *Damodaran v. State*, A. 1960 Ker. 58 (63); *Transport Corpn. v. Municipal Council*, A. 1963 M. P. 253; *Bengal Immunity v. State of Bihar*, A. 1953 Pat. 87.

23. *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1406 (1420; 1422; 1430; 1433).

24. *Kalyani Stores v. State*, (1966) 1 S.C.R. 265 (883); *Mekhlāb v. State of Madras*, A. 1963 S.C. 988.

25. In *Transport Corpn. v. Municipal Council*, A. 1963 M.P. 253 (255), and *Asok v. State*, A. 1963 Orissa 173, opinion to the contrary has been expressed, without examining the question from the standpoint of excessiveness of the burden. In *Bangalore Mills v. Bangalore Corpn.*, A. 1962 S.C. 1263 the Supreme Court seems to have assumed that Art. 304 (b) was attracted to octroi duty; but in that case, it was saved by Art. 305.

1. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 232 (253).

2. *Khyerbati Tea Co. v. State of Assam*, A. 1964 S.C. 925\* (937; 942).

**A. Instances of laws offending under Art. 304 (b).**

1. R. 16(2) of the Madras General Sales Tax (Turnover and Assessment) Rule, 1939.<sup>4</sup>
2. Provisos to r. 2 made under the Forest Act, 1900.<sup>5</sup>

**B. Instances of Acts imposing reasonable restrictions:**

- (i) Assam Taxation (On Goods Carried by Road or Inland Waterways) Act, 1961.<sup>3</sup>
- (ii) Cl. 4 of the M. P. Paddy Procurement (Levy) Order, 1955,<sup>6</sup> issued under the Essential Commodities Act, 1955; Rajasthan Gram & Barley (Prohibition of Export) Order, 1965.<sup>8</sup>
- (iii) Assam Motor Vehicles Taxation (Amendment) Acts, 1963, 1966.<sup>9</sup>
- (iv) U. P. Sugarcane (Regulation of supply and Purchase) Act, 1953.<sup>10</sup>

**305. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct, and nothing in article 301 shall affect**

*Saving of existing laws and laws providing for State monopolies.*

*the operation of any law made before commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub clause (iv) of clause (b) of article 19*

**Amendment.**—The italicised words have been added by the Constitution (Fourth Amendment) Act, 1955

**Object of Amendment.**—The object of this amendment has been explained thus—

'A recent judgment of the Supreme Court in *Saghu Ahmed v. the State of U. P.* has raised the question whether an Act providing for a State monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by article 301, but left the question undecided. Clause (b) of article 19 was amended by the Constitution (First Amendment) Act in order to take such State monopolies out of the purview of sub clause (g) of clause (1) of that article but no corresponding provision as made in Part XIII of the Constitution with reference to the opening words of article 301. It appears from the judgment of the Supreme Court that notwithstanding the clear authority of Parliament or of a State Legislature to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being in the public interest under article 301 or as amounting to a 'reasonable restriction' under article 304 (b). It is considered that any question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of article 305 to make this clear"<sup>12</sup>

**Effect of amendment.**—The effect of the amendment is to make the U. P. Road Transport Act<sup>1</sup> and similar existing laws<sup>14</sup> providing for monopoly trading by the State, immune from attack on the ground of contravention of Arts. 301 and 303. Future law made by the State relating to the same matter are also saved from the operation of Arts. 301 and 303.

3. *Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667 (4675-6)
4. *Mehtab & Co. v. State of Madras*, A. 1965 S.C. 928).
5. *State of Mysore v. Sanjeeviah*, A. 1967 S.C. 1185 (1192).
6. *Baljnath v. State*, A. 1968 M.P. 26 (28)
7. *Chuni Singh v. Union of India*, A. 1968 Delhi 196 (199)
8. *Ganeshlal v. State*, A. 1967 Raj. 90 (99).
9. *State of Assam v. Labanya Probha*, A. 1967 S.C. 1575 (1577).
10. *Pika Ramji v. State of U. P.*, (1950) S.C.R. 393.
11. *Saghu Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.
12. Statement of Objects and Reasons.



### Saving of existing law.

1. This Article saves 'existing laws' which are repugnant to Arts. 301 and 303, subject to orders of the President.

2. There has been some controversy as to whether an Act enacted before but brought into force after the commencement of the Constitution or the exercise after the Constitution, of a power of subordinate legislation, conferred by a pre-Constitution Act, would be an 'existing law' within the meaning of Art. 305.

There is no doubt that the expression in Art. 305 is to be interpreted by the aid of the definition of 'existing law' as given in Art. 366(10), which is explicitly confined to an Act passed or subordinate legislation made *before* the commencement of the Constitution.

I. Now so far as an Act is concerned, the word used in Art. 366(10) is 'passed'. Hence,

An Act passed before commencement of the Constitution is an existing law, even though it is brought into force after the Constitution has come into force. Thus, it has been held that the Madras Commercial Crops Markets Act, 1933 comes under the present article, even though the notifications bringing the Act into force were issued<sup>15-16</sup> after the Constitution came into operation.

II. But so far as the power of issuing subordinate legislation by means of an 'order, bye-law, rule or regulation' is concerned, it is evident from the definition in Art. 366(10) that unless it is issued prior to 26-1-50,<sup>17</sup> it would not be existing law, even though it may have been issued in exercise of the rule-making power conferred by a pre-Constitution Act.<sup>17</sup>

If, therefore, a post-Constitution order, bye-law, rule<sup>17</sup> or regulation offends against Art. 301, it would not be protected by Art. 305 by reason of that fact that the Act which conferred the power to make such subordinate legislation was a pre-Constitution Act.<sup>17-18</sup>

A 'notification' is, of course, not mentioned in the word following the word 'law' in Art. 366(10), but the words 'law passed' make it clear that 'law' in this context means only a law passed by the Legislature. A statutory notification, being a subordinate legislation, can only be 'made' and must therefore, be made before the commencement of the Constitution, in order to constitute 'existing law' within the purview of Arts. 366 (10) and 305.<sup>1-2</sup>

Hence, it has been held that where a post-Constitution notification imposes an additional duty, and thereby infringes the freedom under Art. 301, it cannot be saved as an 'existing law' under Art. 305.<sup>18</sup>

In this context, it must be pointed out that the decision in *Bangalore Woollen Mills v. Corporation of Bangalore*<sup>19</sup> to the effect that a post-Constitution levy of a municipal octroi duty made in exercise of the power conferred by a pre-Constitution Act was saved by Art. 305, is contrary to the decision of the majority in the *Kalyani Stores case*<sup>18</sup> which has been affirmed by the unanimous Court in *State of Mysore v. Sanjeeviah*.<sup>17</sup> Of course, in the *Kalyani Stores case*,<sup>18</sup> the decision in the *Bangalore case*<sup>19</sup> has been

13. *Jain Transport v. State of U. P.*, A. 1957 All. 320.

14. *Eg.*, Orissa Motor Vehicles (Regulation of State Carriage and Public Carriers Service) Act, 1947; Orissa Motor Vehicles (Amendment) Act, 1948 [cf. *Ramchandra v. State of Orissa*, (1956) S.C.R. 281; Assam Road Transport Act, 1954 (*Bhiman v. State of Assam*, A. 1957 Assam 139)].

15. *Kutti v. State of Madras*, A. 1954 Mad. 621 (623).

16. *State of Bombay v. Hemani*, A. 1952 Bom. 6.

17. *State of Mysore v. Sanjeeviah*, A. 1967 S.C. 1189 (1192).

18. *Kalyani Stores v. State of Orissa*, A. 1966 S.C. 1686 (1691-2).

sought to be distinguished on the ground that the post-Constitution resolution of the Municipality did not alter the existing law. In the Author's opinion, the distinction sought to be made is slender and that the *Bangalore decision*<sup>19</sup> deserves a fuller reconsideration for the following reasons—

In the *Bangalore case*,<sup>19</sup> the procedure for levy under the pre-Constitution municipal statute was a resolution of the Corporation imposing the levy, followed by notification in the Official Gazette. Once a notification is held to be a subordinate legislation within the purview of Art 366(10), it ceases to be an 'existing law' if it is made after the commencement of the Constitution,—*no matter whether it increases the existing fiscal burden or not*. In the *Bangalore case*,<sup>19</sup> there was a post-Constitution resolution of the Corporation but there was no publication of a notification. The Court held that the defect in non-publication of the notification was cured by the saving provision in s. 38(1) of the Act. But the question of application of Art 366(10) remained all the same because a resolution of the Corporation was certainly not a 'law' referred to in Art 366(10). Since the resolution was made after commencement of the Constitution, it could not, therefore, be saved by Art. 366(10). Of course, if the Court came to the conclusion that the resolution did not hit Art. 301 at all, there would be no need to invoke Art. 305.

### Instances of existing laws saved by Art. 305.

By reason of Art. 305 the following Acts have been held to be valid notwithstanding their repugnancy to Art. 301—

- (i) Motor Vehicles Act, 1939,<sup>20</sup> Orissa Motor Vehicles Acts, 1947, 1948.<sup>21</sup>
- (ii) Defence of India Act, as continued by the Miscellaneous Provisions Act, 1947.<sup>22</sup>
- (iii) M. B. Customs Regulation Ordinance, 1948 and M. B. Customs Regulation Act, 1949.<sup>23</sup>
- (iv) Hyderabad Customs Act (II of 1956F).<sup>24</sup>
- (v) Jaipur Municipal Act, 1943 (s. 77).<sup>25</sup>
- (vi) City of Bangalore Municipal Act 1948 (s. 98).<sup>1</sup>
- (vii) Forest Act, 1927.<sup>2</sup>

### Law relating to . . . matter referred to in Art. 19(6) (ii).

This means that when a law creates a monopoly in favour of the Government, a restriction imposed on the freedom of that trade in the interests of effectuating the Government monopoly will also be immune from an attack on the ground of contravention of Art. 301 or 303, e.g., an obligation imposed on private traders that they cannot sell their raw materials to anybody other than the State.<sup>3</sup>

### 306. Omitted<sup>4</sup>

19. *Bangalore Woollen Mills v. Corp'n of Bangalore*, A. 1962 S.C. 562 (566).
20. *Motilal v. Uttar Pradesh*, A. 1951 All. 257 (270) 314 F.B. C.S.S. *Motor Service v. State of Madras*, (1952) 2 M.L.J. 894 (914).
21. *Ram Chandra v. State of Orissa*, (1956) S.C.R. 28 (42).
22. *Gout. of Mysore v. Mahantha*, A. 1951 Mys. 65.
23. *Uman v. State*, A. 1958 M.P. 33 (39).
24. *Chobe v. Palmikar*, A. 1954 Hyd. 207.
25. *Sarajmal v. State of Rajasthan*, A. 1954 Raj. 260 (263).
1. *Bangalore Woollen Mills v. Corporation of Bangalore*, A. 1962 S.C. 562.
2. *Patel & Co. v. State of M. P.*, A. 1965 M.P. 211.
3. *Lal Ragho v. State*, A. 1967 M.P. 218 (220).
4. Omitted by the Constitution (Seventh Amendment Act, 1956).

Appointment of authority for carrying out the purposes of articles 301 to 304.

**307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.**

## PART XIV

### SERVICES UNDER THE UNION AND THE STATES

#### CHAPTER I.—SERVICES.

**308. In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu & Kashmir<sup>1</sup>**  
 Interpretation.

**309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:**  
 Recruitment and conditions of service of persons serving the Union or a State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor . . . .<sup>2</sup> of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

**Art 309: Recruitment and conditions of service to be regulated by legislation.**

1. Besides laying down certain general provisions, the Constitution does not aim at providing detailed rules for recruitment or conditions of the services of the Union or of the States. The power is left to the respective Legislatures [Entry 70 of List I and 41 of List II]. The power of appointment belonging to the Executive will thus be subject to legislative control.

2. It is, however, not necessary for the exercise of the legislative power under Entry 70 of List I or 41 of List II that it must be made by a specific legislation under Art. 309. Art. 309 does not stand in the way of an appropriate legislative from laying down necessary conditions of service in any general law enacted by it, e.g., s. 86 (3) of the Representation of the People Act, 1951.<sup>3</sup>

1. Substituted for the words "means . . . Schedule", by the Constitution (Seventh Amendment) Act, 1956.

2. The words of Rajaramnath omitted by 104d.

3. *Mabarak v. Banerjee*, A. 1953 AIR 323.

**'Subject to the provisions of the Constitution'.**

1. The power conferred by Art. 309 is subject to the opening words of the Article which govern not only the power of the Legislature but also the rule-making power conferred by the Proviso.<sup>4</sup> Hence, if any Rule contravenes any of the provisions of the Constitution, e.g., Arts. 14; 15; 16; 19; 229; 234;<sup>5-6</sup> 310 (1); 311 (7)<sup>7</sup> or 311 (2),<sup>8-9</sup> the rule shall be void (see below).

2. On the other hand, the Constitution itself provides the mode of appointment and conditions of service of certain officers in connection with the affairs of the Union and the States, e.g., the Attorney-General [Art. 76].

3. Similarly, there are other provisions in the Constitution which empower other authorities to make rules relating to the conditions of service of certain classes of public servants, e.g., Arts. 98 and 187 [relating to the staff of each House of Parliament and of a State Legislature],<sup>1</sup> Art. 146 (2) [relating to officers of the Supreme Court]; Art. 148 (5) [persons serving in the Indian Audit and Accounts Department], Art. 229 (2) [officers of High Court]. Hence, Art. 309 shall have no application to these classes of Government servants.<sup>10</sup>

**Scope of the Proviso.**

1. The Proviso is a transitional provision empowering the Executive to make rules having the force of law, relating to the above matters, until the appropriate Legislatures legislate on the subject. Further, until the powers conferred by the present article are exercised, the existing Rules will continue to be in force, under Art. 313, *post*, in so far as they are not inconsistent with the provisions of the Constitution.

2. In view of s. 21 of the General Clauses Act, it is competent for the President or a Governor to amend or vary the Rules made by him, so long as the appropriate Legislature does not exercise its powers under Art. 309.<sup>11</sup>

3. The Proviso merely enables the President or the Governor to make rules to regulate the 'recruitment and conditions of service' of the persons mentioned therein and is not co extensive with the power of the Legislature under item 70 of List I or 41 of List II. It does not confer any power to validate an order which was invalid when it was made, e.g., to make a rule to declare that persons who were invalidly retired on a particular date shall be deemed to have been validly retired. Such a rule is *ultra vires* the Proviso to Art. 309 and is, accordingly, invalid,<sup>12</sup> though the Legislature, acting under the Proviso, could have exercised such power of validation.

4. In the case of the Union Territories, the rule-making power belongs to the President,<sup>13</sup> until Parliament chooses to legislate.

**Nature of the rule-making power.**

1. The power conferred by the proviso to Art. 309 is the power to

4. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751 (761).

5. *Nadaf v. State*, A. 1967 Mys. 77 (78).

6. *State of W. B. v. Nripen Bagchi*, A. 1966 S.C. 447 (450).

7. *Motilal v. Union of India*, A. 1965 Punj. 444 (448-449).

8. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. 600 (610).

9. *State of Mysore v. Padmanabhacharya*, A. 1966 S.C. 602 (605).

10. *C. P. K. Bose v. Chief Justice*, (1955) 2 S.C.R. 1331.

11. *Iyengar v. State of Mysore*, A. 1961 Mys. 37 (41).

12. *State of Madras v. Padmanabhacharya*, A. 1966 S. C. 602 (605).

13. *Gobalowsamy v. Pondicherry*, A. 1968 Mad. 298.

make rules which are *general* in their operation, though they may be applied to a particular class of Government servants. It cannot be used to make an *ad hoc* declaration, e.g., that persons who have been illegally retired shall be deemed to have been lawfully retired.<sup>14</sup>

2. A rule made under Art. 309 can be amended only by a Rule or notification duly made under Art. 309.<sup>15</sup>

### **No obligation to make rules.**

1. This Article is an enabling provision which confers certain powers upon the Legislature and does not impose any duty to legislate with regard to the conditions of service of Government servants,<sup>16</sup> nor prevent the Legislature from laying down such conditions in any general law enacted under some other power.<sup>17</sup>

2. On the same principle, Art. 309 does not make it obligatory for the Government to make rules relating to public services, nor invalidate any act done by the Government done by the Government in the exercise of its executive power relating to the public services, on the ground that rules relating the matter, say, recruitment, have not been made under Art. 309.<sup>18, 19</sup>

3. Even after Rules are framed under Art. 309, there is nothing to debar the Government to fill up gaps by administrative instructions on matters in respect of which the Rules are silent, though the Rules cannot be amended or superseded by administrative instructions.<sup>18</sup>

### **Constitutionality of Service Rules.**

#### *1. Applicability of Art 14*

1. It is now settled that Art. 14 is applicable to employment under the State so as to invalidate discriminatory Rules or orders<sup>19, 20</sup> relating to employment, from the stage of initial appointment to its termination.<sup>21</sup> A Rule or order will be discriminatory if the classification made by it is not reasonable.<sup>19</sup>

2. But Art. 14 can be invoked only in the case of actual discrimination as distinguished from an abstract or theoretical inequality.<sup>20</sup>

The application of the above principles to different conditions of service may be illustrated as follows—

#### **(a) Appointment.**

1. The power of the State as an employer is more limited than that of a private employer inasmuch as it is subject to constitutional limitations and cannot be exercised arbitrarily.<sup>12</sup>

2. If, in laying down the qualifications for an appointment, the State lays down qualifications which have no nexus with the object to be achieved, the rule or order in question shall be invalid. Thus, with a view to secure fair and efficient administration of justice, it would be competent for a State to prescribe knowledge of local laws, knowledge of the regional language or adequate experience at the Bar as qualifications for appointment to the Judicial Service, but it cannot be provided that only Advocates

14. *State of Mysore v. Padmanabhacharya*, A. 1966 S.C. 602 (605).

15. *Nagarajan v. State of Mysore*, A. 1966 S.C. 1942; *Saksena v. State of M. P.*, A. 1967 S.C. 1264 (1267-8).

16. *Iyengar v. State of Mysore*, A. 1961 Mys. 37 (41).

17. *Mubarak v. Banerji*, A. 1958 All. 323 (324).

18. *Sant Ram v. State of Rajasthan*, A. 1967 S. C. 1910 (1914).

19. *State of Punjab v. Joginder*, A. 1963 S.C. 913.

20. *Kishori v. Union of India*, A. 1962 S.C. 1139.

21. *Ganga Ram v. Union of India*, (1970) II S.C.W.R. 231 (224).

practising in that State High Court shall be eligible, so as to disqualify Advocates practising in other High Courts though they belong to the same class, without any rational basis for such disqualification.<sup>22</sup>

But—

(i) The Article does not prohibit the prescription of reasonable rules for selection<sup>23</sup> or of qualifications for appointment,<sup>24</sup> for securing efficiency.<sup>25</sup>

(ii) Mere production of inequality by the operation of such rules is not enough to attract the constitutional inhibition, provided the classification is reasonable, and founded on intelligible differentia which bear a reasonable relation to the object sought to be achieved.<sup>26</sup>

(iii) Where there are different sources of recruitment and the preferential treatment of one source in relation to another is based on differences between the different sources which have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be upheld on the basis of a valid classification.<sup>26</sup>

(iv) Except where the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by placing the necessary material before the court that said classification is unreasonable.<sup>24, 26</sup>

3. Having fixed a quota for appointment from different sources, even by an administrative order,<sup>1</sup> Government cannot make recruitments arbitrarily, in disregard of such quota.<sup>2</sup>

### (b) Confirmation.

The fixation of an arbitrary date for the confirmation or determination of seniority of an employee may constitute discrimination<sup>3</sup> and violation of Art. 14.<sup>2</sup>

### (c) Seniority.

1. Similarly, the determination of seniority on the basis of an arbitrary date of confirmation would constitute a violation of Art. 14,<sup>4</sup> but not, if it is based on a relevant consideration.<sup>5</sup>

2. But there is no such violation—

(i) Merely because a person who has passed departmental test earlier is not given seniority on that account,<sup>4</sup> where the passing of the test does not, of itself, confer a right to be promoted, according to the relevant Rules.<sup>22</sup>

(ii) Because the principle of fixing seniority is by rotation, where the service is composed in fixed proportion of direct recruits and promotees.<sup>5</sup>

### (d) Pay.

1. The abstract doctrine of 'equal pay for equal work' has nothing to do with 14.<sup>6</sup>

22. *Jaisinghani v. Union of India*, A. 1967 S.C. 1427.

23. *Bandurangarao v. A. P. P. S. C.*, A. 1963 S.C. 268 (271).

24. *Govind v. Chief Controller*, A. 1967 S.C. 849 (842); *Merryn v. Collector of Customs*, (1966) 3 S.C.R. 600.

25. *Ganga Ram v. Union of India*, (1970) 11 S.C.W.R. 221 (229).

1. *Natarajan v. State of Mysore*, A. 1966 S.C. 1942.

2. *Tienkham v. Union of India*, A. 1968 Mani. 58 (63).

3. *D. R. Nim v. Union of India*, A. 1967 S.C. 1301.

4. *State of Orissa v. Mahapatra*, A. 1969 S.C. 1249.

5. *Merryn v. Collector of Customs*, (1966) 3 S.C.R. 600.

6. *Kishori v. Union of India*, A. 1962 S.C. 1139.

2. Art. 14 would not thus debar the State from dividing the employees doing the same kind of work into superior and inferior classes, with different pay scales nor fixing incremental scales of pay dependent upon the duration of an officer's service;<sup>7</sup> or fixing different scales of pay for persons employed in the same post, on the ground of their being recruited from different sources or by different methods of recruitment.<sup>7</sup>

**(e) Other conditions of service.**

1. Nor does Art. 14 prevent the creation of better conditions of service for one class of employees who are equal in pay and work with another class.<sup>8</sup>

Thus, if an existing service is formed on the basis of a certain qualification, the creation of another service for doing the same work, but with better conditions of service, such as prospects of promotion, cannot be said to be unconstitutional. This might be particularly necessary in the case of a temporary recruitment to meet an emergency.<sup>8</sup>

Though there is a theoretical inequality brought about by the State in such cases, such latitude must be allowed to the administration in the public interest. The Government which is carrying on the administration must have a choice in the constitution of the services to man the administration,<sup>9</sup> provided there is no discrimination or denial of equal opportunity between the members *inter se* of each group so constituted.<sup>9</sup>

2. Again, where there is not statutory rule to govern a matter the mere granting of certain *concessions* to some employees cannot be challenged as discriminatory.

**(f) Reorganisation.**

1. When a service has to be integrated, owing to a territorial reorganisation or the like, it may sometimes be difficult to find an exactly equivalent post for a particular employee or class of employees and a complaint of discrimination may naturally be made in such a case.

2. It has, however, been held that 'special treatment of an odd case' is not necessarily discriminatory. "Discrimination can be proved only if equivalence is not carried out although an equivalent post is available".<sup>9</sup>

**(g) Reservation for backward classes.**

Where the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14 merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes, or merely because such reservation is not made in every kind of service under the State. Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in the public services of the State what the State would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. But if the reservation is so excessive that it partially denies a reasonable opportunity for employment to members of other communities the position

7. *Memon v. State of Rajasthan*, A. 1968 S.C. 51 (84).

8. *Rajalakshmi v. State of Mysore*, A. 1967 S.C. 993 (996). [This decision, it is submitted, should be confined to the facts of the case].

9. *State of Maharashtra v. Ministerial Services*, A. 1966 S.C. 685.

may well be different and it would be open for a member of a more advanced class to complain that he has been denied equality by the State.<sup>10</sup>

### (h) Access to courts.

In the absence of a reasonable basis for special treatment, there is a violation of Art 14 if an individual is deprived of his right of access to a Court of law for the vindication of his just grievances, a right which belongs to every individual.<sup>11</sup>

A rule which prohibits Government servants from having recourse to a Court without previous sanction of the Court would be unconstitutional and its enforcement would amount to contempt of Court.<sup>12</sup>

### (i) Superannuation.

1 An order of Government *retaining* a particular Government servant even after he has reached the age of superannuation cannot be challenged as discriminatory, because the age of superannuation empowers the Government to retire a Government servant after he has reached that age but does not debar the Government to retain anybody who is deemed efficient,<sup>13,14</sup> or different provisions are made regarding persons retiring before and after a specified date.<sup>15</sup>

2. It is competent for Government to raise or reduce the age of superannuation from time to time.<sup>16</sup>

### (j) Compulsory retirement.

A provision authorising compulsory retirement of Government servants after 27 years of service cannot be held to contravene Art 14 merely because the normal time for retirement is after 30 years of service. If the Rule be applicable to all classes of Government servants it cannot be challenged as discriminatory, but if it is applied *mala fide*, the *mala fide* order may be struck down.<sup>17</sup>

### (k) Termination and disciplinary proceedings.

1 A Rule which empowers the Executive to select particular employees for termination of their service under a special procedure, without furnishing definite guide for such selection would offend against Art. 14, but not so where a classification is made on the basis of an intelligible differentia which bears a reasonable relation to the purposes of the Rules, e.g., a provision for proceeding under the Safeguarding of National Security Rules against 'persons engaged in subversive activities'. A hostile discrimination in the application of the Rules also constitutes violation of Art. 14.<sup>18</sup>

But there is no such violation—

If Government is empowered to terminate the services of temporary employees by notice, merely because discretion is vested in the Government to make a action, in this behalf for administrative reasons.<sup>19</sup>

10. *Devadasan v. Union of India* A 1964 SC 170

11. *Ram Prasad v. State of Bihar* (1963) SCR 1129

12. *Pratap Singh v. Gurubux Singh* A 1962 SC 1172 (1178)

13. *Bahen Nayain v. State of U P* (1965) II S.C.A. 95

14. *State of Assam v. Premadhar* (1970) II SCWR 197 (205).

15. *Kailas v. Union of India*, A 1961 SC 1346

16. *State of Assam v. Premadhar*, A. 1970 SC 1314 (1318).

17. *Shivacharya v. State of Mysore* A 1965 SC 280 (282).

18. *State of Orissa v. Dhirendranath*, A. 1961 SC, 1715.

19. *Ram Gopal v. State of M. P.*, (1970) I L.L.J. 367 (368) SC



2. If two sets of rules relating to disciplinary proceedings were in operation at the time when the inquiry was directed against a Government servant, and the inquiry was directed under the set of Rules which was more drastic and prejudicial to the interests of such Government servant, the proceedings against him are liable to be struck off as infringing Art. 14.<sup>19</sup>

In other words, if against two public servants similarly circumstanced, enquiries may be directed according to procedures substantially different at the discretion of the Executive authority, exercise whereof is not governed by any principles having any relation to the purpose to be achieved by the inquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Art. 14.<sup>19</sup>

3. But the mere existence of two sets of rules or the adoption of one procedure in preference to the other will not justify an inference of unlawful discrimination, unless it is shown that it has operated to the prejudice of the public servant,<sup>20</sup> or that there is a *substantial* difference between the procedures prescribed by the two sets of rules.<sup>21</sup>

4. It has been held that there is no discrimination in the following cases:—

(i) Merely because one set of the rules is more detailed, where the procedure prescribed is not, in substance, materially different.<sup>20</sup>

(ii) Merely because one prescribes the penalty to be awarded by a departmental superior with a right of appeal to the Governor while the other empowers the Governor himself to award the penalty, with no further right of appeal. The reason is that in both cases the final order is passed by the Governor.<sup>21, 2</sup>

5. As a result of the application of the States Reorganisation Act, 1956, different sets of Rules came to exist in different parts of the same State. Such differentiation could not be held to be discriminatory because it was due to historical reasons, which offered a reasonable basis for the classification.<sup>23</sup>

## II Applicability of Art 15

Art. 15 (1) will be attracted if there is discrimination in the matter of employment under the State solely on the ground of religion, race, caste,<sup>24</sup> sex or place of birth,<sup>25</sup> even though the discrimination is professed to be made in the interests of the backward class.<sup>1</sup> Exclusion on the ground of language in the case of employment under a State is not barred.<sup>2</sup>

## II Applicability of Art 16

1. It is now settled<sup>3</sup> that the equality of opportunity 'in matters relating to employment or appointment' guaranteed by Art. 16 (1) are wide enough to include all matters in relation to employment, both prior

20. *Kapur Singh v Union of India*, (1960) 2 S.C.R. 569; A. 1960 S.C. 493.

21. *Jaganmuth v. State of U. P.*, A. 1961 S.C. 1245 (1252).

22. *State of Orissa v. Bidyabhusan*, A. 1963 S.C. 779.

23. *Lachman Das v. State of Punjab*, A. 1963 S.C. 222; (1963) 2 S.C.R. 353.

24. *Ct. All-India Station Master' Assocn. v. General Manager*, A. 1960 S.C. 384; *State of Punjab v. Joginder*, A. 1963 S.C. 913.

25. *Venkataramana v. State of Madras*, A. 1951 S.C. 229.

1. *Rama Rao v. State of A. P.*, A. 1961 S.C. 564 (570).

2. *Rajmutha v. State of Orissa*, A. 1955 Orissa 113.

3. *General Manager v. Mangachari*, A. 1962 S.C. 36 (40-41).

4. *Jaganmuth v. State of U. P.*, A. 1961 S.C. 1245 (1252); *State of Orissa v. Bidyabhusan*, A. 1963 S.C. 779.

and subsequent, such as the initial appointment, the conditions of service pertaining to the office to which the appointment is made, e.g., salary, periodical increments, promotion, terms of leave, gratuity, pension, age of superannuation.

2 The equality of opportunity guaranteed by it, however, means "equality as between members of the *same class* of employees, and not equality between members of separate, independent classes"<sup>4</sup>

3. Art 16 is only an application of the general principle of equality guaranteed by Art 14.<sup>5</sup>

#### (a) Appointment.

1 The equality which is guaranteed by this Article is the opportunity to make an application for a post and to be *considered*<sup>6</sup> for it on the merits. The right does not extend to being actually appointed<sup>6, 9</sup>

2 Hence, Cl (1) of Art 16 will be violated—

(a) If, while terminating the service of a temporary employee, on a ground not related to his suitability for appointment to an office under the Government, an administrative ban is imposed against his future employment in future.<sup>9</sup>

(b) If there is an excess reservation of posts for backward classes, so as to render the guarantee under cl (1) illusory<sup>10</sup>

(c) If candidates securing lower marks at a public service examination are appointed, to the exclusion of those who secured higher marks, without considering the relative merits of the candidates<sup>11</sup>

(d) If, after having fixed a quota for appointment to certain posts by direct recruitment and by promotion Government makes *ad hoc* appointments in violation of that quota, at its pleasure<sup>12</sup>

3 Art 16 (2) would invalidate a law or a rule or an order<sup>13</sup> if it authorises discrimination in the matter of appointment under the State on any of the grounds specified therein e.g. descent<sup>14</sup> caste,<sup>15</sup> or religion<sup>8</sup> even though it professes to make a reservation in the interests of the backward classes,<sup>16</sup> or the claim of a senior employee is taken into consideration at all in the matter of promotion on a seniority-cum-merit basis<sup>10, 16</sup>

#### (b) Seniority and Promotion.

1 Equality of opportunity in the matter of promotion means that all employees holding posts in the *same grade*<sup>17</sup> shall be equally eligible for being *considered*<sup>17</sup> on the merits<sup>18</sup> for appointment to the higher grade

5 *State of Mysore v Narasingha Rao* AIR 1968 SC 349

6 *Sant Ram v State of Rajasthan* A 1967 SC 1910 (1915)

7 *High Court v Amalkumar* A 1962 SC 1704

8 *General Manager v Rangachari* A 1962 SC 36, *Krishan Chander v Central Tractor Organisation* A 1967 SC 602

9 *Krishan Chander v C T O* A 1962 SC 602

10 *Devadasan v. Union of India* A 1964 SC 179

11 *Channavasavah v State of Mysore* A 1965 SS 1293

12 *Jaisinghani v Union of India*, A 1967 SC 1427

13 *Venkataramana v State of Madras*, A 1951 SC 229

14 *Rama Rao v. State of A P* A 1961 SC 565 (573)

15 *Nagnoor v State of Mysore*, A 1964 Mys 224; *Mohan v State*, A 1966 Raj. 1 (5)

16 There may be Rules under which the mere putting of an employee's name on a Seniority List does not give him an indefeasible right to retain that seniority [*CI. Rameswamy v. I. G P* A 1966 SC 175 (179 181)]

17 *High Court v Anand Kumar*, A 1962 SC 1704 (1711).

18 *CI. Krishan Chander v. Central Tractor Organisation*, A. 1962 S.C. 602.

Inequality of such opportunity for promotion as between citizens holding different posts in the same grade may, therefore, be an infringement of Art. 16.<sup>19,20</sup>

2. But Art. 16(1) does not prohibit—

(i) The creation of different grades in Government service.<sup>20</sup>

(ii) Laying conditions of efficiency or other qualifications for securing the best service, for being eligible for promotion,<sup>21</sup> which qualifications may not necessarily be technical.<sup>20</sup>

(iii) The preferential treatment of recruits drawn from different sources,<sup>21</sup> or as between different units of the same establishment.<sup>20a</sup>

3. It follows that in the absence of statutory provisions,<sup>22</sup> mere seniority does not confer any legal right to promotion even where a list has been prepared of officers arranged according to seniority,<sup>24</sup> and there is no violation of Art. 16 (1) if the senior officer has been *considered* along with others but Government has considered some one below him to be fit for the higher post.<sup>17</sup>

4. No question of contravention of Art. 16 arises where the officer who complains of discrimination belongs to a class different from that of the person promoted, e.g., where the Petitioner has been recruited by promotion or because of 'war service'<sup>25</sup> whereas the other person has been recruited by competitive examination,<sup>1</sup> or where the Petitioner has been recruited from a different Service or source<sup>21</sup> while the other person has been recruited from the same Service.<sup>24</sup>

On the other hand,—

(i) If the source of recruitment be the same<sup>2</sup> or recruits from different sources are *integrated* into one class, no discrimination can *thereafter* be made in favour of recruits from one source as against the other recruits in the matter of promotion or other conditions of service.<sup>3</sup>

(ii) If, in the matter of fixation of the seniority of an officer, any statutory rule has been violated, the order of the Government would be *ultra vires* and the Court may direct the Government to refix the seniority, in accordance with the law.<sup>4</sup>

(iii) Once the seniority has been duly fixed and acted upon, any interference with or revision thereof made arbitrarily and not based on any rule or principle applicable to determination of seniority in that grade affecting the right to future promotion of employees who are affected by such revision, violates Art. 16 and must be quashed.<sup>6</sup>

19. *All-India Station Masters Assocn v General Manager*, A. 1960 S.C. 281 (1960) 2 S.C.R. 311.

20. *General Manager v. Rangachari*, A.I.R. 1962 S.C. 36 (40-41).

20a. *State of Mysore v. Narasingha Rao*, A.I.R. 1968 S.C. 349 (352).

21. *Jaisinghani v. Union of India*, A. 1967 S.C. 1427 (1431); (1967) 2 S.C.R. 703 (718).

22. *Sham Sunder v. Union of India*, (1968) S.C. [W.P. 31/67, d. 15-7-68].

23. *Cf. State of Mysore v. Bellary*, A. 1965 S.C. 868 (871); *D. R. Nim v. Union of India*, (1967) 2 S.C.R. [371/65] 325.

24. *Ghulam v. State of J. & K.*, (1967) S.C. [W. P. 175/66]; *State of Mysore v. Purahit*, (1967) S.C. [C.A. 281/66].

25. *Govind Dattatray v. Chief Controller*, (1966) S.C. [W.P. 10/65]; *Sant Ram State of Rajasthan*, (1967) S.C. [W.P. 182/66].

1. *Mathotra v. Union of India*, (1967) S.C. [C.A. 1039/65].

2. *Mervyn v. Collector of Customs*, A. 1967 S.C. 52; (1966) 3 S.C.R. 600.

3. *Roshan Lal v. Union of India*, A. 1967 S.C. 1839 (1893).

4. *Nim v. Union of India*, A. 1967 S.C. 1301 (1305).

5. *S. K. Ghosh v. Union of India*, (1966) S.C. [W.P. 131/66, d. 2-4-66].

5. Merely because Government has misconstrued a statutory provision to the advantage of certain persons in the matter of promotion, it would not justify a claim by other persons that the rule should be misconstrued in all cases thereafter.<sup>6</sup> There is no discrimination in the refusal to accede to that claim.<sup>7</sup>

### (c) Termination.

The rule that employment under the State is held at pleasure does not militate against the application of Art 16 (1) to the matter of termination of such employment where there has been an arbitrary discrimination in terminating the services of a particular employee,<sup>8-9</sup> say, on the ground that he has a particular colour or height,<sup>10</sup> or that he belongs to another State<sup>11</sup> or on the ground that he should make room for political sufferers<sup>12</sup>, which is wholly irrelevant to the requirements of the service.

But the fact that an employee has been retrenched on the ground that he has been detained under the law of preventive detention<sup>3</sup> or is engaged in 'subversive activities'<sup>13</sup> is not an arbitrary or discriminatory ground unless it is shown that those who have been retained in service or are similarly situated.<sup>12</sup> Such discrimination cannot be inferred from the mere fact that a senior employee has been retrenched while persons junior to him have been retained.<sup>14</sup>

### III Application of Art 19 (1) (a), (1) (b)

In the interests of the integrity of and discipline in the services, Government may prohibit a Government servant—

(a) To criticise in public any policy pursued or action taken by Government.

(b) To ask for or accept or in any way participate in the raising of any subscription or other pecuniary assistance in pursuance of any object whatsoever, without the previous sanction of the Government.<sup>15</sup>

But the restriction imposed by a Rule will be void if it is not proximately related to any of the grounds of restriction specified in cl (2) of Art 19.<sup>16-18</sup>

(c) To make a demonstration or the employees in furtherance of their cause, attended with violence<sup>17</sup> but not peaceful or silent demonstrations.<sup>14</sup>

(d) To participate in a strike.

(e) To disclose any information obtained by them in the course of performance of their official duties, e.g. in relation to income-tax, election and the like.<sup>16</sup>

(f) to hold a meeting at a place which is not open to the general public<sup>19</sup>

6. *State of Orissa v Durgacharan*, A. 1966 SC 1547 (1551).

7. *Pandurang v Union of India*, A. 1959 Bom 134. [This proposition was assumed to be correct on appeal, in *Union of India v Pandurang*, A. 1962 S.C. 630 (633)].

8. *Sukhmandan v. State*, A. 1957 Pat. 617.

9. *Cf. General Manager v. Rangachari*, A. 1962 S.C. 36.

10. *Krishan Chander v. C. T. O.*, A. 1962 S.C. 602.

11. *Janakiraman v. State of A. P.*, A. 1959 A.P. 185.

12. *Union of India v. Pandurang*, A. 1962 S.C. 630.

13. *Balakrishna v. Union of India*, A. 1958 S.C. 232 (238).

14. *Sethu Madhava v. Collector*, A. 1955 Mad. 469.

15. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166 (1170).

16. *Ghosh v. Joseph*, A. 1963 S.C. 812.

17. *Rama v. Govt. of India*, (1970) 1 L.L.J. 299 (30).

18. *Rudhey Shyam v. Post-Master General*, A. 1955 S.C. 311.

19. *Ry. Board v. Niranjan*, A. 1969 S.C. 966.

But the restriction will be void if it is not proximately related to any of the grounds of restriction specified in cl. (2) of Art. 19.<sup>19, 20</sup>

#### IV. *Applicability of Art. 19 (1) (c).*

1. While restrictions may be placed<sup>21</sup> upon the freedom of association of Government servants in the interests of discipline and the like which come within the meaning of 'public order' or morality in Art. 19 (4),<sup>20a</sup> restriction is bad if it constitutes pre-censorship<sup>22</sup> or goes in excess of the requirement<sup>23</sup> or affords a vague criterion to the administration to select individual employees for punishment or discriminatory treatment.<sup>20</sup>

2. Though an association of employees have no right to be recognised,<sup>21</sup> where the matter is governed by statutory rules, a breach of the rules in the matter of withdrawal of recognition may afford a cause of action.<sup>24</sup>

3. The freedom of association guaranteed by Art. 19 (1) (c) does not include a right to strike.<sup>25</sup>

#### V. *Applicability of Art. 20 (2).*

Since Art. 20 (2) has been held to be applicable only to punishment in judicial proceedings, there is no question of its application where a prosecution or acquittal in a criminal proceeding is followed by a departmental proceeding against a Government servant, and *vice versa*.<sup>26, 27</sup>

#### VI. *Applicability of Art. 20 (3).*

Cl. (3) of Art. 20 has been held to be applicable only where a person is 'accused of an offence'.<sup>1</sup> It follows that this guarantee is not available to a Government servant in a disciplinary proceeding against him where there is no 'accusation' of an 'offence',<sup>2, 3</sup> so that the order made against him cannot be challenged on the ground that it is based on self-incriminating evidence.<sup>2</sup>

#### VI. *Applicability of Art. 310 (1)*

A Rule which seeks to fetter the power of the President or Governor to dismiss a Government servant at pleasure (subject to the qualification in Art. 311), shall be void.<sup>4, 5</sup>

#### VII. *Applicability of Art. 311 (1).*

If any Rule seeks to make a Government servant liable to be dismissed by an officer subordinate in rank to the appointing authority, such Rule shall be void.<sup>6</sup>

20. *Javali v. State of Mysore*, (1962) 1 L.L.J. 134 (S.C.).

20. *Balakrishna v. Union of India*, A. 1958 S.C. 232 (238).

21. *O. K. Ghosh v. Joseph*, (1962) 11 L.L.J. 615 (S.C.).

22. *Madras N. G. Assocn. v. Asstt. General*, (1970) 1 L.L.J. 303 (Mad.).

23. *All India Bank Employees' Assocn. v. National Industrial Tribunal*, A. 1962 S.C. 171.

24. *Venkataraman v. Union of India*, (1964) S.C.R. 1150.

25. *Narayan Prasad v. State of Orissa*, A. 1957 Orissa 51 (54).

1. *Mogool v. State of Bombay*, A. 1953 S.C. 325; *Narayanlal v. Mumukshu*, A. 1961 S.C. 29 (38).

2. *Bhagwan v. Dy. Commr.*, A. 1962 All. 232.

3. *Srikant v. Union of India*, A. 1963 Pnt. 38 (46).

4. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751 (571).

5. *Jagannath v. State of U. P.*, A. 1961 S.C. 1245.

6. *Balabhai v. Asstt. Security Officer*, A. 1960 M.P. 183.

VIII. *Applicability of Art. 311 (2).*

Any Rule which seeks to affect the protection offered by Art. 311 (2) shall be void,<sup>7</sup> e.g.,—

(i) A Rule providing that certain Government servants who have been unlawfully retired should be deemed to have been lawfully retired.<sup>8</sup>

(ii) A Rule providing that a permanent Government servant's services may be terminated by serving a notice or otherwise than by complying with Art. 311 (2).

(iii) A Rule which empowers the authority to order compulsory retirement of an employee, without fixing a minimum period of service after which such retirement may be ordered or permits the authority to order retirement at any time before the age of superannuation fixed by the rules.<sup>9</sup>

(iv) A rule which provides that an employee may be punished on the basis of cumulative evidence that he was *suspected* of corruption in a number of instances, without *any proof* of his guilt.<sup>10</sup>

IX. *Applicability of Art. 314.*

Any Rule which takes away the protection offered to members of the I. C. S., by Art. 314, is void.<sup>11</sup>

**Fundamental Rights of Government servants.**

1. Subject to the power of Parliament, under Art. 33, to modify the fundamental rights in their application to members of the Armed Forces and the Police Forces, the fundamental rights guaranteed by the Constitution are in favour of all 'citizens', which obviously include Government servants.<sup>12</sup>

2. It can hardly be contended that Government servants, while entering into a contract of employment under the State, have waived their fundamental rights.<sup>13</sup> For the same reason, it cannot be contended that having accepted appointment subject to the Rules, a Government servant would be estopped from questioning the constitutionality of such Rules on the ground that they contravene fundamental rights,<sup>14</sup> though the nature and incidents of his duties may necessarily involve restrictions of certain freedoms in relation to a Government servant as distinguished from private citizens.<sup>15</sup>

3. Restrictions upon the rights of the public servants under art. 19 can, therefore, be imposed only on the grounds specified in c.s. (2)-(6), and to the extent that such restrictions are reasonable.<sup>16</sup>

But while public servants possess the fundamental rights as citizens, the State also possesses, under the Proviso to Art. 309, the power to regulate their 'conditions of service'. Now, the interests of service under the State require efficiency, honesty, impartiality and discipline and like qualities on the part of the public servant. The State has thus the constitutional power, to ensure that every public servant possesses these qualities and to prevent any person who lacks these qualities from being in the public service. It seems, therefore, that State regulation of the conditions of service of public servants so as to restrict their fundamental rights will be valid only to the extent that such restriction is reasonably necessary<sup>17</sup> in

7. *State of Madras v. Srinivasan*, A. 1966 S.C. 1827.

8. *Accountant-General v. Bakshi*, A. 1962 S.C. 505 (510).

9. *Komashung v. State of Bihar*, A. 1962 S.C. 1166 (1170). *Ghosh v. Joseph*, A. 1963 S.C. 812.

10. *State of Punjab v. Joginder*, A. 1963 S.C. 913.

the interests of efficiency, integrity, impartiality, discipline, responsibility and the like which have a 'direct proximate and rational' relation to the conditions of public service<sup>1</sup> as well as the general grounds (*e.g.*, public order under Art. 19) upon which the fundamental rights of all citizens may be restricted.<sup>2</sup>

[As to Arts. 14-16, see pp. 676-83, *ante*].

### 'Conditions of service'.

1. The following matters, *inter alia*, constitute the conditions of service of a Government employee:

(i) Salary<sup>3</sup> or wages,<sup>4</sup> including subsistence allowance during suspension,<sup>5</sup> a periodical increments

(ii) Leave,<sup>6</sup> Provident Fund,<sup>7</sup> gratuity<sup>8</sup>

(iii) Promotion;<sup>9</sup> seniority.<sup>10</sup>

(iv) Tenure or termination of service.<sup>11</sup>

(v) Superannuation,<sup>12</sup> pension.<sup>13</sup>

2. Conditions relating to recruitment and appointment cannot, however, be said to be included within conditions of service because they operate prior to the commencement of the service itself.<sup>14</sup>

### 'Public services and posts in connection with the affairs of the Union and of the States'.

I. Besides the regular services of the Union and the States, there may be persons holding posts in connection with the affairs of the Union or a State who do not belong to these regular services, *e.g.*, temporary employees. The Legislature concerned shall have power to regulate recruitment, etc., of persons appointed to these 'posts' as well. The present article thus amplifies the Legislative entries (70 of List I and 41 of List II, which refer only to the 'Services')

II. This expression includes the officers and members of the staff attached to a High Court, even though the power to appoint them belongs to the Chief Justice under Art. 229 (1).<sup>15</sup> The power given by Art. 229 (2) to the Chief Justice, to make rules to regulate the conditions of service of the High Court staff is made expressly 'subject to the provisions of any law made by the Legislature of a State'. Hence, the rule-making power of the Chief Justice is subject to the laws made under Art. 309.

III. The expression also includes District Judges and members of the subordinate Judiciary (*vide* Art. 235).<sup>16</sup>

IV. The expression 'public services and posts in connection with the affairs of the Union and of the States', includes holders of both civil and military offices and posts and is thus co-extensive with the scope of Art. 310 (1), *below*, though defence personnel are excluded from the protection of Art. 311. The result is that though members of the Armed Forces cannot invoke Art. 311 as against dismissal or reduction in rank, there is nothing

11. *Thillai Natarajan v. Fernandez*, (1956) Bom.L.R. 821; *Divisional Supdt. v. Mukund*, A. 1957 Punj. 130.

11a. *General Manager v. Rangachari*, A. 1962 S.C. 36 (40-41).

12. *Sunil v. Ajit*, (1964) 58 C.W.N. 483 (485); A. 1955 Cal. 245.

13. *High Court v. Amal Kumar*, A. 1962 S.C. 1704.

14. *Appanna v. State of Mysore*, A. 1965 Mys. 19 (22).

15. *N. W. F. Prov. v. Suraj Narain*, A. 1940 P.C. 112.

16. *Patel v. State of Gujarat*, A. 1965 Cal. 23 (40).

17. *G. P. K. Bote v. Chief Justice*, (1955) 2 S.C.R. 1331.

18. *Nripendra v. Chief Secy.*, A. 1961 Cal. 1 (S.B.).

to debar the President from making Rules to regulate the conditions of their service, including safeguards against arbitrary dismissal or reduction,<sup>19</sup> such as the Civilians in Defence Services, Classification, Control and Appeal) Rules, 1952.<sup>20</sup>

### Statutory force of Rules of Service.

1. Though the position was otherwise prior to the Constitution,<sup>21</sup> it is now settled<sup>22</sup> that Rules framed under Art. 309 or under the previous Constitution Acts which are continued under Art. 313<sup>22</sup> have a statutory force provided, of course, they are not inconsistent with any provision of the Constitution, including Art. 310 itself, which enshrines the doctrine of pleasure; or the provisions of any statute.<sup>22a</sup>

2. In case of breach of any of these Rules, therefore, the aggrieved person has a remedy in a court of law.<sup>23</sup>

3. The above, however, presupposes that the decision of the Government has been expressed and published in the form of statutory rules, otherwise it will have no greater value than executive instruction, on the basis of which no order to the prejudice of a Government servant can be made.<sup>23</sup>

4. But in view of the specific provisions of rr. 156-7 of the Railway Establishment Code, Vol. I, circulars and letters issued by the Railway board, which have a general application, have been held to have a statutory force as a rule.<sup>24</sup>

### Enforceability of Service Rules.

1. The enforceability of a Service Rule is a question different from that of its character as to whether it is statutory or otherwise. All statutory rules are not necessarily enforceable in a court of law. It is only the breach of a *mandatory* statutory Rule which is justiciable.

A. It follows that the following categories of Service Rules are *not* legally enforceable even though they are of a statutory origin and have the force of law:

#### I. Rules which are merely directory

As has been held by the Supreme Court,<sup>25</sup> though the U P Police Regulations have been framed under the Police Act, 1861, some of its Rules are merely directory and are *not*, accordingly enforceable by legal proceedings.

#### II. Rules which confer a discretion as distinguished from a duty

Whatever be the legal character of the Rules where discretionary power<sup>26</sup> is given to the administration to confer certain benefits or privileges, no legal right arises in favour of the Government servant. Hence no legal action would lie to enforce his alleged right, e.g.—

##### (a) Dearness allowance

No legal relief is available to a person who has been denied dearness

19. Cf. *Kadoor Singh v Union of India*, A. 1960 M.P. 119 (121).

20. *Venkata v Secy. of State*, A. 1937 P.C. 31. *Rantachari v Secy of State*, A. 1937 P.C. 27 (30) [presumably because such Rules would then be *ultra vires*].

21. *State of U.P. v. Balu Ram*, A. 1961 S.C. 751 (763).

22. *State of Mysore v. Bellary*, A. 1965 S.C. 868.

22a. *Shukla v. State of Gujarat*, (1970) 1 S.C.C. 419 (425).

23. *Saksena v. State of M. P.*, A. 1967 S.C. 1264 (1266-7).

24. *Union of India v. Santikumar*, A. 1967 Cal. 126 (131); A. 1967 Assam 44 (47); A. 1965 Bom. 267; A. 1967 Delhi 79 (82).

25. *State of M. P. v. Mandawar*, A. 1954 S.C. 493.



allowance,<sup>21</sup> unless, of course, such denial constitutes a violation of a constitutional provision, such as Art. 14.<sup>22</sup>

### (b) Seniority and Promotion

1. The same conclusion holds good as regards a claim for promotion<sup>1</sup> or to a particular rank in seniority,<sup>2</sup> unless it is governed by rules having statutory force,<sup>3-4</sup> in which case it is enforceable even by mandamus,<sup>5</sup> and the seniority list may be canceled and directed to be revised.<sup>6</sup>

2. Where, however, a statutory rule treats the service on *deputation* to another department as equivalent to service in the parent department, satisfactory service rendered in the new department should entitle him to promotions which are open on seniority-cum-merit basis and if the post he would be entitled to on that basis is refused to him, he has a cause of action and he may also claim the difference in salary lost to him on account of such refusal.<sup>7</sup>

3. Service in an *ex cadre* post does not confer any right to seniority in the department to which the employee belongs.<sup>8</sup>

4. But—

By reason of Art. 14 and 16 (1), a Government servant has a right to be considered for promotion to the next higher post when a vacancy arises.<sup>9</sup>

### (c) Pension

Pension after retirement is granted at the discretion of the Government and the Service Rules usually lay down that "full pension admissible under the Rules is not to be given as a matter of course" and that the sanctioning authority has the discretionary power to reduce the pension as it thinks proper where the service of the Government servant "has not been thoroughly satisfactory." Hence, if this discretionary power is exercised and the pension is reduced, the Government servant has no legal remedy, even though the Rules laying down the mode of computation of the pension are statutory.<sup>10</sup>

Where, however, the above discretionary power to reduce the pension is not exercised according to the Rules, the pension already due according to the Rules is recoverable by suit.<sup>11</sup>

B. But once a Rule is held to be *mandatory*<sup>12 13</sup> (and it is not inconsistent with the Constitution), there is no reason why it should not be enforceable like any other statutory rule and should be considered to be mere administrative instructions, simply because they relate to matters relating to Government service.

### (d) Disciplinary proceedings

1. Where the Rules relate to dismissal, removal or reduction in rank and purport to lay down the *same thing* as is safeguarded by Art. 311, the

1. *Santa Ram v. State of Rajasthan*, A. 1967 S.C. 1910.

2. *High Court v. Amalkumar*, A. 1962 S.C. 1704.

3. *D. R. Nim v. Union of India*, (1967) S.C. [C.A. 371/65]; *Jaisinghani v. Union of India*, (1967) S.C. [C.A. 1058/65]; *Malhotra v. Union of India*, (1967) S.C. [C.A. 1039/65]; *Wadhwa v. Union of India*, A. 1964 S.C. 423.

4. *State of Mysore v. Chandrasekhara*, A. 1965 S.C. 532 (537-8); *Gaya Prasad v. State of Bihar*, A. 1969 Pat. 311.

5. *State of Mysore v. Bellary*, A. 1965 S.C. 868.

6. *Noharia Ram v. Director-General*, A. 1958 S.C. 113.

7. *Santa Ram v. State of Rajasthan*, A. 1967 S.C. 1910.

8. E. g., Civil Service Regulations.

9. *Gandhi v. Union of India*, A. 1962 Punj. 8.

10-22. *Niranjan Singh v. State of U. P.*, A. 1957 S.C. 142; Cf. *State of Bombay v. Narul Lati*, (1965) 11 S.C.W.R. 667.

question of enforceability of the Rules becomes academic, because in any view of the matter, the aggrieved employee will get relief.

2. But supposing the Rule relates to matters other than those governed by Art. 311, or relates to disciplinary action but provides for some safeguard *in addition to* those provided by Art. 311, should the employee have relief in a Court if such Rules are violated, without contravening Art. 311?

(i) Of course, the Rule itself will be void if it contravenes Art. 310 or 311 or any other provision of the Constitution. Thus,

If the Rule provides that a Government servant would be irremovable, it will operate as a fetter upon the pleasure of the President or Governor under Art. 310 and will, accordingly, be unenforceable.<sup>23</sup>

Similarly, if the Rule provides that the Government servant shall be removable by an authority subordinate to the appointing authority<sup>24</sup> or that the Government servant shall be removable without offering him a reasonable opportunity of showing cause<sup>25</sup> or without the Rule holding an inquiry into the charges,<sup>26</sup> it will be void. On the other hand a Rule providing for an inquiry cannot prevail against an order of the President or Governor dispensing with inquiry made in exercise of his constitutional power under Art. 311 (2), proviso (c).<sup>1</sup>

(ii) But if the Rule imposes some procedure *in addition to* that laid down in Art. 311 (2), *without fettering the pleasure* of the Government under Art. 310, there is no reason why the Rule having statutory force, shall not be enforceable.<sup>2</sup>

For instance,--(a) Where the Rule says that departmental action in respect of charges relating to certain offences can be taken against Police officers only after a police investigation is held into such charges, a departmental proceeding held without such prior police investigation shall be quashed by *mandamus*.<sup>2</sup> The Supreme Court found that the U. P. Police Regulations, which contained a Rule to the preceding effect, maintained in fact the power of the Governor to dismiss Police Officers at his pleasure but provided for a procedure for exercising that pleasure which was consistent with Art. 311 (2). Hence, the Rule was valid and its violation rendered the dismissal void.<sup>3</sup>

(b) Similarly, where the statutory rule says that an enquiry must be held before removal or dismissal in case the person charged so desires, a dismissal or removal without holding such inquiry would be invalid.<sup>4</sup>

(c) If the statutory rule (e.g., R. 1721 of the Railway Establishment Code) provides—

(i) That the delinquent officer must be given an opportunity of being accompanied by another Railway servant or a trade union officer (who is not a profession lawyer);<sup>4</sup>

(ii) That the appellate authority, if requested, shall give the appellant an opportunity of personal hearing;<sup>4</sup>

(iii) That the appellate authority must also take into consideration certain specified matters;<sup>4</sup>

and it appears that any of these statutory requirements has not been complied with, the order will be liable to be quashed.<sup>4</sup>

23. *State of U. P. v. Baburam*, A. 1961 SC 751 (758-765-6).

24. *Cf. Balakrishna v. Asst. Security Officer*, A. 1960 M. P. 183.

25. *Ramlal v. Union of India*, A. 1963 Rai 57 (60) [R. 1709 of the Railway Establishment Code].

1. *Enwariah v. State of Andhra*, A. 1958 A. P. 298 (291).

2. *State of U. P. v. Baburam*, A. 1961 SC 751 (765-6).

3. *State of Bombay v. Nurul Latif* (1965) 11 S.C.W.R. 667.

4. *Ganwani v. G. M. S. E. Ry.*, A. 1965 Cal 557 (567).

(iv) Similarly, if in a case where Art. 311 (2) is not attracted at all, e.g., in the case of civilian defence personnel, the President makes a 'Rule under Art. 309 [e.g., *Civilians in Defence Services (Classification, Control and Appeal) Rules, 1952*], extending the provisions of Art. 311 (2) or some procedure similar to that under Art. 311 (2) to such employees, a dismissal in contravention of such Rule must be set aside.'

(v) Again, the subject-matter of the Rule may relate to a matter other than termination of the service to which the pleasure under Art. 310 relates. If such a Rule, being mandatory, is enforced, it would not constitute a fetter upon the pleasure. As our Supreme Court has held,<sup>9</sup> there is no reason to hold that because the tenure of a service is at the pleasure of the State, all the other conditions of service, not relating to termination, should also be at the pleasure of the State.

#### (c) Transfer.

1. When a person belongs to a service or cadre which is transferable, then, in the absence of any statutory restrictions, a person appointed to the cadre or service is transferable from one post to another, in the interests of public service.<sup>7</sup>

2. When a member of a transferable service is thus *permanently* transferred to another department, it is not necessary that there should be a fresh order of appointment of that person in the new department.<sup>8</sup> If such transfer he comes under the disciplinary control of the head of the department.<sup>6</sup>

3. An order of transfer cannot be challenged on the mere ground that the employee would thereby lose his chances of promotion in the Department from which he has been transferred.<sup>9</sup>

#### 4. But--

(a) When a post is created by statute, without making transferability a condition for appointment to the post and the person who is appointed to the post does not belong to any transferable cadre or service,<sup>10</sup> such person cannot be transferred to some other post, even though he is a whole time public servant.<sup>7</sup>

(b) After a person has acquired the status of a permanent Government servant, his subsequent transfer to any temporary post cannot affect his permanent status.<sup>11</sup>

(c) Where the right of the Government to transfer is founded on a statutory rule, it is liable to be challenged on grounds upon which any statutory order may be challenged, such as

(i) *Ultra vires*, where the statutory conditions have been violated;

(ii) *Malu fide*.<sup>7 11a</sup>

But the Court cannot question the *propriety* of an order of transfer.<sup>11a</sup>

5. *Kapoor Singh v. Union of India*, A. 1960 M. P. 119. 'The decision to the contrary in *Kailaschand v. G. M.*, A. 1966 M. P. #2, which does not notice the earlier decision, is, it is submitted, not sound.'

6. *State of Bihar v. Abdul Majid*, A. 1954 S.C. 245.

7. *State v. Hirendra*, A. 1967 Cal. 285 (288) D.B.; *Fateh Singh v. State of Punjab*, A. 1970 P. & H. 315 (318).

8. *State of U. P. v. Ram Noresh*, A. 1970 S.C. 1263 (1265).

9. *Cf. State of Mysore v. Parohit*, (1967) S.C. [C.A. 2281/66, d. 25-1-67].

10. *Prem Beharilal v. Director*, A. 1959 All. 629.

11. *Rajendra v. State of Haryana*, A. 1970 P. & H. 1321 (144).

11a. *Cf. Lockman v. Shivgawarhar*, A. 1967 Punj. 76 (79).

### Whether the Rules can be changed retrospectively.

1. The controversy in the High Courts<sup>12</sup> as to whether the Government could make rules under Art. 309, so as to affect the conditions of service of persons appointed before such rules are made, appears to have been settled by the Supreme Court, in the affirmative, in *Vadera v. Union of India*<sup>13</sup>

2. But where the retrospective change of the Rules contravenes an independent constitutional provision,<sup>14</sup> such as Art. 14<sup>15</sup> 16 or the like,<sup>16</sup> the person affected may have a cause of action.

3. Nor can a Rule made under Art. 309 take away a privilege conferred by a statute<sup>16</sup>

4. It is to be noted in this context, that where a Rule or amendment is given effect to only from the date when it is promulgated and not from any earlier date, it cannot be said to be retrospective merely because, in its operation, it would affect persons who had entered into the service prior to the date of commencement of the Rule or amendment.<sup>17</sup>

### Non-statutory rules and orders not enforceable.

It is clear that where a rule or order is merely administrative, having no force of law, there is no cause of action for breach thereof unless such order constitutes a violation of some statutory or constitutional provision, e.g., —

Where a person mentioned in a list of approved officers fit for promotion is not promoted according to such list.<sup>18</sup>

### Art. 309 and ss. 115, 129 of the States Reorganisation Act.

1. Art. 309 gives, subject to the provisions of the Constitution, full power to make rules relating to the employees of a State to the State Government.

The Proviso to s. 115 (7) of the States Reorganisation Act limits that power but that limitation is removable by the Government by giving its previous approval to the making of rules by a State Government.<sup>19</sup>

2. The State Government's power to make rules has not been taken away by ss. 115 and 129 of the States Reorganisation Act but may be exercised in so far as it is not circumscribed by the Central Government choosing to exercise its power.

3. The power to prepare an inter-State priority list after the reorganisation, belongs to the Central Government under s. 115 (5) of the Act. But until such list is made by the Central Government a State Government is not powerless to make a provisional list and to act on the basis thereof subject to this that as soon as the central list is made the State Government must give effect to that list if it makes any alteration in the matter.<sup>20</sup>

<sup>12</sup> 5 Sh. 629

<sup>13</sup> *Vadera v. Union of India* A 1969 SC 116 (125) overruling the Mysore decision in *Gorindappa v. I. G. R.* A 1965 Mys. 25 and explaining the observations in *State of Mysore v. Padmanabhacharya* A 1966 SC 602 (603).

<sup>14</sup> *Padmanabhacharya v. State of Mysore* A 1962 Mys. 280 (288).

<sup>15</sup> *Roshan Lal v. Union of India* A 1967 SC 1889 (1894).

<sup>16</sup> *Iyengar v. State of Mysore*, A 1961 Mys. 37 (42).

<sup>17</sup> *Bishun Narain v. State of U. P.* A 1965 SC 1567.

<sup>18</sup> *Apanna v. State of Mysore* A 1965 Mys. 19 (25).

<sup>19</sup> *Raghavendra v. Dy. Commr.* A 1965 SC 136.

<sup>20</sup> *Patel v. State of Gujarat*, A 1965 Guj. 23 (F.B.), [vide contra *Bhagwantha v. State of Mysore*, A 1969 Mys. 306].

4. The duty of the new State is, if course, to offer an 'equivalent' post to be an allocated employee. But where the post held by the employee in the old State was an 'odd' one, which cannot be possibly equated to a corresponding one in the new State, a special treatment of such employee is not necessarily discriminatory.<sup>21</sup> The 'equivalence' must be in accordance with the criteria laid down by the Central Government,<sup>22</sup> under s. 117

5. The limitation in the Proviso to s. 115 (7) of the Act which says that in determining the conditions of service in the case of any person his existing conditions of service should not be varied to his disadvantage except with the previous approval of the Central Government does not prevent the State Government from changing the cadre of any service, from a district wise to a State wise system, even though the chances of promotion of certain persons may be affected by such change

### Arts. 309 and 233-4.

1 So far as judicial officers are concerned, the provisions of Art. 309 are to be read subject to Arts 233-4. The result is, that though the Governor is entitled to make rules under Art 309, prescribing the conditions of service of such officers,—(a) the recruitment of judicial officers (other than district judges) must be made in accordance with the Rules framed under Art 254, and (b) the appointment of district judges can be made only in accordance with the provisions of Art 233.<sup>24</sup>

2 On the other hand, it is competent for the Government to provide in the rules made under Art 309 (read with Art 255) that the inquiry into charges made against judicial officers under Art 311 (2) should be made by the High Court, the final power of award in the punishment being retained by the Government.

3 Art 233 provides that the appointment, posting and promotion of a District Judge can be made by the Governor only in consultation with the High Court. Such consultation is mandatory and must take place on each such occasion.<sup>1</sup> A Rule which violates Art 253 even indirectly would be unconstitutional.<sup>1</sup>

4 The power of the Governor to make rules under the Proviso to Art 309 as regards the appointment of 'persons other than district judges to the judicial service of a State' is subject to the provisions of Art. 234. Hence, such rules cannot be valid unless made in consultation with the State Public Service Commission and the High Court.<sup>2</sup>

5 The rules under Art 234, it is to be noted, can be made or amended<sup>3</sup> by the Governor only after consultation with the State Public Service Commission and the High Court, which consultation is imperative.<sup>3,4</sup>

### Amendment of Rules made under Art. 309.

A rule made under Art 309 may be amended by another Rule made under Art 309 or by an Act of the appropriate Legislature but not by an

21. *State of Maharashtra v. Ministerial Services Assn.* (1966) 11 L.L.J. 132 (135) S.C. A. 1966 S.C. 625.

22. *Union of India v. P. K. Roy*, A. 1968 S.C. 850 (852)

23. *State of Mysore v. Purohit*, (1967) S.C. (1967) Service Law Reporter, 753.

24. *Amar Singh v. State of Rajasthan*, A. 1956 Raj 104 (106)

25. *Ghouse v. State of A. P.*, A. 1959 A.P. 497 (503)

1. *Chandra Mohan v. State of U. P.*, A. 1966 S.C. 1987 (1990)

2. *Devashyam v. State of Madras*, A. 1958 Mad. 53 (61); *Amar Singh v. State of Rajasthan*, A. 1956 Raj. 104.

3. *State of Mysore v. Krishnacharya*, A. 1967 Mys. 77 (79)

4. *Chandrasekhar v. State of Mysore*, A. 1963 Mys. 292.

ad hoc order, even though issued in the name of the Governor under Art. 166,<sup>5</sup> not purporting to act under Art. 309.

**Some Service Rules made under the Proviso to Art. 309:**

(i) The Civilians in Defence Services (Classification, Control & Appeal) Rules, 1952<sup>6</sup>

(ii) The Central Civil Services (Conduct) Rules, 1955 and 1964.<sup>7</sup>

(iii) The Central Civil Services (Classification, Control & Appeal) Rules, 1957<sup>8</sup> and 1965.

(iv) Railway Establishment Code, 1959 with its Appendices,<sup>9,10</sup> the Indian Railway Establishment Manual.<sup>9</sup>

(v) The Union Territories Employees Rules, 1959<sup>11</sup>

**310. (1)** Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or an all-India service or holds any post connected with defence of any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor.....<sup>12-14</sup> of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor.....<sup>12-14</sup> of the State, any contract under which a person, not being a member of a defence service or of an all-India or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor.....<sup>12-14</sup> as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate the post.

**Art. 310: Office during pleasure of Government.**

1. Cl (1) of this Article provides that subject to the other provisions of the Constitution in his behalf, all civil posts under the Government are held at pleasure of the Government under which they are held and are terminable at its will. This right of the Government is, however, subject to the restrictions imposed by Art 310 (2) and Art 311 (1) (2).<sup>15</sup> Hence, the dismissal of civil servants must comply with the *procedure* laid down in Art 311, and Art 310 (1) cannot be invoked independently with the object of justifying a contravention of Art 311 (2).<sup>16</sup>

5. *State of Mysore v. Padmarubhacharya*, A. 1966 S.C. 602 (605)

5a. *State of U. P. v. Baburam*, A. 1961 S.C. 751 (para 22)

6. *Cf. Subodh v. Callaghan* (1966) 60 C.W.N. 917 (921) [Gaz. of India, dated 2-2-52]; *Kailaschand v. G. M. A.* 1966 M.P. 81 (84)

7. S.R.O. 551 dt. 7-3-55

8. S.R.O. 607, dt. 28-2-57.

9. *Union of India v. Shanti Kumar*, A. 1967 Cal 129 (130)

10. *Lachmandas v. Sureswarikar*, A. 1967 Punj 76

11. *Ramesh v. Union of India*, A. 1970 Delhi 129 (130) (Amendment) Act, 1956.

12-24. References to 'Pravukh' have been omitted by the Constitution (Seventh

25. *Parshotam v. Union of India*, A. 1957 S.C. 36 (41)

1. *Khemchand v. Union of India*, A. 1958 S.C. 300 (304)

2. *Motiram v. Union of India*, A. 1965 S.C. 600 (610)

2. The office being terminable at the pleasure of the State, there is no limitation as to the *grounds*<sup>3</sup> upon which the services of a Government servant may be terminated. Once the procedure under Art. 311 (2) has been complied with, the Courts are not entitled to determine whether the ground or the charge upon which Government has proceeded against a Government servant is sufficient to warrant a dismissal.<sup>4</sup>

But a rule, which provides for dismissal on a ground which unreasonably restricts the fundamental rights of a Government servant, may be challenged as unconstitutional (see pp. 676-84, *ante*).

3. The words "pleasure of the 'President' or Governor" do not mean that the article is applicable only when a Government servant is dismissed by the President or Governor personally. Under Arts. 53 (1) and 154 (1), the executive power of the Union or a State may be exercised by the President or Governor either directly or through officers subordinate to him. Hence, Art. 310 is attracted whenever a person is dismissed by an officer competent to dismiss such person serving under the Union or a State, as the case may be. But where the power is vested in the President, it cannot be delegated by him.<sup>5</sup>

#### **Whether the pleasure can be fettered by legislation.**

Art. 310 (1) provides that all service is held at the pleasure of the President or Governor 'except as provided by this Constitution.'

From this, the Bombay High Court<sup>6</sup> has held that this pleasure cannot be fettered except by the provisions of Art. 311, in the result, the pleasure cannot be fettered by ordinary legislation. The Court, accordingly, refused relief to an industrial employee of the Government whose services had been terminated in contravention of the provisions of the Industrial Disputes Act, 1947.

#### **Cl. (1): 'Except as otherwise provided by this Constitution'.**

1. These words refer, *inter alia*, to Arts. 124, 148, 217, 218 and 324 which, respectively, provide that the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except in the manner laid down in those Articles.<sup>7</sup> The holders of these offices, therefore, hold their posts not at the pleasure of the 'President' but 'during good behaviour'.

2. As already stated, cl. (1) of the present Article is to be read subject to the conditions imposed by cl. (1) (2) of Art. 311,<sup>8</sup> 313.

#### **Whether Art. 310 (1) is controlled by fundamental rights.**

There was a difference of opinion as to whether the pleasure of the Government to terminate the services of a Government servant is to be exercised subject to the fundamental rights contained in Part III which are applicable to all citizens.

The question has now been settled in the affirmative, by several Supreme Court decisions.<sup>9-10</sup> [See pp. 679, 683, *ante*].

3. *Cl. Madhosingh v. State of Bombay*, A. 1960 Bom. 285.
4. *State of Orissa v. Vidayabhusan*, A. 1963 S.C. 779 (786).
5. *Cl. Jagannath v. Asstt. Excise Commr.*, A. 1959 All. 771 (774); *Moti Ram v. N. E. F. Rly.*, A. 1961 S.C. 75 (para 57).
6. *Ravindran v. Patel*, (1956) S.A. 1061/56, referred to in *Shankarlingam v. Union of India*, (1960) 62 Bom.L.R. 1 (5-6).
7. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.
8. *Parshotam v. Union of India*, A. 1957 S.C. 36 (41); (1958) S.C.R. 828.
9. *Union of India v. More*, A. 1962 S.C. 630 (633).
10. *State of Orissa v. Dhirendranath*, A. 1961 S.C. 1715; *Kapur Singh v. Union of India*, (1960) 2 S.C.R. 569; *Jagannath v. State of U. P.*, A. 1961 S.C. 1245 (1252); *Kameshwar v. State of Bihar*, A. 1962 S.C. 1160 (1172); *Ghosh v. Joseph*, A. 193 S.C. 812 (814).

**Whether pleasure of the Government can be fettered by contract.**

In India, Art. 310 (1) is not subject to the provisions of any contract.

Consequently, notwithstanding the existence of a contract, Government is free to terminate the services of the employee before the expiry of the contractual period and without payment of compensation<sup>11</sup>

This general principle is, however, subject to payment of *compensation* in the limited class of cases which come within cl (2) of Art 310. It is to be noted that even in such cases, Government is not debarred from dismissing the contractual employee, subject to payment of such compensation, in the contingencies specified in cl (2)

Where, however, the pleasure of the Government itself is subject to an express provision of the Constitution, the constitutional provision cannot be overridden by the Government by entering into a contract. Thus, while the provision in a contract for temporary employment that the employment would be terminated after one month's notice without assigning any reasons is quite valid,<sup>12-18</sup> a provision to the effect that no notice would be required for terminating such employment on the ground of some misconduct or inefficiency would be void for contravention of Art 311 (2).<sup>13-14</sup>

**'All-India Service'.**

1. A member of the Indian Civil Service is a member of an all-India Service as defined in Art 312, *post*. Hence subject to the special privilege's safeguarded by Art 314, *post*, he holds his service at the pleasure of the President under Art 310 (1) and is liable to be dismissed by him<sup>15</sup> whether employed under the Union or a State for the time being

2. But though removable only by the President where a member of an all-India Service is for the time being employed in a State, there is nothing to debar the State Government from exercising its statutory power under the Public Servants (Inquiries) Act 1850, to make any inquiry against such officer<sup>16</sup>

3. Such civil servants are entitled to the protection of Art 311<sup>17</sup>

**'Member of a civil service of a State or holds any civil posts'.**

The expression includes members of the staff of a High Court<sup>18</sup>

**'Civil post'.** - See *post*

**Cl. (2): Compensation payable for premature termination of contractual service.**

1. Though all service under the Government is terminable at any time, the present clause provides for payment of compensation where the service is held under a special contract which provides for such compensation and the service is terminated before the expiry of the contractual period

2. The present clause is not applicable in the following cases

- (i) In the case of members of the *Defence Services*
- (ii) In the case of members of the *all India Services*
- (iii) In the case of members of a civil service of the Union or of a State.

11. *Mohan v Pepsu*, A 1954 Pepsu 136 (143).

12. *Satis Anand v. Union of India*, A 1953 SC 250

13. *Parshottam v. Union of India*, A 1958 SC 36

14. *Fakir v. Chakravarti*, (1954) 58 C.W.N. 336 (339) [Cf. *Moti Ram v N E F. Ry.*, A. 1964 SC. 600 (610)].

15. *Kapur Singh v. Union of India*, (1960) 2 S.C.R. 569 (577-8)

16. *Pradyat v Chief Justice*, (1955) 2 S.C.R. 1331.



The scope of this clause is, therefore, very narrow, and is limited to those cases where the post does not belong to any of the regular services and Government is obliged to enter into a special contract for securing the services of a person having special qualifications. But even in these cases, no compensation would be payable under the clause if the service is terminated within the contractual period, on the ground of his *misconduct*. It will be payable only—

(a) if the post is abolished before the expiration of the contractual period; or

(b) if the person is required to vacate his post before the expiry of the contractual period, for reason *unconnected with misconduct*

3. The provision in cl. (2) is only an enabling provision and empowers the Government to enter into a contract with a specially qualified person, providing for payment of compensation where no compensation is payable under the doctrine of 'service at the pleasure of the State'. It does not, however, mean that if there is a contract with a specially qualified person, the contract must necessarily contain such a term as to compensation or that in the absence of such a term the contract would be invalid for contravention of Art. 310 (2).<sup>17</sup>

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

**311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.**

**(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry<sup>18</sup>**

**Provided that this clause shall not apply—**

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry;<sup>19</sup> or

(c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry<sup>19</sup>

**(3) If, in respect of such person as aforesaid,<sup>19</sup> a question arises whether it is reasonably practicable to hold such inquiry as is referred to in<sup>19</sup> clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.**

#### **Amendment.**

The changes indicated by italics were introduced by the Constitution (Fifteenth Amendment) Act, 1963, which came into force on October 6, 1963.

17. *Mohan v. Pepsu*, A. 1954 Pepsu 136 (149).

18. Substituted by the Constitution (Fifteenth Amendment) Act, 1963.

**Effects of Amendment.**

See *post*.

**Scope of Arts. 310 and 311.**

1. Art. 311 does not in any way alter or affect the principle that a Government servant holds office at the pleasure of the President or the Governor, as the case may be. Art. 311 only subjects the *exercise* of that pleasure to the two conditions laid down in this Article. In other words, the provisions of Art. 311 operate as a proviso to Art. 310 (1),<sup>19, 20</sup> in relation to persons holding *civil* posts.

2. These two conditions are—

(i) that such an employee shall not be *dismissed* or removed by any authority subordinate to that by which he was appointed;

(ii) that such an employee shall not be *dismissed, removed or reduced in rank* until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him

The object is to afford protection to a class of persons who otherwise hold their office during pleasure<sup>21</sup>

3. The Article makes no distinction between permanent and temporary members of the services or between persons holding permanent or temporary posts.<sup>22, 23</sup>

If a person's services are terminated or he is reduced in rank in contravention of the conditions and formalities prescribed by Art. 311 he has a cause of action to complain to the Court<sup>24</sup>

4. Art. 311 is not subject to Art. 309, 310 or any other provision of the Constitution<sup>25</sup>

5. Art. 311 has no application—

(a) to persons in the *military* service,<sup>26</sup>

(b) to persons who do not serve under the Union or a State, but under a statutory corporation, such as the Life Insurance Corporation<sup>27</sup>

**Unconstitutionality of Rules inconsistent with Art. 311.**

It has been already stated (p. 675, *ante*) that neither the Legislature nor the Executive can make a Rule under Art. 309 to override the provisions of either cl. (1) or cl. (2) of Art. 311<sup>28</sup>

Instances of Rules which have been declared void by the Courts on the ground of contravention of Art. 311 are—

(i) R 10 of the U P Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, which *requires* the Governor to accept the recommendation of the Tribunal and to pass an order of punishment in terms recommended by the Tribunal is void because every police officer holds his office at the pleasure of Governor (Art. 310) and is entitled, under Art. 311 (2) to a reasonable opportunity to show cause to the *satisfaction of the Governor* against the action proposed to be taken against him.<sup>29</sup>

19. *Pradyat v Chief Justice* (1955) 2 SCR 1331

20. *Moti Ram v. General Manager* A 1961 SC 600

21. *Parshotam v Union of India* A 1958 SC 36

22. *Benjamin v Union of India*, (1958) SC. ICA 1341 '66)

23. *Divisional Personnel Officer v Karavendrachar* (1966) 2 SCR 106 (110)

24. *State of Bihar v. Abdul Majid* (1954) SCR 285

25. *Union of India v. Ramchand* A 1955 Puri 167

1. *Atarwal v. Hindusthan Steel* A 1970 SC 1150; *Mafatlal v. Divisional Controller* (1966) 3 SCR 40 (42)

2. *N. W. F. P. v. Suraj Narain* A 1149 PC 112; *Motiram v. General Manager*, A 1964 SC 600.

(#) If a junior Police officer has a statutory right to be promoted to the Senior scale by seniority in service, any Rule which provides that he would be liable to be demoted if an officer junior to him is considered more suitable, would be unconstitutional, because a person who has a right to a rank or post cannot be deprived thereof without complying with Art 311 (2).<sup>4</sup>

**Scope of cl. (1):—No dismissal by authority subordinate to appointing authority.**

1. This clause applies only if the following conditions are satisfied--

(a) That the person whose services are terminated is a member of a civil service or holds a civil post.

(b) That such termination amounts to 'dismissal' or 'removal'<sup>5</sup> as explained below. Thus, cl. (1) need not be complied with where a person is discharged in terms of the conditions of his contract of service.<sup>6</sup> Similarly, where the penalty awarded is other than dismissal or removal, e.g., reduction in rank, or suspension, it may be awarded by an authority who is empowered in that behalf by the Rules even though he is not the 'appointing authority'.<sup>7</sup>

2. Cl. (1) makes it imperative that the order of dismissal of a civil servant should be made by an authority who is not subordinate to the authority who appointed that civil servant. A dismissal by an officer *subordinate* to the appointing authority is null and void.<sup>8</sup>

3. On the other hand,--

(a) This clause does not require that the dismissal or removal must be ordered by the very same authority who made the appointment or by his direct superior. There is a compliance with the clause if the dismissing authority is not lower in rank or grade than the appointing authority.<sup>9</sup> It follows that dismissal by an authority superior to the appointing authority is not bad.<sup>9</sup>

(b) The dismissal is not invalid where the order of dismissal is passed by the appointing authority but the order is merely *communicated* by some subordinate officer.<sup>10</sup>

(c) Where a minor punishment has been awarded by a subordinate authority, there is nothing to prevent the superior appointing authority from reopening the case and imposing the higher punishment referred to in Art 311 (1),<sup>11</sup> subject, of course to the procedural requirements of Art 311 (2).

(d) It is for the Government servant to plead and prove who was his 'appointing authority' and also that the dismissing authority is lower in rank than the appointing authority.<sup>12</sup>

(e) 'Reduction in rank', it is to be noted, is covered by Cl. (2), but not by Cl. (1).

3. *Jagannath v. State of U. P.* A. 1961 S.C. 1245 (1252).

4. *Wadhwa v. Union of India* A. 1974 S.C. 423.

5. *Jagdish v. Union of India*, A. 1964 S.C. 449.

6. *Isvar Narain v. Union of India*, A. 1967 All. 439, *Sharda Prasad v. A. G.* U. P., A. 1955 All. 496.

7. *Md. Ghouse v. State of Andhra*, A. 1957 S.C. 246 (249).

8. *N. W. Frontier Prov. v. Suraj Narain*, A. 1949 P.C. 112; *State of Bihar v. Abdul Majid*, (1964) S.C.R. 785.

9. *Mahesh Prasad v. State of U. P.*, A. 1955 S.C. 70 (73); *State of U. P. v. Ram Naresh*, A. 1970 S.C. 1263 (1265).

10. *Bhojraj v. Maharashtra Government*, A. 1952 Sau. 40 (42); *Balakrishna v. Union of India*, (1958) S.C.R. 1952 (1066).

11. *Dandl v. State*, A. 1959 Raj. 284.

12. *State of U. P. v. Om Prakash*, (1970) 1 S.C.W.R. 139 (160).

**Subordinate.**

'Subordinate' refers to subordination in rank and not in respect of function.<sup>13</sup>

(A) 1. Where the order of dismissal is made by an authority subordinate to the appointing authority, the unconstitutionality is not cured by the fact that the order of dismissal is confirmed, on appeal, by the proper authority.<sup>14, 15</sup> On the same principle, the appointing authority cannot delegate his power of dismissal or removal to a subordinate authority, so as to destroy the protection afforded by the Constitution,<sup>16</sup> unless the Constitution itself authorises such delegation by other provisions.<sup>17</sup>

It is not possible for the proper authority to validate an order made without jurisdiction, with retrospective effect.<sup>1</sup>

2. Any rule which seeks to vest the power of dismissal in an authority subordinate to in rank to the appointing authority shall be void.<sup>18</sup>

3. The constitutional protection offered by this clause cannot be taken away by rules framed under Art. 309 vesting the power of dismissal in an authority subordinate to the appointing authority.<sup>19, 21</sup> It follows that changes in these Rules as regards the appointing authority will not affect the rights of a civil servant under Art. 311 (1), so as to render him liable to be dismissed by an authority lower in rank than the authority by whom he was appointed.<sup>20</sup>

(B) On the other hand,

(1) This clause does not require that the dismissal or removal must be ordered by the very same authority who made the appointment or by his direct superior. There is a compliance with the clause if the dismissing authority is not lower in rank or *post* than the appointing authority.<sup>22</sup> It follows that dismissal by an authority superior to the appointing authority is not bad.<sup>23</sup>

(ii) On the other hand, where a minor punishment has been awarded by a subordinate authority, there is nothing to prevent the superior appointing authority from reopening the case and imposing the heavier punishment referred to in Art. 311 (1).<sup>24</sup>

4. There is some controversy as to whether the expression 'authority subordinate' refers to *existing* subordination.

A. On the one hand is the view<sup>25</sup> that the expression refers to a subordination existing at the time of the unajigned order of termination of service.

Hence, if at the time of dismissal the authority who appointed the delinquent was no longer available because that post had since been abolished<sup>26</sup> or the State in which the Petitioner had been appointed was defunct

13. *Mahadev v. Chatterjee*, A. 1954 Pat. 285; *Sobhagmal v. State*, A. 1954 Raj. (207); *Amkul v. C. I. F.*, A. 1962 Cal. 3; *Laxminarayana v. State of Orissa*, A. 1963 Orissa 8.

14. *Suraj Narain v. A. H. Prod.*, A. 1942 F.C. 3.

15. *Somasundaram v. State of Madras*, A. 1956 Mad. 419 (421).

16. *Ramchandra v. D. I. G.*, A. 1957 MP 126 (128); *Mahadev v. Chatterjee*, A. 1954 Pat. 285.

17. *Cf. Kapoorchand v. State of Rajasthan*, A. 1962 Raj. 258.

18. *N. W. F. P. v. Suraj Narain*, A. 1949 P.C. 112.

19. *Somasundaram v. State of Madras*, A. 1956 Mad. 419.

20. *Balakadas v. Asstt. Security Officer*, A. 1960 A.P. 183.

21. *Gurmukh v. Union of India*, A. 1963 Punj. 307.

22. *Mahesh Prasad v. State of U. P.*, A. 1955 S.C. 70 (73).

23. *Venkateswararao v. State of Madras*, A. 1954 Mad. 1043.

24. *Dulal v. State*, A. 1958 Raj. 284.

25. *Dulal v. R. K. Bose*, A. 1958 Cal. 356.

owing to integration,<sup>1</sup> the dismissal would be valid if it is ordered by an authority who has now the power to appoint in respect to the post held by the de inquent.

Similar situation arises where an appointing authority is *substituted* by another by law,<sup>2</sup> but not so where only the designation of the officers is changed.<sup>30</sup>

B. On the other hand is the view that where no officer equal in rank to the appointing authority is available, the order of dismissal should be passed by an officer of superior rank.<sup>3-5</sup>

Thus,

(i) The post of Deputy Inspector-General, the appointing authority of the Petitioner, having ceased to exist, the order of dismissal was passed by the Senior Superintendent of Police who had been vested with the powers of the Deputy Inspector-General. Nevertheless, the dismissal—was held to be in contravention of Art. 311 (1) inasmuch as the *rank* of the Senior Superintendent had always been subordinate to that of Deputy Inspector-General.<sup>5</sup> On the same principle, an officer authorised to perform the current duties of the appointing authority, without being clothed with his rank, would not be competent to dismiss.<sup>4</sup>

(ii) After having been appointed by the Head of a Department, the Petitioner was transferred to another Department. *Held*, he could not be removed by any person other than the Head of the new Department.<sup>6</sup>

### Appointing authority.

1. 'Appointing authority' means the authority which actually appointed the officer to the service which has been terminated. Thus,

(a) Where on a change in the administration, the previous service is terminated and a fresh appointment is made, the 'appointing authority' thereafter is the officer who makes the fresh appointment.<sup>7</sup>

(b) If, however, the previous service is *continued* by an order of the new administration, the appointing authority is the authority who corresponds to the authority who made the initial appointment.<sup>7</sup>

Thus,—

(i) In the absence of statutory rules to the contrary, when an officer is deputed from one State to another he is deemed to remain on the establishment of the parent State as regards disciplinary matters.<sup>8</sup>

But when a Government servant, transferred or deputed from one Department to another, elects not to go back to his parent Department and is permanently appointed in the transferee Department, he may be dismissed by the appointing authority in the new Department.<sup>9</sup>

(ii) The same principle has been applied in the case of employees of the Railways which were taken over by the Government of India in 1944.<sup>9</sup>

2. In order to ascertain who was the 'appointing authority' for the purposes of application of Art. 311 (1), the formal document on the basis of which the civil servant holds his appointment must be looked into.<sup>10</sup>

1. *Raghunath v. State of M. P.*, A. 1959 M.P. 43.
2. *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (249).
3. *Anukul v. Commr. of I. T.*, A. 1962 Cal. 3.
4. *Qidwai v. G. G. in Council*, A. 1953 All. 17.
5. *Gurmukh Singh v. Union of India*, A. 1963 Punj. 370.
6. *Mysore S. R. T. Corpn. v. Mohiuddin*, A. 1969 Mys. 41.
7. *Kama Iyer v. Union of India*, A. 1957 Ker. 1 (2).
8. *Jageram v. State of M. P.*, A. 1953 Nag. 160 (162).
9. *Nand Shankar v. State of Rajasthan*, A. 1957 Raj. 148.
10. *Kamtacharan v. Post Master-General*, A. 1955 Pat. 381 (384).

3. Hence, when a person is, in fact, appointed by an authority superior to the authority who is entitled, under the Departmental rules, to appoint that person, he can be dismissed only by that authority who had, in fact, ordered that appointment and not the authority empowered by the rules.<sup>11</sup>

4. The appointing authority referred to in Art 311 (1) means the authority who appointed the Government servant to *the post from which he has been dismissed or removed*. He may be an authority other than the authority who made the order of initial appointment of the employee concerned.<sup>12</sup>

But if it is not a new appointment but *transfer* from one Department to another no officer who is subordinate in *rank* to the appointing authority can dismiss him, e.g., a person appointed by the Commissioner of Excise cannot, on transfer to the Prohibition Department, be dismissed by the District Prohibition Officer who holds the rank of an Assistant Excise Commissioner,<sup>13</sup> when a person, appointed by the head of a Department, is transferred to an independent Department, he can be dismissed only by the head of the new Department.<sup>14</sup> The same principle shall apply where the Department itself is placed under another head or a new Departmental head is created.<sup>15</sup>

5. Where the power to appoint is vested by a statutory provision in one authority, to be exercised on the advice of another, it is the former who is to be regarded as the appointing authority.<sup>16</sup>

6. Where a person is confirmed in a higher post in which he was officiating, it is the officer who issues the order of confirmation who becomes his appointing authority and not the higher officer who may have selected him for such confirmation.<sup>17</sup>

### Appointing authority after integration of Indian States.

(1) In the case of officers of the Indian States who continue in service after the merger or integration of the States the contracts of service with the Indian States automatically terminated with such merger or integration.<sup>18</sup> If thereafter,

(a) An employee is continued in service by a specific order of appointment, the appointing authority, for the purposes of Art 311(1), will, obviously, be the authority who issued the order of appointment.

(b) If, however, the employee is retained in service of the integrated State, not by virtue of a specific order of appointment, but by virtue of a general order or law the appointing authority would be that authority who corresponds to or is equivalent to the authority who initially appointed the employee in the old State.<sup>19</sup> That is to say, that authority *who could have appointed* the employee in the new State at the time of the merger or integration.<sup>20, 21</sup>

### The power to dismiss cannot be delegated

1. The appointing authority cannot delegate his power of dismissal or removal to a subordinate authority so as to destroy the protection

11. *Somasundaram v. State of Madras*, 1 1966 Mad 419 (421)

12. *Madanlal v. Principal*, A 1962 All 166

13. *Cf. State of Assam v. Kripunath*, 1 1967 SC 459 (462)

14. *State of Assam v. M. K. Das*, A 1970 SC 1255 (1262)

15. *Amar Singh v. State of Rajasthan*, A 1958 SC 228

16. *Ramchandria v. D. I. G. Police*, A 1951 MP 126

17. *Sobhagmal v. State*, A. 1954 Raj 207

18. *Pradyat v. Chief Justice*, A 1956 SC 285 (291).

afforded by Art. 311 (1) of the Constitution, unless, of course, the Constitution itself authorises such delegation by other provisions.<sup>19</sup>

For the same reason, it is not possible for the proper authority to validate an order made without jurisdiction, with retrospective effect.<sup>20</sup>

2. The position is not different where a statutory provision vests the power of dismissal etc. in a specified authority.<sup>21</sup> Where the power to dismiss is vested in the President, it cannot be delegated to any other person and Art. 77 is not attracted to such power.<sup>22</sup>

3. It follows that the notice to show cause against the proposed punishment, after considering the guilt or innocence of the delinquent, must be issued by the disciplinary authority and the cause shown must also be considered by him, before making the final order.<sup>23</sup>

4. This does not mean that Government cannot empower an officer other than the appointing authority to dismiss a government servant; the only condition is that such officer must not be subordinate to the appointing authority.<sup>24</sup> R. 14A of the Fundamental Rules does not affect this power.<sup>25</sup>

### The power to inquire into the charges may be delegated.

1. The power to appoint or dismiss an officer is an administrative and not a judicial power notwithstanding the fact that an opportunity to show cause and an inquiry simulating judicial standards have to precede the exercise of the power to dismiss. Hence, it is open to the dismissing authority to take the assistance of some subordinate authority in the exercise of the power e.g., asking him to *enquire and report*,<sup>26</sup> provided that the ultimate responsibility for the exercise of the power to dismiss remains with the person who is entitled to dismiss under cl. (1) of this Article.<sup>27</sup> It is also competent for the Government to set up a statutory tribunal from the purpose of making such inquiries.<sup>28</sup>

2. What clause (1) requires is that the order of dismissal or removal must be made by an authority not subordinate to the appointing authority. It does not require that the order initiating the inquiry or the same person not subordinate to him.<sup>1</sup> But cl. (1), when read with cl. (2), implies that it is the dismissing authority himself who has to issue the notice to show cause contemplated by cl. (2) and to consider the cause shown, before making the order of dismissal or removal.<sup>2</sup> The 'appointing authority' must not only decide the measure of punishment but also the primary question of guilt or innocence.<sup>3</sup> The finding of the inquiry officer must not be taken as final.<sup>4</sup>

3. Though the principle that a prosecutor cannot be a Judge is not strictly applicable to a department inquiry and it is competent to a person who issues a notice of inquiry to make the inquiry himself, it would be a violation of the principle of natural justice if the officer selected for inquiry is the person against whom the person charged has made allegations and

19. *Kapurchand v. State of Rajasthan*, A. 1962 Raj. 258.

20. *Sher Singh v. Union of India*, A. 1966 Punj. 370 (371).

21. *State of U. P. v. Baburam*, A. 1961 S.C. 751 (para. 22).

22. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (519).

23. *State of U. P. v. Ram Naresh*, A. 1970 S.C. 1263 (1265).

24. *Cf. Osgood v. Nelson*, (1872) 5 App. Cas. 636 (645) H.L.

25. *Cf. Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules, 1953* [*Ghouse v. State of A. P.*, A. 1959 A.P. 497 (501)].

1. *Cf. Jyotirath v. State of Assam*, A. 1955 Assam 171.

2. This view, expressed at p. 436 of the First Ed. of this book now finds support from *Garewal v. State of Punjab*, A. 1959 S.C. 512 (519).

3. *Neelakanta v. State of Kerala*, A. 1960 Ker. 279; *Jagdeo v. State of Madras*, A. 1957 Andhra 197; *Sreedharan v. D. S. P.*, 1960 A.P. 473 (476).

who is, accordingly, interested to bring the guilt home to the accused at any cost.<sup>4</sup>

4. Where the Rules framed under Art. 309 or other statutory provision authorises an officer other than the punishing authority to initiate the charges or to hold the inquiry, there is no violation of Art. 311 (1).<sup>5</sup>

5. Where, however, the disciplinary power is vested by statute in a specified authority, all steps starting from initiation of the proceedings must be taken by the specified authority and not by delegate.<sup>6</sup>

### 'No person who holds a civil post'.

The provisions of Art. 311 extend to all persons holding a *civil post* under the Union or a State, including members of the All-India and State Service. Members of the Defence Services are thus excluded from the scope of this Article, but not Police officers.<sup>7</sup>

### 'Civil post'.

1. The expression 'civil post', *prima facie*, means an appointment or office on the civil side of the administration as distinguished from a post under the Defence Forces. The only persons who are excluded from the purview of Art. 311 (1) [which is in the nature of an exception to the general provision in Art. 130 (1)] are— (a) members of Defence Services and (b) persons holding any post connected with defence.<sup>8</sup>

2. All persons, excepting the above two classes, who hold any post under the Union or a State, hold a civil post.<sup>9</sup> It is immaterial whether the employee is a member of any of the civil services or whether the Civil Service Rules are applicable to him or not.<sup>10</sup> Similarly, whether remuneration is paid or not is immaterial,<sup>11</sup> provided the person has been employed by the Union or a State to a post, for the discharge of public duties, not connected with defence. The expression is wide enough to include all such employees, whether permanent or *temporary*,<sup>12</sup> or on probation,<sup>12</sup> or on officiating basis.<sup>12</sup>

3. A 'post', in this context, denotes an 'office'.<sup>8</sup>

A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and *which may exist apart from and independently of the holder of the post*. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State

4. *Choudhury v. Union of India*, A. 1956 Cal. 662 (665); *K. S. Rao v. State of Hyderabad*, A. 1957 Andhra. 114 (417).

5. *State of Kerala v. Sukumaran*, (1965) 11 L.L.J. 403 (408) (Ker.).

6. *Shardul Singh v. State of M. P.*, A. 1966 M.P. 193 (197). [See, in this connection, rr. 1702(ii) 1709, 1710 of the Ry. Establishment Code, Vol. I [*Sudarshanlal v. Agarwala*, A. 1966 Raj. 37], which lay down a contrary rule.

7. *Jagannath v. State of U. P.*, A. 1961 S.C. 1245 (1250); (1962) 1 S.C.R. 511.

8. *State of Assam v. Kanak*, A. 1967 S.C. 884; *Ajmani v. Union of India*, (1967) S.C. [C. A. 1185/65, d. 6-2-67].

9. *Qidwai v. G. G. in Council*, A. 1963 All. 17 (21).

10. *Nagendra v. Comms.*, A. 1955 Cal. 56 (58); *Brajnandan v. State of Bihar*, A. 1956 Pat. 353 (356).

11. *Rames v. Prov. of Bengal*, (1953) 57 C.W.N. 767 (775); *Isher Das v. Pepsu*, A. 1952 Pepsu 148; *Jayanti Prasad v. State of U. P.*, A. 1951 All. 793 (794).

12. *Parshotam v. Union of India*, A. 1958 S.C. 36; (1958) S.C.R. 830.



may create or abolish the post and may regulate the conditions of service of persons appointed to the post.<sup>4</sup>

4. The question for determination on this point is whether a relationship of master and servant<sup>12</sup> exists between the Government and the employee in question, and this is to be determined on a consideration of all the relevant circumstances in each case<sup>14</sup>. In general, selection by the employer coupled with payment by him of remuneration of wages, the right to control the method of work, and power to suspend or remove from employment are indicative of the relation of master and servant<sup>14</sup>. But co-existence of *all the indicia* is not predicated in every case to make the relation one of master and servant.<sup>15</sup> Ordinarily, the right of an employer to control the method of doing the work, and the power of superintendence and control may be treated as strongly indicative of the relation which imports the power not only to direct the doing of some work but the power to direct the manner in which the work is to be done. *If the employer has that power, prima facie, the relation is that of master and servant,*<sup>16</sup> as distinguished from that of an independent contractor.<sup>15, 16</sup>

5. The test for the application of Art. 102 or 191 is not relevant for the application of Art. 311.<sup>17</sup>

6. The real test for determining whether a person is holding a 'civil post' under the State is not whether he is paid out of the State funds but whether the post is held under the administrative control of the State.<sup>18</sup>

7. On the other hand, if the test of administrative control and the relationship of master and servant is established, the fact that the holder does not enjoy a definite rate of pay but works on commission<sup>19</sup> or is a part-time employee<sup>20</sup> does not exclude him from the category of the holder of a civil post under the Government.<sup>15</sup>

A. Applying the 'master and servant' test, the following persons have been held to be holders of 'civil post' within the meaning of the present Article—

- (i) Members of the Police forces.<sup>19, 20</sup>
- (ii) A Special Constable appointed under the Calcutta Suburban Police Act 1866.<sup>1</sup>
- (iii) The Manager of a Bank owned by a State.<sup>2</sup>
- (iv) A Home Guard appointed under the C. P. & Berar Home Guards Act.<sup>3</sup>
- (v) A General Manager of Court of Wards.<sup>4</sup>
- (vi) Officers appointed by a High Court.
- (vii) A *Tahsildar*, appointed, in the U. P., to assist a Government Treasurer.<sup>5</sup>
- (viii) Officers appointed by the Government to a Municipal body which the Government has taken over.<sup>6</sup> Where, however, the Municipality is not superseded by the

13. *State of Assam v. Kanak*, A. 1967 S.C. 884 (886).

14. *Cf. Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1350).

15. *State of U. P. v. Audh Narain*, A. 1965 S.C. 360 (363).

16. *Shivanandan v. Punjab National Bank*, (1955) 1 S.C.R. 1427; *Piyare Lal v. Commr. of I. T.*, (1960) 3 S.C.R. 669.

17. *Ranjit v. Union of India*, A. 1969 Cal. 95 (101).

18. *State of Punjab v. Prem Prakash*, A. 1957 Punj. 219.

19-20. *Jagannath v. State of U. P.*, A. 1961 S.C. 1245 (1250).

1. *Projo v. Commr. of Polire*, (1955) 59 C.W.N. 628 (630).

2. *Mohan v. Pepsu*, A. 1954 Pepsu-136 (139).

3. *Sher Singh v. State of M. P.*, A. 1955 Nag. 175.

4. *Sarkar v. State of Bihar*, A. 1940 Pat. 366 (369).

5. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.

6. *State of U. P. v. Audh Narain*, (1964) 9 F.L.R. 238 (S.C.).

7. *Prem Prakash v. State of Punjab*, A. 1954 Punj. 255.

Government, the mere fact that an employee of the Municipality is appointed by the Government under statutory powers, does not make the Municipal employee a State employee.<sup>8</sup>

(ix) A Mauzadar in Assam Valley.<sup>9</sup>

B. On the other hand,—

1. The employees of the following authorities, which constitute legal entities separate from the State,<sup>9-10</sup> cannot claim to be holders of posts under the State, in order to attract Arts 310-1 of the Constitution, even if they may adopt the Fundamental Rules for governing the employees:<sup>11</sup>

A company incorporated under the Companies Act,<sup>12</sup> including a 'Government company',<sup>9</sup> even though its management is responsible to the Government of India.<sup>13</sup>

2. There cannot be a 'civil post' unless there is some post<sup>9</sup> or office which exists apart from the person who is employed. Thus it has been held that the following employees *do not* hold a 'civil post'—

(i) A casual labourer<sup>9</sup> or member of a contingency staff which is casually appointed.<sup>14</sup>

(ii) Chaudharis or agents for collection of land revenue appointed under the Land Revenue Act of Bikaner.<sup>9</sup>

(iii) Extra departmental Branch Postmaster.<sup>12</sup>

(iv) Employees of the Employees' State Insurance scheme.<sup>15</sup>

(v) An extra typist who is occasionally appointed according to the needs of the time.<sup>16</sup>

(vi) Members of the Madras Local Authorities Electrical Engineers Service.<sup>17</sup>

(vii) The licensee of a Railway stall in a Railway station even though he has to work under the directions of the Railway administration.<sup>18</sup>

### Employees of statutory authorities.

1. A statutory authority being a juristic entity separate from the State,<sup>19</sup> an employee of a statutory authority cannot be said to hold a 'civil post' under the State, so as to attract Art. 311.<sup>13</sup>

2. The fact that a statutory corporation exercising statutory powers may be 'State' within the purview of Art. 12<sup>20</sup> does not necessarily lead to the conclusion that its employees hold civil posts under the State Government—the questions under the two provisions being different.<sup>21</sup>

8. *State of Punjab v. Prem Prakash* A 1957 Puri 219; *Mugal Samra v. State of Punjab* A 1952 Puri 58.

9. *Gurushantappa v. Inayat* (1964) 1 SCC 566 (171) Mysore Iron & Steel Ltd.]

9a. *State of Assam v. Kanak* A 1967 SC 884 (187).

10. *Tata Engineering Co. v. State of Bihar* A 1967 SC 40 S T v C T O 1963 SC 1811 (1822).

11. *Debi Prasanna v. State* A 1956 Cal 56.

12. *Praga Tools Corpn. v. Inamdar* (196 19 F I R 110 (111) SC.

12a. *Venkataram v. Supdt. of Post Offices* A 1957 Orissa 112.

13. *Agarwal v. Hindusthan Steel* A 1970 SC 1150.

14. *Karier Singh v. Pepsu* A 1955 Pepsu 25.

15. *Nanigopal v. State of W. B.* A 1970 Cal 1.

16. *Lakhan Pal v. State of U. P.* (1966) 13 F I R 333 (All).

17. *State of Madras v. Madurai Municipality* (1966) SC IC A 174/641.

18. *Nanik v. Union of India* (1970) SC IC A 51/70 d 20-7-701.

19. *Valubhai v. State of Bombay* A 1963 SC 1890 (1894); 4 P S R T C v 1, F. O., 4 1964 SC 1486 (1493).

20. *Rajasthan State Electricity Bd v. Mohan Lal* A 1967 SC 1857 (1861 2).

21. *Ranjit v. Union of India* A 1969 Cal. 95 (99).

3. There is another reason why Courts have refused to interfere with the termination of services of employees of statutory authorities, by the writ of *mandamus*. This writ issues only if there is any statutory duty or obligation which may be enforced against the authority. In the absence of statutory limitations, employment under a statutory authority is governed by the ordinary law of master and servant and the relation between the employer and the employee is contractual,<sup>22</sup> so that *mandamus* will not lie to interfere with an order of removal made by such authority,<sup>23</sup> in the absence of breach of statutory duty.<sup>24-2</sup>

If the termination of service is in breach of a statutory obligation in compliance with which only the employment can be terminated, a writ under Art. 226<sup>2</sup> as well as a suit for declaration will lie.<sup>24</sup> But if the regulations do not impose any statutory obligation but merely embody the terms of the *contract* of employment, only a suit for damages for wrongful dismissal will lie, in case of violation of such regulations.<sup>24</sup>

### Members of Defence services.

Under Art. 310, members of the Defence services hold office during pleasure of the President but they are not entitled to the protection offered by Art. 311,<sup>25</sup> as they do not hold 'civil post'.<sup>25</sup>

2 *Mandamus* may, however lie, for violation of the provisions of the Army Act or of Rules having a statutory basis, but not Rules and Regulations which are non-statutory and are in the nature of instructions for the guidance of the Authorities.<sup>1</sup>

### Civilians in Defence Establishments.

1. Civilians who hold posts 'connected with defence', cannot be said to hold 'civil post' under the Union whether the Army Act extends to them or not.<sup>1</sup> Hence, though Art. 310 does, Art. 311 does not apply to them.<sup>25, 2</sup>

2 But they can challenge an order on the ground of contravention of a Rule made under a statute or Art. 309 of the Constitution (e.g. Civilians in Defence Services (Classification, Control & Appeal) Rules 1952).<sup>3</sup>

### Police Officers.

1. As stated earlier, Police officers are holders of 'civil posts' within the meaning of Art. 311.<sup>4</sup>

2 A Police Officer is governed not only by the Police Regulations framed under the Police Act, but also by the Rules made under s. 241 of the Government of India Act in so far as they are not repugnant, or are not inconsistent with the Constitution.<sup>5</sup> Government has the option to proceed against a Police Officer under any of these Rules provided that

22. *Tiwari v. Dt. Board*, (1964) 1 L.L.J. 1 (S.C.).

23. *Lekhraj v. Deputy Custodian*, A. 1966 S.C. 334.

24. *U. P. State Warehousing Corporation v. Tyagi*, A. 1970 S.C. 1244 (1955).

25. *L. I. C. v. Sunil*, A. 1964 S.C. 847.

25. *Ajwani v. Union of India*, (1967) S.C. [CA. 1185/65].

1. *Chittoor v. State of T. C.*, A. 1953 T.C. 140.

2. *Kaboor Singh v. Union of India*, A. 1960 M.P. 119; *Kailashchand v. G. M. A.* 1966 M.P. 82 (84); *Tara Singh v. Union of India*, A. 1960 Bom. 101; *Dassmal v. Union of India*, A. 1956 Punt. 42; *Subhad v. O'Callaghan*, A. 1956 Cal. 532; 60 C.W.N. 917; *Atindra v. Gillet*, A. 1955 Cal. 543; 59 C.W.N. 835.

3. *Sham Lal v. Director, Military Farms*, A. 1968 Punt. 312 (319) F.B.

4. *Jaganmoh v. State of U. P.*, A. 1961 S.C. 1245.

5. *State of U. P. v. Baburam*, A. 1961 S.C. 751 (758).

there is no substantial difference<sup>6</sup> to the prejudice of the delinquent officer between the procedures under the two sets of Rules.<sup>4,7</sup>

3. Since these Rules are subject to Art. 310 of the Constitution, the Governor does not use his power to dismiss or remove a Police Officer merely because another authority is given that power by any of the aforesaid Rules.<sup>4</sup>

4. A provision in the Rules which makes it obligatory upon the Governor to accept the recommendations of the Tribunal set up under the Rules in the matter of dismissal etc., offends against Art. 311 (2), under which the delinquent officer has the right of showing cause to the satisfaction of the Governor why the proposed action shall not be taken against him.<sup>4</sup>

### Officers on deputation to another Department or Office.

1. 'The service of an officer, on deputation to another Department or office, should, on principle,<sup>8</sup> be treated as equivalent to service in the parent Department.'<sup>8</sup>

2. On reversion to his parent Department, therefore, he is entitled to obtain recognition for the satisfactory service rendered by him on deputation, in the matter of those promotions in the parent Department, which are open on seniority claimant basis, as distinguished from promotion to 'selection posts.'<sup>9</sup>

3. On the same principle adverse remarks and punishments awarded in the new Department would be taken into account in the parent Department.<sup>8</sup>

4. On reversion to the parent Department, he can also claim the time scale increments and chances of promotion which would have been available to him but for the deputation.<sup>8</sup>

5. If, therefore on reversion from deputation the officer is appointed in the parent Department to a post lower than that which he was holding at the time of deputation, that would, *prima facie*, constitute a 'reduction in rank'.<sup>9</sup>

6. 'Deputation is, however, to be distinguished from "transfer".'<sup>10</sup>

7. By reason of Art. 312, officers of all India Services are common to the Union and the States. When therefore they are transferred from the Union to a State or vice versa, it should not be considered as a deputation, unless the order of transfer says so expressly. The Central posts known as 'tenure posts' are not necessarily 'deputation posts'.<sup>11</sup>

### Status of holder of ex-cadre post.

1. 'Cadre', as defined in F.R. 9(4), means

"the strength of a service or a part of a service sanctioned as a separate unit."

2. It is competent for an appropriate authority to create a post outside the cadre or regular establishment of a particular office. When such an ex-cadre post is created:-

(a) The employee will be under the administrative control of the office to which the ex-cadre post is attached.<sup>12</sup>

6. *Rajagopal v. Supdt of Police*, A. 1965 Mad 103 (106).

7. *State of Madras v. Sundaram*, (1964) S.C. [C.A. 400/64].

8. *State of Mysore v. Bellary*, A. 1965 S.C. 868 (871) [interpreting r. 50 (b) of the Bombay Civil Services Rules].

9. *B. K. Roy v. State of W. B.*, (1965) 69 C.W.N. 1063 (1069).

10. *Srinivas v. State of Mysore*, (1967) 1 L.L.J. 652 (Mad.).

11. *Debas Chandra v. Union of India*, (1966) S.C.A. 579.

12. *Neharia Ram v. Union of India*, A. 1958 S.C. 113.

(b) But even though confirmed in that ex-cadre post, the employee will have no claim to promotion or seniority in the office to which he has been attached for the purposes of administrative control.<sup>18</sup>

(c) Even if such holder of ex-cadre post is transferred to foreign service, he cannot claim the benefit of F. R. 113.<sup>19</sup>

### Broad classification of civil servants.

1. A *permanent* post means a post carrying a definite rate of pay sanctioned without a limit of time.<sup>18-19</sup> A *temporary* post means a post carrying a definite rate of pay sanctioned for a limited time.<sup>20</sup> The tenure of a temporary post may be for a certain specified period or for a year and renewed from year to year.

2. The appointment of a Government servant to a permanent post may be *substantive* or on *probation* or on an *officiating* basis. A *substantive* appointment to a permanent post confers normally on the servant so appointed a substantive right to the post called a 'lien'.<sup>21</sup> An appointment to a permanent post *on probation* means that the servant so appointed is taken on trial. The period of probation may be for a fixed period or for an unspecified period. An appointment to *officiate* in a permanent post is usually made when the incumbent substantively holding the post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. In the case of an appointment on probation or on an officiating basis, thus, the servant so appointed does not acquire any substantive right to the post, even though the post itself be permanent, and it is an implied term of such appointment that it may be terminable at any time. An appointment to a permanent post may also be on a *temporary* basis, e.g., 'until further orders', in which case the position of the employee is no better than in the case of an appointment in an officiating basis.<sup>22</sup>

3. An appointment to a temporary post may likewise be substantive or on probation or on an officiating basis. The incidents of an appointment on probation or on an officiating basis are similar to those just discussed, relating to similar appointments to permanent posts.

A substantive appointment to a temporary post gives no lien or right to hold the post except where the appointment is for a *certain specified period*, in which case, the servant acquires a right to hold his post for the specified period.<sup>21</sup>

### Quasi-permanent status.

1. The Central Civil Services (Temporary Services) Rules, 1949, have conferred a security of tenure upon a class of temporary Government servants by creating a '*quasi permanent service*'. According to r. 3 of these Rules, a Government servant shall be deemed to be in quasi-permanent service—

"(i) If he has been in continuous Government service for more than three years.<sup>23</sup>

13-19. F. R. 9 (22).

20. F. R. 9 (30).

21. F. R. 9 (13).

22. *Ram Chandra v. Secy. to Govt. of W. B.*, A. 1965 Cal. 265 (275).

23. In the Rule, as originally printed by the Government of India, there was no conjunction here. But the Supreme Court has held (*Champaklal v. Union of India*, A. 1964 SC. 1854) that the two clauses are to be read as conjunctively, as if the conjunction 'and' was there, so that both the conditions in r. 3 must be satisfied before a temporary Government servant may be said to have acquired quasi-permanent status.

(ii) If the appointing authority, being satisfied as to his suitability . . . for employment in a quasi-permanent capacity, has issued a declaration to that effect . . ."

Both the conditions must be satisfied. Hence, a declaration under r. 3 is essential before a person's service can be regarded as quasi-permanent<sup>23, 24</sup> and the quasi-permanency takes effect from the date of the declaration [r. 2 (b)].

The security of such persons is laid down in r. 6 thus—

"The service of a Government servant in quasi-permanent service shall be liable to termination:

(i) in the same circumstances and in the same manner as a Government servant in permanent service; or

(ii) when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service;

Provided that the service of a Government servant in quasi-permanent service shall not be liable to termination under cl. (ii) so long as any post of the same grade and under the same appointing authority as the specified post held by him, continues to be held by a Government servant not in permanent or quasi-permanent service . . ."

Thus, as soon as a Government servant's service ripens into a quasi-permanent service, he acquires a right to his post even though his initial appointment was temporary.<sup>25</sup> But the 'reduction' referred to in r. 6 (ii) is not necessarily confined to the abolition of posts but includes the keeping of certain posts in abeyance and the 'certificate' referred to in the same clause may be given by the appointing authority by means of a memorandum instead of by a formal order.<sup>24</sup>

2. In the absence of a 'declaration', as aforesaid, a person who was appointed on a 'temporary basis', does not acquire the status of a permanent Government servant merely because the temporary post held by him is subsequently made permanent.<sup>1</sup>

3. Once a temporary servant acquires quasi-permanent status, his service can be terminated (r. 6) only in the same manner as that of a permanent Government servant. In the result, it cannot be done by giving a mere notice or pay in lieu of notice. Art. 311 (2) must be complied with, inasmuch as the mere termination of service of a permanent or quasi-permanent Government servant, according to the decision in *Parshotam's* case attracts Art. 311 (2).<sup>2, 3</sup>

### **Title of a person substantively appointed to a permanent post.**

1. A person who has been appointed substantively to a permanent post acquires the legal right<sup>4</sup> to continue in that post until any of the following contingencies happen.:

(a) Superannuation;<sup>4</sup>

(b) Compulsory retirement according to relevant Rules;<sup>4</sup>

24. *Srinivasan v. Union of India*, A. 1958 S.C. 419; (1958) S.C.R. 1295.

25. *Parshotam v. Union of India*, A. 1958 S.C. 36; (1958) S.R.C. 828.

1. *State of Nagaland v. Vasanta*, A. 1970 S.C. 537.

2. *Champaklal v. Union of India*, A. 1964 S.C. 1854.

3. Except where the declaration was unauthorised or invalid [*Srinivasan v. Union of India*, A. 1958 S.C. 419].

3a. *Moti Rani v. N. E. F. Ry.*, A. 1964 S.C. 600 (610).

4. *State of Bombay v. Subhagchand*, A. 1957 S.C. 892.

(c) Abolition of that post,<sup>5</sup> in the exigencies of public service.<sup>6</sup>

(d) Removal or dismissal in conformity with Art. 311 (2) of the Constitution.<sup>7</sup>

2. If, therefore, any Rule provides for the termination of the services of a permanent Government servant otherwise than in any of the forgoing modes, e.g., by service of a notice, *that Rule itself* offends against Art. 311(2) and *must be struck down as invalid*, for the premature termination of the services of a person who has a legal right to hold a post itself amounts to a penalty so as to attract the operation of Art. 311 (2), so that it cannot be ordered without offering the opportunity to show cause as required by that provision.<sup>8</sup>

3. For the same reason, the termination of the services of the holder of a permanent employee, for any reason other than those specified earlier<sup>9-11</sup> or by any indirect device<sup>7</sup> such as the following, would constitute a 'removal', so as to attract Art. 311 (2)—

(i) Retixation of the age of the employee, so as to advance his age of superannuation;<sup>12</sup>

(ii) Providing that overstaying on the expiration of leave or absence without leave would automatically result in termination of service or require reinstatement;<sup>9</sup>

(iii) Abolishing a post which is 'permanent' within the meaning of F. R. 9 (22) of the Fundamental Rules,<sup>13</sup> for the purpose of punishing the holder of that post.<sup>14</sup>

## CL (2).

### CL (2), when does it come into operation.

1. It is now settled that Art. 311 (2) is attracted only when a civil servant is 'reduced in rank'<sup>11</sup> or dismissed or removed (that is to say, his services are terminated), before the normal period of his service and against his will,<sup>12</sup> by way of penalty.

2. The expressions used in the impugned order are not conclusive on the question whether it is by way of punishment. It is to be determined from the circumstances of each case by applying a two-fold test,<sup>11-14</sup> namely,

(a) Whether the Government servant, whose services have been terminated, had a right to the post or the rank;

(b) Whether he has been visited with evil consequences, e.g., forfeiture of the benefits already earned by him.

If *either*<sup>15</sup> of these two tests is satisfied, it must be held that the servant has been punished, so as to attract Art. 311 (2).<sup>12-14</sup>

3. There was a prolonged controversy as to when a penal element may be said to be involved in a termination of service so as to amount to a 'dismissal' or 'removal' within the meaning of Art. 311 (2).

5. *Bhupathi v. State*, A. 1968 A.P. 307 (309).

6. *Jai Shanker v. State of Rajasthan*, A. 1966 S.C. 492 (494).

7. *Prem Behari v. State of U. P.*, A. 1965 All. 406 (408).

8. *Binapani v. State of Orissa*, A. 1956 Orissa 81 (84).

9. *Majumdar v. Dist. Controller*, A. 1966 S.C. 1364.

10. Apart from the additional rights conferred by r. 426 of the Civil Service Regulations or any equivalent Rule.

11. *Shyamal v. State of U. P.*, 1954 S.C.R. 476.

12. *Jai Shanker v. State of Rajasthan*, A. 1966 S.C. 492.

13. *Parashottam v. Union of U. P.*, 1954 S.C.R. 476.

14. *Champaklal v. Union of India*, A. 1964 S.C. 1854.

15. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. S.C. 600 (610; 612).

(i) The Supreme Court<sup>15</sup> has settled the controversy by drawing a distinction between two classes of Government servants, viz., (a) those who have a right to or lien upon the post held by them; and (b) those who have no such right.

A. Where a Government servant has the right to hold a post either according to contract or the conditions of his service, the mere fact of termination of his service will be deemed to be penal and Art. 311 (2) will be attracted, whether such termination takes place assigning any reason, or not. It follows, therefore, that the services of the following classes of Government servants cannot be terminated without compliance with Art. 311 (2):

(i) Termination of the services of a Government servant holding a *permanent* post, substantively,—prior to the age of superannuation,<sup>15</sup> except by way of compulsory retirement, according to the Rules.<sup>15</sup>

(ii) Premature termination of the services of a Government servant holding a *temporary* post for a *fixed term*.<sup>13, 16</sup>

(iii) Termination of the services of persons in 'quasi-permanent' service otherwise than according to r. 6 of the Central Civil Services (Temporary Services) Rules, 1949.

In the foregoing cases, termination of service will *ipso facto* amount to 'dismissal' or 'removal', irrespective of any penal intention or additional penal consequence being involved, because the employee in question had a *right* to hold the post till the age of superannuation, or some other specified time, as the case may be,<sup>15</sup> and the deprivation of such right *per se* constitutes a penalty.<sup>15</sup> This right cannot be defeated by an administrative exigency or by the abolition of the post itself or the entire cadre to which the post belongs, because the Government servant in question had a right to hold that post until superannuation or compulsory retirement under the Rules,<sup>12</sup> and that right can be taken away only in the manner laid down in Art. 311 (2) of the Constitution.<sup>12, 15</sup>

But even in the above cases, Art. 311 (2) will *not* be attracted if (a) Government has a *right to discharge* or retire<sup>15</sup> the Government servant under the conditions of his service or terms of a contract and (b) such discharge or retirement does not involve any *penal* consequence by way of loss of salary, allowance, pension or other benefits *already acquired* by his *past services*.<sup>17</sup> In any case, the motive behind the order is immaterial.<sup>17</sup>

But an order of discharge in exercise of the power conferred by Regulation which provides that—

"An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have *sacrificed his appointment* and may only be reinstated with the sanction of the competent authority"

has been construed as an order of 'removal' so as to require a compliance with Art. 311(2), because in whatever manner the order might be framed, it amounted to a termination of service on the ground of the employee's unfitness to continue in service on account of his overstay on the expiry of leave.<sup>12</sup>

16. The contrary decision in *Fateh Singh v. State of Punjab*, A. 1970 P. & H. 315 (319) is a case of reversion from *officiating* appointment for a fixed term

17. *Balakrishna v. Union of India*, A. 1958 S.C. 232; *Jagdis v. Union of India*, A. 1964 S.C. 449 (456).



(B) *Except* in the three classes of cases specified above, a Government servant has no right to the post held by him, e.g., when a person is appointed to a post on probation or in an officiating capacity, or to hold a temporary post other than for a fixed term (and he does not attain the status of quasi-permanent service), the termination of his service at any time will not, *prima facie*, attract Art. 311 (2), because by the very term of his employment, express or implied, the service was terminable at any time so that the termination cannot be deemed to be by way of a punishment.

But even in this class of cases, Art 311 (2) would be attracted, if the Government takes the view that a simple termination of service is not enough and that the Government servant deserves punishment. The two conditions necessary for the application of Art. 311 (2) in such cases are—

(i) That such punishment is intended to be awarded on the ground of the Government servant's misconduct, inefficiency, negligence and the like.<sup>17</sup>

(ii) That the Government intends to inflict *penal* consequences upon the Government servant, by way of loss of benefits *already acquired* by him, (e.g., withholding a part of the salary earned<sup>18</sup>) or loss of seniority or chances of future promotion in his substantive rank (if any); or any stigma is added to the order.<sup>17</sup>

(a) It is now *settled*<sup>17</sup> that a termination is intended to be penal so as to attract the operation of Art 311, not only where it is imposed for some misconduct,<sup>1</sup> but also where it is imposed *on some ground which is capable of being explained*,<sup>19</sup> that is to say, against which it is possible for the Government servant to show cause. Art 311 (2) is attracted, e.g., where the service is terminated on ground of inefficiency<sup>20</sup> physical or mental incapacity,<sup>21</sup> lack of will or negligence<sup>22</sup> to discharge the duties of the office; absents without leave and without reasonable cause<sup>23</sup> or over staying on expiry of leave<sup>24</sup>

But no penal element is involved where the appointment was not *valid*,<sup>25</sup> e.g., where it was made without consulting the Public Service Commission and it is sought to be terminated on that ground alone;<sup>25</sup> or where the previous order of confirmation was due to a mistake;<sup>1</sup> or the appointment was 'provisional', subject to verification of antecedents or the like<sup>2</sup>

(b) On the other hand where the *consequences* are not penal, it is immaterial that the termination has taken place as a result of allegations or imputations against the Government servant,<sup>3</sup> or after holding an *informal* inquiry to ascertain whether he should be retained in service<sup>21</sup>

In short,—

(i) Where a person's services are sought to be terminated on the

18 *Union of India v. Dakshinamurthy*, A. 1952 Mad. 376; *Union of India v. Irawan Ram* A. 1958 S.C. 905

19. *Shyamal v. State of U. P.*, (1955) S.C.R. 26 (41)

20 *Bejoy Chand v. State of Assam*, A. 1954 Assam 12 (15).

21 *Parshotam v. Union of India*, A. 1958 S.C. (49). [The observations of the contrary in *M. & S. Factory v. Suklal*, A. 1966 Cal 252 (256) go against the Supreme Court observation as well as previous decisions of the Calcutta High Court, e.g., *Fakir v. Chakrabarty*, (1954) 58 C.W.N. 335 (341)].

22 *Ishar Das v. State of Pepsu*, A. 1952 Pepsu 148.

23. *Cf. Malatlal v. Civil Controller*, (1965) S.C. [C.A. 757/641].

24. *Jai Shanker v. State of Rajasthan*, A. 1966 S.C. 492 (494).

25. *Srinivasan v. Union of India*, A. 1958 S.C. 419.

1. *State of Punjab v. Jagdish*, A. 1964 S.C. 521.

2. *Sugatha Prasad v. State of Kerala*, A. 1966 Ker. 93.

3. *State of Bombay v. Saubhagmal* A. 1957 S.C. 892.

expiry of the term for which he was appointed,<sup>4</sup> or at the expiry of the period of notice by which his services could be terminated according to the contract of his employment, there is no penalty involved, and Art. 311 (2) has, accordingly, no application.

(ii) Similarly, where a Government servant does not incur any penalty, in the shape of loss of benefits already earned by past service, *e.g.*, in the case of compulsory retirement, Art. 311 (2) is not attracted.<sup>5</sup>

(iii) Thirdly, Art 311 (2) is not attracted when any other punishment is sought to be awarded against a civil servant.<sup>6</sup> Thus, r 49 of the existing Civil Services (Classification, Control and Appeal) Rules provide for a number of different penalties—(a) Censure<sup>7</sup>; (b) Withholding increment or promotion<sup>8</sup>; (c) Reduction to a lower post or time-scale; (d) Recovery from pay of a part or the whole of any pecuniary loss caused to Government by negligence or breach of orders; (e) Suspension; (f) Removal from service; (g) Dismissal. Of these Art 311 (2) comes into operation only when any of the three penalties,—dismissal, removal or reduction in rank is sought to be imposed.<sup>9</sup>

(iv) Nor is the Article attracted where the Government servant is sought to be penalised in any other manner, *e.g.*, by reduction of his pension.<sup>10</sup>

(v) In order to be a 'penal consequence', it must be a *consequence* of the order of termination of service and not anything else *e.g.*, the refusal to pay subsistence allowance during the period of suspension which has no connection with the termination of service.<sup>11</sup>

### Burden of Proof.

The burden of proving that the order of termination of the Petitioner's services is *penal*, in the sense explained above is on the Petitioner.<sup>12</sup>

### 'Dismissed or removed'.

1. According to the Departmental Rules, there is some difference between dismissal and removal as to their consequences. Thus while a person 'dismissed' is ineligible for re-employment under the Government, no such disqualification attaches to a person 'removed'.<sup>13</sup> An order that a person's 'services be dispensed with' amounts to an order of removal.<sup>14</sup>

2. But from the constitutional standpoint they stand on the same footing, two elements being common to both—

(a) Both are *penalties*<sup>15</sup> awarded on the ground that the conduct of the Government servant is blameworthy or deficient<sup>16</sup> in some respect.

(b) Both entail penal consequences, such as the forfeiture of the right to salary allowances or pension already acquired for *past services* [vide F. R. 52].

4. *Satischandra v Union of India*, 1953) S.C.R. 177.

5. *Shyamlat v State of U.P.* 1954 S.C.R. 476.

6. *Ramanarayan v State of Bihar*, A. 1963 P.W. 97 (101).

7. *Parshotam v. Union of India*, A. 1958 S.C. 36.

8. *Narasimharao v State of Mysore*, A. 1970 S.C. 247 (251).

9. *Union of India v Pandurang*, A. 1962 S.C. 630.

10. *Union Territory v Gopal* (1963) II L.J. 633 (S.C.).

11. *Satis Anand v Union of India*, A. 1953 S.C. 250 (252) see also r. 49 (vi)-(vii) of the Civil Services (C.C.A.) Rules.

12. *State of Orissa v. Govindadas* (1959) 1 S.C. 412 581.

13. *Jadish v. Union of India*, A. 1964 S.C. 449; *Champaklal v. Union of India*, A. 1964 S.C. 1854.

14. *Parshotam v. Union of India*, A. 1958 S.C. 36 (1958) S.C.R. 828.

(A) 1. The term actually used in the order terminating the officer's services is not conclusive.<sup>15, 16</sup> Words such as 'discharged' or 'retrenched' may constitute 'dismissal' or 'removal', if the order entails *penal consequences*, as referred to above.

Thus, where an order of reinstatement had the effect of making the Petitioner a permanent civil servant, a cancellation of that order would constitute a 'removal' so as to attract Art. 311 (2).<sup>18</sup>

2. For the same reason, it is not the motive<sup>14</sup> behind the order which is material, but the penal consequences, to determine whether Art. 311 is attracted.

(B) On the other hand,—

1. It is clear that in order to attract Art. 311 (2), the termination of the services must be *against the will* of the civil servant, i.e., while he is willing to serve.<sup>19</sup> The Article has no application where it is the result of his voluntary act, e.g., where he applies for leave preparatory to retirement and that application is granted<sup>20</sup> or if after having attained the age of 55, a ministerial officer confesses his inability to continue in service any longer and seeks permission to retire and that application is granted. Of course, before the permission to retire is *granted*, the officer may *revoke* his prayer for permission to retire<sup>21</sup> and then the normal rule would again come into operation if the Government wants to retire him on the ground of inefficiency, but if after the permission is granted and his service is terminated or after the leave preparatory to retirement is granted the officer applies for permission to resume his duties and that permission is refused there cannot be any question of application of Art 311 (2).<sup>22</sup> Similarly, where a Government servant is given the option to voluntarily retire on a proportionate pension as an *alternative* to dismissal and he elects to retire, he cannot, after such order, turn round and challenge the validity of the order on the ground of non-compliance with Art 311 (2).<sup>23, 24</sup>

2. The following orders of termination of service have been held *not* to constitute 'dismissal' or 'removal':

(a) Termination in accordance with the terms of the contract of employment.<sup>25</sup>

(b) Termination in terms of the conditions of service as embodied in the relevant Departmental Rules applicable to the Government servant.<sup>1</sup>

(c) Option by a Government servant to retire<sup>2</sup> on proportionate pension as an alternative to dismissal.<sup>26</sup>

15. *State of Orissa v. Ram Narayan* A 1961 SC 176 (180); *Jeewanlal v. Union of India* A 1958 SC 915 (918).

16. *Ramesh v. State of M. B. A.* 1953 Cal 181 (192); *Brojo v. Commr. of Police* (1965) 59 CWN 628 (673).

17. *Balbirbhai v. State of M. B. A.* 1957 MP 130; *Gairaj v. State of M. B. A.* 1960 M.P. 299.

18. *Hirwar v. State of M. B. A.* 1958 MP 135 (139).

19. *Cf. Jai Shankar v. State* (1964) 1 SCR 825 (829).

20. *Koshi v. State of T. C. A.* 1952 T.C. 409; *Balmukund v. State*, A 1970 Orissa 130 (131).

21. *Raikumar v. Union of India*, A 1960 SC 180.

22. *Jai Ram v. Union of India*, A 1964 SC 584.

23. *State of Assam v. Harnath* A. 1957 Assam 77.

24. *Quere.* What happens if the Government servant alleges that he was induced to elect under threat or duress?

25. *Satish Chandra v. Union of India*, A. 1953 SC 250.

1. *Hartnell v. Uttar Pradesh Govt.* A 1957 S.C. 886.

2. *Cf. F. R. 86.*

(d) Compulsory retirement under Art. 465A of the Civil Service Regulations,<sup>3,4</sup> or similar rules (see *below*), without casting any stigma.<sup>5,6</sup>

(e) Termination of service owing to change in the age of superannuation.<sup>7</sup>

(f) Termination of services under the Railway Services (Safeguarding of National Security) Rules.<sup>8</sup>

### Abolition of post.

I. When a post is *temporary*, the abolition of such post raises no problem because appointment to a temporary post confers no right upon the employee to hold that post.<sup>9</sup> Hence, Art. 311 (2) is not plainly attracted when such employee is simply 'discharged' on the abolition of the post,<sup>9</sup> even though such abolition takes place on the failure of departmental or criminal proceedings against the officer on the charge of some misconduct.<sup>9</sup>

II. A controversy has, however, arisen as to the situation arising from the abolition of a *permanent* post, because, on appointment to such post, the employee acquires a legal right<sup>10</sup> to hold until any of certain contingencies takes place. This right arises by reason of the very definition of a permanent post, as given in F. R. 9 (22).

A. Until the decision of the Supreme Court in *Moti Ram's case*,<sup>10</sup> the consensus of opinion was that even in the case of a permanent post, Art. 311 (2) was not attracted, simply because abolition of a post for administrative exigencies could not be said to be a 'punishment'.<sup>11</sup> Even after *Moti Ram's case*,<sup>10</sup> this view has been maintained in some High Courts.<sup>12</sup>

B. But abolition of post is not one of the exceptions mentioned in *Moti Ram's case* to Art. 311(2) in the case of permanent posts.<sup>13</sup>

### Absence without leave.

Some Service Rules provide that if an employee remains absent without leave or permission, he shall be deemed to have resigned<sup>14</sup> or that he ceases to be in Government employ.<sup>15</sup>

1. Such a provision, though apparently innocuous, has been held to constitute 'removal' hence, there cannot be a termination of service in pursuance of the provision until opportunity to show cause is given to the employee, according to Art. 311(2).<sup>16</sup>

2. 'Remaining absent', within the meaning of such rules, means *voluntary* absence and not absence for a cause beyond the employees'

3. *Shyam Lal v. Govt. of U. P.* (1955) 1 S.C.R. 26

4. *Shivacharuna v. State of Mysore*, A. 1965 S.C. 280 (282)

5. *Saksena v. State of M. P.*, A. 1967 S.C. 1264 (1266).

6. *State of U. P. v. Madan Mohan*, A. 1967 S.C. 1260 (1262)

7. *Bishnu Narain v. State of U. P.*, A. 1965 S.C. 1567 (1569)

7a. *Parshottam v. Union of India*, A. 1958 S.C. 36.

8. *Balakrishna v. Union of India*, A. 1958 S.C. 232 (238)

8a. *Salis v. Union of India*, (1955) S.C.R. 655, *Champaklal v. Union of India*, A. 1964 S.C. 1854 (1861, para. 11)

9. *Brijnandan v. State of Bihar*, A. 1955 Pat. 353 (356).

10. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. 600 (608, para. 18)

11. *Vide Nank v. State of Maharashtra*, A. 1967 Bom. 482, *Mohinder v. Union of India*, A. 1969 Delhi 170 (176).

12. *E.g., State v. Saxena*, A. 199 All. 449 (F.B.), per majority.

13. *Vide C5, Vol. V, pp. 215-6; Cak J's judgment in the Allahabad Case State v. Saksena*, A. 1969 All. 449 (F.B.).

14. Cf. Reg. 13 of the Jodhpur Service Regulations.

15. Cf. r. 2014 of the Railway Establishment Code, Vol. I.

16. *Jai Shanker v. State of Rajasthan*, A. 1966 S.C. 492.

control, e.g., serious illness or other cause preventing him from resuming duty.<sup>17</sup>

### Compulsory retirement.

I. Compulsory retirement of an officer who has completed 25 years of service (but before superannuation), under Note 1 to Art. 465A<sup>18</sup> Civil Service Regulations<sup>19,20</sup> would not attract Art. 311 (2) of the Constitution even though it is, in fact, ordered on the ground of misconduct, inefficiency or the like,<sup>20</sup> because in compulsory retirement under such Rules (which is a condition of service), the Government servant does not lose any of the benefits (e.g., salary, allowances or proportionate pension) which he has already earned by past services.<sup>20</sup> As it does not entail any penal consequences, it does not amount to a 'dismissal' or 'removal' so as to attract the operation of Art. 311,<sup>20</sup> or the principles of natural justice. Even where an inquiry is actually made into charges drawn up against the Government servant, that must be taken to be only for the satisfaction of the authority for ordering compulsory retirement.<sup>20,21</sup>

(a) In short, a compulsory retirement, without any additional loss, does not attract Art. 311, even though misconduct or inefficiency weighs with the Government in ordering compulsory retirement,<sup>20</sup> or it is made during the pendency of disciplinary proceedings.<sup>18, 22</sup>

(b) But the case becomes otherwise if some aspersion or stigma is expressly attached to the order itself, e.g., that the officer 'has outlived his utility',<sup>23,24</sup> or the order of compulsory retirement is made *after* finding the delinquent guilty of the charges in a departmental proceeding,<sup>25</sup> or on the basis of such report.<sup>21</sup>

On the other hand, if the order itself contains no express words throwing any stigma on the Government servant, the Court cannot delve into the Secretarial files to discover whether some kind of stigma can be inferred on such research.<sup>23, 1</sup>

II. Whether it is in the public interest or not to retain an employee in service after he has completed 25 years of service is for the Government to decide and its opinion on the point cannot be challenged before a Court of law, except on the ground of *mala fides*.<sup>2</sup>

III. In *Dalip Singh's case*,<sup>2</sup> it was held that retirement even before the age superannuation, if it is ordered in pursuance of a *policy retrenchment* or other administrative reason and on payment of a proportionate pension, does not amount to 'removal' as there is no element of penalty

17. *Baluant v. Union of India*, A. 1968 All. 14 (17).

18. *Cf. Champak Lal v. Union of India*, (1961) 5 S.C.R. 119 (210).

19. Or R. 165A of the Bombay Civil Service Rules; or R. 285 of the Mysore Civil Services Rules, 1958; or F.R. 56 (j).

20. *State of Bombay v. Doshi*, A. 1957 S.C. 892; (1958) S.C.R. 571. *Moti Ram v. General Manager*, A. 1964 S.C. 600 (607, 617); *Union of India v. Sinha*, (1970) S.C. [C.A. 381/70, d. 12-8-70].

20a. *Dalip Singh v. State of Punjab*, A. 1960 S.C. 1305 (1308).

21. *Madan Gopal v. State of Punjab*, A. 1963 S.C. 531.

22. *Basistha v. C. I. T.*, A. 1968 Pat. 113 (115).

23. *Saxena v. State of M. P.*, A. 1967 S.C. 1264 (1266).

24. *Jagdish v. Union of India*, A. 1964 S.C. 449.

25. *State of Bombay v. Nurul Latif*, (1966) 11 LL.J. 595 (600) S.C.; A. 1966 S.C. 269.

1. *State of U. P. v. Madan Mohan*, (1967) 14 FLR. 262 (265) S.C.; A. 1967 S.C. 1260.

2. *Shivacharan v. State of Mysore*, A. 1965 S.C. 280 (282).

3. *Dalip v. State of Punjab*, A. 1960 S.C. 1305; (1961) 1 S.C.R. 88.

involved,<sup>4</sup> except where he has a statutory right to continue upto a particular age.<sup>4</sup>

But the observations in *Dalip Singh's case*, must now be read subject to the observations in *Moti Ram's case*<sup>5</sup> that if a Rule provides for compulsory retirement at any time, without providing for a *minimum period of service* after which only the compulsory retirement may be ordered, that Rule itself must be held to be void for contravention of Art. 311 (2), because such compulsory retirement, in the case of a permanent Government servant, amounts to a 'removal'.<sup>6</sup>

IV As regards ministerial officers, R 56 (b) (i) of the Fundamental Rules<sup>7</sup> Provides—

'A ministerial servant who is not governed by subcl (ii) may be required to retire at the age of 55 years, but should ordinarily be retained in service if he continues efficient, up to the age of 60 years.'<sup>8</sup>

The proper interpretation<sup>9</sup> of the Rule is that a ministerial servant falling within this class may be compulsorily retired at the age of 55; but when the servant is between the age of 55 and 60 the appropriate authority has the *option* to continue him in service, subject to the condition that the servant continues to be efficient, but the authority is *not bound* to retain him even if he continues to be efficient.<sup>10</sup>

V, Art 294 (a) of the Mysore Service Regulations says—

'A Government servant who has attained the age of 55 years may be required to retire, unless the Government considers him efficient and permits him to remain in service

Art. 297 provides

A Government servant in superior service who has attained the age of 55 years, may *at his option* retire from the service on a superannuation pension

The Supreme Court held<sup>11</sup> that the Rules read together, fixed the age of retirement at 55 years and left it to the discretion of the Government to retain him in service beyond that age.<sup>12</sup> Art 297 did not leave it entirely at the option of the Government servant to continue after the age of 55 years, but where the Government decides to retain him after that age the Government servant may still opt for retirement.<sup>12</sup>

In this case,<sup>12</sup> it is to be noted, the order of compulsory retirement was made during the pendency of an inquiry for misconduct and that the pension was *reduced* 'to 2/3 the amount to which he would ordinarily be entitled in view of the irregularities committed by him'. The order was obviously '*penal*' within the meaning of the decision in *Shyam Lal*<sup>13</sup> and *Doshi* cases. But those cases, unfortunately, were not referred to in the decision at all, even though Note I to Art 294 reproduced above expressly stated that the exercise of the Government's power to retire the Government servant on the completion of the age of 55 years was '*mutually*'

3a. *Saksena v. State of M. P.* A 1967 S.C. 1264 (1266)

4. *Bholanath v. State of Saurashtra* A 1954 S.C. 680

5. *Moti Ram v. N. E. F. Ry.* A 1964 S.C. 603 (617)

6. *Gurdev Singh v. State of Punjab* A 1964 S.C. 1585

7. The provision contained in r 204b (2) (a) of the Railway Establishment Code or r 71 of the Orissa Service Code, Vol. I, is to the same effect

8. *Kailas Chandra v. Union of India*, A 1961 S.C. 1346

9. *Narasimhachar v. State of Mysore*, A 1960 S.C. 247 (1960) 1 S.C.R. 981 990

10. *State of Mysore v. Padmanabhaiah*, A 1960 S.C. 602 (603)

11. *Shyam Lal v. State of U. P.* (1955) 1 S.C.R. 26.

12. *State of Bombay v. Doshi*, A. 1957 S.C. 892 (1958, S.C.R. 571

VI. Note 4, added to r. 294(a) of the Mysore Service Regulations, in 1955, provides—

"The age of retirement of trained teachers in the Education Department may generally be 58 years,....."

The Director of Public Instruction. is empowered to order the retirement of teachers, trained and untrained in the non-Gazetted cadre who have *not got a good record of service and are not up to the mark*, at the age of 55 years. ."

The above provision has been interpreted to mean that trained teachers were normally entitled to continue till 58 years, but a trained teacher could be retired at 55, provided only the Director came to the conclusion that he had not a good record of service and were not up to the mark. In the absence of such a determination, the order of retirement at 55 years was bad.<sup>13</sup>

VII. Where the Rule does *not* fix the age for compulsory retirement, but empowers the Government to retire the Government servant for administrative reasons, *at any time*, the retirement may amount to a removal, if there is a loss of pension or other benefit;<sup>14</sup> but *not* so, if the Rule itself provides for payment of full pension on such retirement,<sup>15</sup> even though considerations of misconduct might have weighed with the Government in taking the action.<sup>16</sup>

VII. Where the Rule fixes an age for compulsory retirement, but a Government servant is made to retire *before* he has attained that age, as a punishment in disciplinary proceedings, Art. 311 is obviously attracted in as much as such retirement cannot be said to have been ordered in terms of the contract of his service.<sup>14</sup>

VIII. Where the Rule itself says that compulsory retirement there under amounts to 'removal' *e.g.*, Expl. II to Reg. 214 of the Police Regulations,<sup>15, 16</sup> Art. 311 (2) would be attracted.

#### **Grounds on which an order of compulsory retirement may be challenged.**

An order of compulsory retirement may be challenged on the following possible grounds:

I. That it amounts to a 'removal' within the meaning of Art. 311 (2) and is accordingly invalid for contravention of the requirements of that Article,<sup>17, 18</sup> *e.g.*, where it has been ordered as a *penalty* in a disciplinary proceeding,<sup>19</sup> or *otherwise* than under a Rule providing for compulsory retirement on reaching the age of superannuation.<sup>17</sup>

II. That the Rule under which the order has been made is unconstitutional and invalid,<sup>17, 19</sup> *e.g.*,

(i) Where the Rule does not fix any age of superannuation but enables the Government to retire a Government servant *at any time*, without payment of full pension.<sup>20</sup>

(ii) Where the age of superannuation has not been reasonably fixed and is unreasonably short.<sup>19</sup>

13. *Gurdev Singh v. State of Punjab*, A. 1964 S.C. 1585.

14. *State of Madras v. Gopala*, (1962) Factories & Labour Rep. 431 (Mad.)

15. *Shankar v. State of M. P.*, A. 1956 Nag. 162 (164).

16. The Patna High Court has held in the negative, in *Ram Asher v. State of Bihar*, A. 1954 Pat. 187. But, according to the Supreme Court decisions, the sole test to be applied in such cases is whether the order entails penal consequences by way of loss of benefits accrued.

17. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. 600 (610).

18. *Cf. State of Bombay v. Narul Lalf*, A. 1966 S.C. 269.

19. *Gurdev Singh v. State of Punjab*, A. 1964 S.C. 1585.

20. *Dalip Singh v. State of Punjab*, A. 1960 S.C. 1305 (1306).

III. That the order is *ultra vires* the provisions of the Rule under which it purports to have been made,<sup>21-22</sup> e.g., that the condition precedent for the application of the Rule had not been satisfied.<sup>23</sup> Thus, where the Rule requires that compulsory retirement can be order only 'in the public interest', it is open to the Petitioner to show that there was, in fact, no such interest involved. But, in the absence of *mala fides*,<sup>24</sup> the determination of the State Government in this behalf shall prevail<sup>25-26</sup> and it is competent for the Government to order compulsory retirement on the ground of misconduct or inefficiency.<sup>26</sup>

IV. That the order is *mala fide*<sup>23</sup>

(a) by merely alleging that the order is not in the public interest, because the question of public interest is to be determined by the Government and not by the Court;<sup>23</sup>

(b) by merely alleging that the *motive* was to punish the petitioner<sup>25</sup>

### Superannuation.

1. This term means the age on the attainment of which a Government servant ceases to have a right to continue in Government service.<sup>1</sup> In F.R. 56, it is referred to as the age of 'compulsory retirement'. F.R. 56 (a), thus, says—

"(a) Except as otherwise provided in the other Clauses of this Rule the date of compulsory retirement of a Government servant, other than a ministerial servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the local Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances"

2. Even where the services of a Government servant, who has attained 55 years, is continued under the second part of the above Rule he does not acquire any *legal right* to hold office by such continuation.<sup>1</sup>

3. The validity of the second part to select superannuated persons to be retained in service cannot be challenged as violative of Art. 14 inasmuch as it is founded on the exigencies of public service.<sup>1</sup>

### Fixation of the age of superannuation.

1. It is competent for Government to fix any age for superannuation and to raise or reduce it from time to time.<sup>2</sup> There is no cause of action if an order raising the age is modified subsequently, thus affecting those who had benefitted from the previous order.<sup>2</sup> It cannot be urged that enforcement of the reduced age amounts to 'removal'.<sup>2</sup>

Office orders changing the age of superannuation have been held to be merely executive instructions giving no *legal right* to hold office beyond 55 years.<sup>1</sup>

2. There is no obligation to order retirement as soon as the age of retirement is reached. The power can be exercised any time thereafter, provided the requirements are fulfilled.<sup>3</sup>

21. Cf. *State of Rajasthan v. Srital* (1964) 1 S.C.R. 742 (746)

22. *State of Mysore v. Podmanabhaiah* A. 1966 S.C. 602

23. *Shivcharan v. State of Mysore* A. 1965 S.C. 790 (282).

24. *Ram Dial v. State of Punjab* A. 1965 S.C. 1518.

25. *Jaydih v. Union of India* A. 1964 S.C. 449.

1. Cf. *State of Assam v. Premadhar* A. 1970 S.C. 1314 (1316)

2. *Bishnu Narain v. State of U.P.* A. 1965 S.C. 1567 (1569); (1965) 1 S.C.R. 693.

3. *Vishwaniltra v. State of Bihar* A. 1967 Pat. 90.



### **Determination of correct age of Government servant for retirement.**

1. If, in any particular case, a question arises as to whether a Government servant has, in fact, attained the age of superannuation<sup>4</sup> or compulsory retirement,<sup>5</sup> according to the Rules, he cannot be retired without giving him an opportunity to prove the fact of his age; otherwise the retirement would offend against Art. 311 (2).<sup>6</sup>

2 Any entry in the Service Register as to the date of birth of a Government servant does not preclude the Government from making an inquiry for refixing the date of his birth. But the decision of the Government can be based only upon an inquiry held in consonance with the basic rules of justice and fairplay.<sup>7</sup> The Government servant must be informed of the case he has to meet and the evidence in support of it and be given an opportunity to set up his version or defence and an opportunity to correct or controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice.<sup>8</sup>

### **Status after superannuation.**

1. A permanent Government servant has a right to hold his post up to his age of superannuation, according to the Rules governing the conditions of service<sup>9</sup> but not beyond that.<sup>7</sup>

2 If, therefore, a Government servant is retained in service after he has attained the age of superannuation, such retention would not confer upon him any right to continue in service, so that termination of his service, on any ground thereafter, cannot constitute 'dismissal' or 'removal'. The reason is that such retention which is at the discretion of the Government, does not confer any legal right to continue in office beyond the age of superannuation, and Government has the discretion to withdraw such retention at any time.<sup>8</sup>

### **Retention in service after superannuation, for purposes of inquiry.**

(A) 1 Some of the Departmental Rules authorise the retention of a Government servant after superannuation for the purpose of completing a departmental proceeding against him.<sup>9</sup>

2. Such order of retention must, however, be made prior to the date of retirement of the Government servant. Any such order made with retrospective effect, after the services of the Government servant had in law, been terminated, would be a nullity,<sup>9-10</sup> for by its unilateral action Government cannot make a fresh contract of service.<sup>9</sup>

(B) But, in the absence of a specific Rule that such retention can be made for the purpose of making a departmental enquiry or holding a disciplinary proceeding, a Rule which merely says that a person may be retained in service after the age of superannuation on 'public grounds' would not justify an extension of service beyond the age of superannuation merely for the purpose of holding disciplinary proceedings. The expression 'public grounds', in this context, simply means that a person

<sup>4</sup> *State of Orissa v. Binapani*, (1967) II L.L.J. 266 (269); A. 1967 S.C. 1269 (S.C.)

<sup>5</sup> *Dakshabarasud v. I. G. P.* A. 1967 Assam 13 (14).

<sup>6</sup> *Parshottam v. Union of India*, A. 1958 S.C. 36; *Moti Ram v. N. E. F. Ry.* A. 1964 S.C. 600.

<sup>7</sup> *Dehendra v. State of Bihar*, A. 1965 Pat. 186 (190).

<sup>8</sup> *State of Assam v. Premadhar*, A. 1970 S.C. 1314 (1318).

<sup>9</sup> *State of Assam v. Padma Ram*, A. 1965 S.C. 473 [see R. 55 (d) of the Fundamental Rules—*State of W. B. v. Nripendra*, A. 1966 S.C. 447 (449)]; *Pratap Singh v. State of Punjab*, A. 1963 S.C. 72.

<sup>10</sup> *Rangachari v. Secy. of State*, A. 1937 P.C. 27.

having meritorious records can be retained even after he has attained the specified age, because such retention would be in the interest of public service.<sup>11</sup>

### Discharge in terms of contract or conditions of service.

1. Government is free to enter into a formal contract for the employment of a person which is not in contravention of any constitutional provision and if the employee is discharged in terms of that contract, Art. 311 (2) is not attracted.<sup>12</sup> Hence, there is no question of application of the present Article where a person's services are sought to be terminated at the expiry of the *term* for which he was engaged or at the expiry of the period of *notice* by which, in accordance with the conditions of his service, his services could be terminated,<sup>13-14</sup> provided, of course, the contract itself is not unconstitutional, say, for contravention of Art. 311 (2).<sup>15</sup>

2. The above principle has been applied not only where there is a formal contract of employment or the conditions of termination of service are laid down in the order of appointment under which the Government servant entered into the service, but also where the conditions are embodied in the Departmental Rules<sup>16</sup> relating to the service in question which must be taken to be a part of the contract of employment.<sup>17</sup> Some of the Rules, for instance, provide that the service can be terminated on serving a notice.<sup>18-19</sup> Art. 311 has no application to such a case because it is not a 'dismissal' or 'removal' but an ordinary case of a contract being terminated by notice under its terms.<sup>12</sup> In principle, there is no distinction between the termination of service of a person under the terms of a contract governing him and the termination of his service in accordance with the terms of his conditions of service. But such Rule itself must not be unconstitutional.<sup>11</sup>

3. When a contract for a fixed term expires, it is open to Government to re-employ the officer on a fresh basis, and if the re-employment is made on different terms, the officer holds on the terms of such re-employment, even though the new terms were inferior.<sup>12</sup> If, however, after the expiry of the contractual period, no fresh engagement is made and the officer continues to hold on without any period being fixed, he holds on as a 'temporary' Government servant, and Art. 311 (2) would be applicable to the termination of such temporary employment.<sup>20</sup>

4. There has been a serious controversy as to whether Art. 311 (2) would be attracted where the contractual power to terminate service, say, after issuing a notice of discharge, is used by the Government for removing a Government servant for misconduct, inefficiency or the like, which would have otherwise attracted Art. 311 (2).<sup>17</sup>

The Supreme Court has solved this controversy by laying down the following propositions—

(a) A termination of service brought about by the exercise of a contractual right is not *per se* a dismissal or removal within the meaning of

11. *State of W. B. v. Nripendra*, A. 1966 S.C. 442 (449).

12. *Satish Anand v. Union of India*, A. 1953 S.C. 250; (1953) S.C.R. 655.

13. *Union Territory of Tripura v. Nikhil Chandra*, (1961) S.C. [C.A. 278/60].

14. *Katipada v. S. D. O.*, A. 1969 Cal. 164 (165).

15. *Moti Ram v. General Manager*, A. 1964 S.C. 600.

16. *Cf. Benjamin v. Union of India*, (1966) S.C. [C.A. 1341 (Misc.)/66].

17. *Parshotam v. Union of India*, A. 1958 S.C. 36; (1958) S.C.R. 828.

18. Cf. R. 5 of the Civil Services (Temporary Service) Rules, 1949; Rr. 1283 (d); guarding of National Security) Rules.

19. *Balakrishna v. Union of India*, A. 1958 S.C. 232.

20. *Hartwell v. Govt of U. P.*, A. 1957 S.C. 886.

Art. 311 (2), even though the *motive*<sup>21-23</sup> operating in the mind of the Government, for applying the contractual power be the misconduct, negligence or inefficiency of the Government servant, for, in such cases the termination of service does not carry with it the penal consequences of loss of pay, allowance or pension *already acquired* by past services, under F.R. 52. In such cases, it is immaterial whether there has actually been an allegation of misconduct or even an inquiry, before the contractual power is used in order to determine whether the contractual power should be applied against him.<sup>24</sup> The same principle applies where a disciplinary proceeding was actually started but eventually dropped before the order of discharge was made, without recording any finding that he is guilty of the charges.<sup>25</sup>

It is only when a termination of service is ordered by way of *punishment* that it amounts to 'dismissal' or 'removal'.<sup>21</sup>

(b) In other words, the test for applicability of Art. 311 (2) is not the motive of the authority but the *consequences* of the order of termination of the service. It follows, therefore, that where the Government, instead of simply terminating the service in terms of the contract of employment, wants to impose penal consequences upon the Government servant, by way of forfeiture of the pay, allowances,<sup>24</sup> or pension which he has acquired by his past services, Government cannot do so by simply issuing a notice under the contract; it can be done only by a proceeding in conformity with Art. 311 (2), on the ground of misconduct, inefficiency or similar charge against the Government servant.<sup>25</sup>

5. But if the order does *not* entail penal consequences; it does not constitute 'dismissal' merely because the contractual power was used by the authority, with a motive to punish the Government servant.<sup>27</sup>

It follows that there is nothing to debar the Government from discharging a Government servant in terms of the conditions of service after a prior order of dismissal has been set aside and the Government servant re-instated.<sup>1</sup>

6. The form of the order is, therefore, not decisive as to whether it amounts to a dismissal, to attract Art. 311 (2).<sup>28</sup> Whether any order discharging an employee in exercise of the power conferred by the conditions of service amounts to an order of dismissal would depend upon "the nature of the enquiry, if any, the proceedings taken therein, and the substance of the final passed on such enquiry",<sup>25</sup> and the material facts that existed prior to the order.<sup>3</sup>

### Whether it is permissible to contract out of Art. 311 (2).

1. It is, however, not permissible to contract out of the provisions of the Constitution, including the provisions of Art. 311 (2).<sup>4,5</sup>

Hence, any provision in a service contract with the Government to the effect that Government would be entitled to terminate the service of the

21. *Jatdish v. Union of India*, A. 1964 S.C. 449; *Champaklal v. Union of India*, A. 1964 S.C. 1854.

22. *Benjamin v. Union of India*, (1966) S.C. J.C.A. 1341 (Misc.)/66].

23. *State of Bombay v. Abraham*, (1963) 41 L.L.J. 422 (S.C.): A. 1962 S.C. 794.

24. *Union of India v. Jeewan Ram*, A. 1958 S.C. 905.

25. *Perkelam v. Union of India*, A. 1958 S.C. 36.

1. *Waman v. Collector of Central Excise*, (1958) 60 Bom. L.R. 55.

2. *State of Orissa v. Ram Narayan*, (1961) 11 L.L.J. 558 (556-F) S.C. = A. 1961 S.C. 177.

3. *Jatdish v. Union of India*, (1964) 1 L.L.J. 413, (428) S.C. = A. 1964 S.C. 449.

4. *Moti Ram v. N. E. F. Ry.*, A. 1964 S.C. 600 (611).

5. *Sethi Chandra v. Union of India*, (1963) S.C.R. 655.

employee for mental or physical incapacity or misconduct without any notice or without giving any opportunity to the employee to show cause would be void.<sup>6</sup>

2. It is quite lawful in a contract to provide that the service would be liable to be terminated with or without notice, but if it provides that the service can be terminated on the ground of misconduct or inefficiency, without giving him an opportunity to show cause, it militates against Art. 311 (2) and is to that extent void.<sup>7</sup> For this reason, the Court will so construe the terms of a contract, if possible, that it will not entail the termination of the services of the employee on ground of 'misconduct', without complying with the requirements of Art. 311 (2).<sup>8</sup>

**Discharge of a temporary officer, holding otherwise than for a fixed term or on 'quasi-permanent service'.**

1. R. 5 of the Central Services (Temporary Service) Rules, 1949 says—

"(a) The service of a temporary Government servant who is not in quasi permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant

(b) The period of such notice shall be one month unless otherwise agreed to by the Government and by the Government servant "

2. It follows from the decision in *Parshotam v. Union of India*<sup>9</sup> that when a person holds a temporary post, or is appointed temporarily to a permanent post, without specifying a fixed term and such temporary officer has not attained quasi permanent status, his discharge would not constitute a 'dismissal' or 'removal' so as to attract Art. 311 (2),<sup>10</sup> except where Government intends to inflict penal consequences upon him by way of loss of the benefits acquired by him by his past services.

3. Thus,—

(a) No penal action is involved where a temporary officer is simply 'discharged' on the abolition of the temporary post,<sup>11</sup> even if the abolition of the post takes place on the failure of departmental or criminal proceedings against the officer on the charge of some misconduct.<sup>12</sup>

(b) On the same principle, when a person is appointed to *officiate* during a particular contingency, such as a leave vacancy, Art. 311 (2) is not attracted when that particular contingency terminates.<sup>13</sup>

(c) A penalty which does not follow from the termination as a consequence is not relevant for attracting Art. 311 (2), e.g., the denial of subsistence allowance during the period of suspension anterior to the termination of service.<sup>14</sup>

4. The *notice* operating in the mind of the authority in terminating the services of a temporary servant does not alter the character of the termination and is not material for determining whether Art. 311 (2) is

6. *Isher Das v. State of Pepsu*, A. 1952 Pepsu 148.

7. *Subhashchand v. State of Saurashtra*, A. 1954 Sau 146.

8. *Cf. State of U. P. v. Sharma*, A. 1968 S.C. 158 (160).

9. *Parshotam v. Union of India*, A. 1958 S.C. 36.

10. *Union Territory v. Nikhil*, (1961) S.C. [C.A. 278/60].

11. *Jagdish v. Union of India*, A. 1964 S.C. 449.

12. *Champaklal v. Union of India*, A. 1964 S.C. 1854.

13. *Brainandan v. State of Bihar*, A. 1955 Pat. 353 (356).

14. *Diloy v. State of Assam*, A. 1954 Assam 12 (14).

15. *Union of India v. More*, A. 1962 S.C. 630 (623).

attracted to such termination.<sup>9, 16</sup> Even where an inquiry into the conduct of the Government servant is held *for the purpose* of deciding whether the contractual power to discharge should be used, and a simple order of discharge, without any stigma, is made *after dropping* the formal disciplinary proceedings, Art. 311 (2) cannot be invoked to challenge the order.<sup>11, 6</sup>

5. But Art. 311 (2) would be attracted if the temporary or officiating appointment is terminated by an order which imposes other penal consequences, *e.g.*, forfeiture of salary;<sup>17</sup> or withholding of increment<sup>18</sup> already earned; or barring future employment;<sup>19</sup> or a *stigma* is cast upon the Government servant in the order of discharge,<sup>20</sup> *e.g.*, holding him 'undesirable to be retained in Government service'.<sup>21</sup> There is no such stigma where subsequent to the order of discharge and, in reply to his representations, the employee has been told that he could not be re-employed because he was an ex-convict.<sup>22</sup>

Art. 311 (2) would also be attracted where, instead of terminating the service by notice, the authority chooses to hold an inquiry into his alleged misconduct.<sup>23</sup>

### Probationer, who is.

1. Briefly speaking, a Probationer is a person who has been appointed on trial and has *no right* to the post held by him.<sup>24</sup>

2. Where the Rules provide that all appointments in a service are to be on probation and Government has no discretion in the matter, an officer appointed to such service becomes a probationer according to the Rules even though the order of appointment does not expressly mention the words 'on probation'.

3. It is also absolutely within the province of the Government to *extend the probationary period* of a Government servant from time to time according to circumstances.<sup>25</sup> Once appointed 'on probation', a Government servant continues in that status until he is confirmed or discharged.<sup>23, 21</sup>

### Status of a probationer after expiry of specified period of probation.

1. Where the Rules<sup>17</sup> or the order of appointment<sup>10</sup> expressly provide that the Probationer will be automatically confirmed on the expiry of a specified period or on expiry of the maximum period fixed,<sup>26</sup> it is obvious that no order of confirmation will be required after the expiry of the period.<sup>26</sup> The result is the same where the Service Rules fix a period of probation and forbid any extension thereof.<sup>1</sup>

2. In the absence of such express provision, the Probationer cannot claim to have been confirmed merely because his original period of probation or an extended period<sup>7</sup> has expired.<sup>24, 2</sup> He continues to be a Proba-

16. *Benjamin v. Union of India*, (1966) S.C. [C.A. 1341/66], *Chimanlal v. Union of India*, A. 1964 S.C. 1854 (1861).

17. *Babulal v. Principal*, A. 1960 M.P. 294.

18. *Gurdip v. State of Punjab*, A. 1960 Punj. 126.

19. *Parshotam v. State of Punjab*, A. 1967 Punj. 115.

20. *State of M. P. v. Madan Mohan*, (1967) 14 F.L.R. 262 (265) S.C.

21. *Jagdish v. Union of India*, A. 1964 S.C. 449.

22. *Union Territory v. Gopal*, A. 1963 S.C. 601.

22a. *State of Orissa v. Ram Narayan*, A. 1961 S.C. 177 (178).

23. *Madan Gopal v. State of Punjab*, A. 1963 Punj. S.C. 531.

23a. *Ramesh v. Union of India*, A. 1963 S.C. 1852.

24. *Sukhhans v. State of Punjab*, A. 1962 S.C. 1711; *Rameswamy v. I. G. P.*, A. 1966 S.C. 175 (179).

25. *State of U. P. v. Akbar Ali*, A. 1966 S.C. 1842.

25a. *State of Punjab v. Dharam Singh*, A. 1968 S.C. 1216 (1218).

1. *Director of Public Instructions v. Dev Raj*, A. 1968 S.C. 1210.

tioner until there is an *affirmative order* of his confirmation by a competent authority on being satisfied as to his worth, or he is absorbed in a permanent post.<sup>21,22</sup> Confirmation does not depend upon mere passage of time; \* it depends upon the Government servant being found fit for confirmation. This is an implied term of appointment on probation.

3. Even in the absence of any provision for extension of the probationary period in the Rules or in the order of appointment, it is open to the competent authority to extend the period from time to time according to circumstances, for, it is implicit in an appointment on probation that the probation would continue till such time as the probationer was either confirmed or discharged.<sup>24</sup>

An extension of the period of probation may, accordingly, be made even after the expiry of the original or extended period of probation,<sup>23,1</sup> either expressly or by implication.<sup>21</sup> The result is that it is immaterial whether there is a formal order extending the probation or whether it is given retrospective effect or not.<sup>21</sup>

4. There may be cases where the order of appointment or the relevant Rule says that the specified period of probation will not be extended or will not be extended beyond another specified period, say, one year.<sup>1</sup> *Prima facie*, in such a case, if the Government extends the probation in contravention of the Rule, the order of the Government becomes *ultra vires*. Nevertheless, if the Government does extend the period and the Probationer, without tendering his resignation within a reasonable notice,<sup>1</sup> continues to serve as before, it may be taken that the contract has been modified by his consent, and he can neither contend that his service has terminated automatically on the expiry of the legitimate period of probation or that he has been automatically confirmed because it was the duty of the Government to confirm him as soon as the period of probation was completed. The reason is, as pointed out by the Supreme Court in *Sukhban's case*,<sup>24</sup> that no Probationer has a legal claim to be confirmed merely because of lapse of time, the satisfaction of the competent authority that he is fit to be confirmed is essential.

### Discharge of Probationer: Art. 311 (2), if attracted.

1. Discharge of a probationer at any time before he is confirmed, without any imputation and without any penal consequences other than termination of service would not attract Art. 311 (2).<sup>6</sup>

Appointment to a post on probation gives to the person so appointed no right to the post; hence, the termination of that employment without any injury whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.<sup>7</sup>

2. *Ramaswamy v. I. G. P.*, A. 1966 S.C. 175 (179).

3. *Verghese v. Union of India*, A. 1963 Cal. 421 (424).

4. Cf. *Harabilas v. I. T. Commr.*, A. 1963 Cal. 250, *Kanshi Ram v. State of U. P.*, A. 1966 All. 330 (not disturbed on this point by *State of U. P. v. Kanshi Ram*, A. 1958 All. 844).

5. *State of Bihar v. Gopkishore*, A. 1960 S.C. 689 (691). *State of Orissa v. Ram Narayan*, (1961) 1 S.C.R. 606; A. 1961 S.C. 177, Cf. *Dalip Singh v. State of Punjab*, A. 1960 S.C. 1304; *Ranendra v. Union of India*, A. 1963 S.C. 1552 (1554).

6. *State of Punjab v. Sukhraj*, A. 1968 S.C. 1089.

7. The position would, of course, be different where the Rules of service lays down that the discharge of a probationer for some specific fault amounts to removal (*Ranendra v. Union of India*, A. 1963 S.C. 1552 (1554)). Or, if such Rule requires a particular procedure to be followed, that must be complied with (*ibid.*).

2. But if the discharge is ordered *on the ground* of misconduct or the like *and is attended with penal consequences*, Art. 311 (2) must be complied with.<sup>8</sup> Hence,

If, instead of terminating the services of a Probationer without inquiry, the employer chooses to hold an inquiry into his alleged misconduct, or inefficiency, or for some similar reason for the purpose of punishing him for such misconduct, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career.<sup>9</sup> Hence, if a Probationer is discharged as a result of an inquiry on any such ground, the order of termination of service will be struck down if the requirements of Art. 311 (2) are not duly complied with.<sup>10</sup> Even where no reasons are given for the termination, it can be shown from the antecedents and other circumstances that it was *mala fide* and intended to be penal.<sup>11</sup>

3. But an order of discharge of a Probationer is not 'penal' merely because—

(i) The order recites 'unsatisfactory work and conduct' as the ground for discharge.<sup>9, 11</sup>

(ii) If, the discharge takes place as a result of an inquiry 'to ascertain whether he was fit to be *confirmed*', Art. 311 (2) will not be attracted.<sup>9, 12</sup> The rationale of the decision in this case is that there was no penalty besides termination of the probationary appointment.<sup>12</sup>

Where the order is made after inquiry, the *object* for which the inquiry was held has to be looked into in order to determine the nature of the order made.<sup>12</sup>

(iii) Even where the order of an order of reversion from a higher post on probation imposed the additional penalty that "he should not be considered for promotion for a period of seven years from the date of reversion", the Court held that it did not attract Art. 311(2), because this latter part of the order had been cancelled by the Governor upon a memorial submitted by the employee.<sup>12</sup>

### Resignation.

Art. 311 (2) is not attracted because there is no dismissal, where the employee voluntarily tenders his resignation and that is accepted by the Government.<sup>14</sup> The service is terminated as soon as the resignation is accepted and the employee has no right to withdraw it thereafter even though the acceptance has not been communicated to the employee.<sup>14</sup>

### 'Reduction in rank'.

1. Reduction in rank means the degradation in rank or status of the officer, directed by way of penalty.<sup>14, 15</sup> It thus involves two elements — (a) a reduction in the physical sense, relating to his classification as a Government servant;<sup>15</sup> (b) such degradation or demotion must be by way of penalty.

8. *Parshottam v. Union of India*, A. 1958 S.C. 36.

9. *State of Orissa v. Ram Narayan*, A. 1961 S.C. 177 (180).

10. *Sukhbans v. State of Punjab*, A. 1962 S.C. 1711.

11. *Jasdish v. Union of India*, A. 1964 S.C. 449 (455).

12. *State of U. P. v. Akbar Ali*, A. 1966 S.C. 1842 (1846); *State of Punjab v. State Raj*, A. 1968 S.C. 1089. But if the inquiry was into some misconduct and followed by a stigma in the order of discharge, it should attract Art. 311 (2), as held in *State of Orissa v. Ram Narayan*, A. 1961 S.C. 177 (180).

13. *Raj Kumar v. Union of India*, A. 1969 S.C. 180 (182).

14. *High Court v. Amalkumar*, A. 1962 S.C. 1704.

15. *Chandpal v. Union of India*, A. 1964 S.C. 1854.

A. Reduction in rank in the *physical sense* takes place where the Government servant is reduced to a lower post or rank<sup>16</sup> or to a lower stage in the pay-scale.<sup>17,18</sup>

On the other hand,—

(a) The word 'rank' in Art. 311 (2) has reference to a person's classification and not his particular place in the same cadre for the hierarchy of the service. . . . . Therefore, "*losing some place in the seniority is not tantamount to reduction in the rank*", the reason being that officers in the same cadre hold the same rank.<sup>19,20</sup> What happened in this case was that owing to the withholding of the Petitioner's promotion to a higher rank for sometime, when subsequently he was promoted, he got a place in the seniority list of the higher rank which was lower than that which he would have got, *had he been promoted in due time*. It was held that he had got the higher rank by the eventual promotion and that he could not complain of loss of seniority in the *promoted rank*, because that did not involve any *reduction in rank*.

But if, as a result of the reversion from an officiating or temporary appointment, the employee loses his seniority in the *substantive rank*, it would amount to a 'reduction in rank' provided it is ordered by way of punishment and not by reason of administrative considerations.<sup>21,22</sup> The real test to determine whether Art. 311 (2) would be applicable to such cases, therefore, is whether the impugned order has been made *by way of penalty*.

(b) Where there is no reduction in pay, right to pension, gratuity and the like, the mere fact that the Petitioner has been transferred from a post which is the Head of a Department to another post which is not designated as Head of a Department, does not constitute a 'reduction in rank'.<sup>19</sup>

B. As regards the *penal nature* of the reduction the Supreme Court<sup>20</sup> has applied the test of 'right to the rank' in question, in the same manner as the 'right to the post' test has been applied in the case of dismissal or removal.<sup>21</sup> Thus,

(i) Where a Government servant has a *right* to a particular rank, the very reduction from that rank will be deemed to be by way of penalty<sup>21,22</sup> and Art. 311 (2) will be attracted, without more. Thus,

An officer who holds a permanent post in a substantive capacity, cannot be transferred to a lower post, without complying with Art. 311 (2).<sup>23,24</sup>

(ii) On the other hand, where a Government servant has no title to a particular rank, under the contract of his employment or conditions of service,—there will ordinarily be no reduction in rank within the meaning of Art. 311 (7),<sup>1</sup> e.g., where a person's name is deleted from a promotion or selection panel where he had been placed on a 'provisional' basis,<sup>2</sup> or as a temporary measure, e.g., during absence on leave of the incumbent of the higher office.<sup>25</sup>

16. *Shilla v. N. E. Ry.*, A. 1966 SC 1197 (1200) [The wide proposition to the contrary in *Dineswar v. Chief Commercial Supdt.*, A. 1960 Cal 209 overruled].

17. *Madhar v. State of Mysore*, A. 1962 SC 8 (11).

18. *Cf. State of Punjab v. Jagdip*, A. 1964 SC 521.

19. *Gopal v. Union of India*, A. 1967 SC 1864.

20. *Hartwell v. Uttar Pradesh Govt.*, A. 1957 SC 250.

21. *Union of India v. Parshotam*, A. 1956 Punj 207, affirmed by *Parshotam v. Union of India*, A. 1958 S.C. 36.

22. *Shilla v. N. E. Ry.*, A. 1966 S.C. 1197.

23. F. R. 15.

24. *State of Punjab v. Sukhbans*, A. 1957 Punj. 191.

25. *Champahal v. Union of India*, A. 1964 SC. 1854 (1861).



(iii) A single Judge of the Punjab High Court<sup>22</sup> has held that even where a Government servant has been appointed to officiate in higher post for a *fixed* term, a reversion to his substantive post before the expiry of that period would not amount to reduction in rank. But the real question, in such cases, according to the decision in *Parshotam's case*<sup>23</sup> is (a) whether, according to the relevant Rules of service, such officiating appointment for a fixed term or tenure<sup>1, 23</sup> confers upon the person a *right* to hold that post for the specified period; and (b) whether the reversion is ordered as a penalty for 'unsatisfactory performance'.<sup>23</sup>

Art. 311 (2) will be attracted even in such cases if the reduction visits the Government servant with *penal* consequences, such as loss of seniority in his *substantive* rank;<sup>23</sup> stoppage or postponement of his future chances of promotion;<sup>21, 23</sup> an order of refund of excess payments, giving effect to the reversion retrospectively;<sup>21</sup> or it is attended with a stigma.<sup>25</sup>

Where a case of this class comes before the Court, the Court has to see from the order passed whether it affects the seniority of the Government servant in his substantive rank or the chances of his future promotion.<sup>21</sup> Losing same places in the seniority list within the same cadre is not tantamount to reduction in rank.<sup>23, 1</sup>

II. In some earlier cases,<sup>2</sup> it was held that it was the intention of the authority or the conduct of the Government servant concerned which attracted the operation of Art 311 (2). But the Supreme Court decisions referred to above have established that it is the *penal consequences* of the order which is material.

In other words, the *motive* behind the reversion is immaterial.<sup>3, 4</sup> Hence, Art. 311 (2) is not attracted where an employee is merely reverted from his higher officiating post to his substantive post, even though the motive or ground for such reversion be misconduct, inefficiency or the like.<sup>4</sup>

It would follow, therefore, that there is *no* reduction in rank in the following cases:

(i) Where certain posts were allotted to the Petitioners under a misapprehension and the Petitioners had no right to remain in those posts, e.g., for want of the requisite qualifications, or in contravention of the Rules regulating promotion, e.g., without consulting the Public Service Commission<sup>6</sup> and so they were reverted to their original lower posts.

(ii) Under a misapprehension of the Rules, certain officers officiating in a higher post were confirmed in those posts, though there were no permanent vacancies, by creating supernumerary posts, but this could not be done by such procedure. Upon objection taken by the Accountant General, the mistake was rectified by 'de-confirming' these officers. Held, that Art. 311 (2) was not attracted because the order was made

1-22. *Shilla v. N. E. Ry.*, A. 1966 S.C. 1197; (1966) 3 S.C.R. 61.

23. *Wadhwa v. Union of India*, A. 1964 S.C. 423 (430-1) [provided the seniority list in question gives the employee a *right* to seniority, according to the relevant Rules, *Ramaswamy v. I. G. P.*, A. 1966 S.C. 157 (179)].

24. *Harbans v. State of Punjab*, A. 1966 Punj. 46 (48).

25. *Devesh Chandra v. Union of India*, A. 1970 S.C. 77.

1. *High Court v. Amal Kumar*, (1963) 1 S.C.R. 437.

2. *Balal v. N. Ray Choudhry*, 58 C.W.N. 239; *Brajraj v. Saurashtra Govt.*, A. 1952 Sau. 40 (42).

3. *Madhav v. State of Mysore*, A. 1962 S.C. (8) (11).

4. *State of Bombay v. Abraham*, A. 1962 S.C. 794 (769-7).

5. *Amalendu v. Kailash*, (1952) 56 C.W.N. 846; *Chauhan v. Collector*, A. 1955 Al. 328.

6. *Srinivasan v. Union of India*, A. 1958 S.C. 419.

7. *Sunder Lal v. State*, A. 1970 P. & H. 241 (264) F.B.

only to correct an earlier error and not to punish the officers in question who had no right to the higher rank or post.<sup>8</sup>

(iii) When an officer loses his seniority owing to the revision of the seniority rules;<sup>9</sup> or because a more senior officer is transferred to the cadre from elsewhere, in the usual course,<sup>10</sup> or owing to integration or reorganisation of States

(iv) A person who had attained a benefit in the way of seniority by relaxation of the rules cannot claim as of right any particular rank in his substantive cadre or seek to enforce such right.<sup>9</sup>

(v) Where the relevant Rules provide that when an employee is confirmed, another claimant to that post may appeal against that order of confirmation and have it set aside, the confirmation is subject to the administrative appeal and that, accordingly, when it is set aside as a result of such appeal no reduction in rank or any punishment is involved.<sup>12</sup>

(vi) Similar would be the result where the officer who made the order of confirmation was not competent to make it or it was in respect of a post which is not vacant in fact.<sup>12</sup>

2. On the other hand, the 'penal consequences' which may attract the operation of Art. 311 (2) must be consequences to be suffered by the delinquent officer while he is in service. It does not extend to a reduction of the pension because a pension is granted to a Government servant, after he has retired, and solely at the discretion of the Government.<sup>11</sup> On the same principle, an order for the recovery from the pension of sums due from the Government servant in the of loss caused by his negligence or the like, would not constitute a 'reduction in rank' within the meaning of Art. 311 (2).<sup>13</sup>

3. Once the foregoing conditions are fulfilled, Art. 311 (2) will be attracted, whether the reduction in rank is permanent or is to be operative for a temporary period.<sup>14</sup>

### Reversion from officiating appointment.

1. Where a person is appointed to a higher post on probation<sup>1</sup> or in an *officiating capacity*, he does not acquire any legal right 'to hold that post for any period whatsoever and accordingly there is no reduction in rank' within the meaning of Art. 311 (2), if he is *merely* reverted to his substantive post<sup>1</sup> even though the *motive* for such reversion be misconduct, inefficiency unsuitability or the like,<sup>2</sup> and the reversion is made after holding an inquiry to determine his fitness for the post,<sup>3, 4</sup> or even for

8 *State of Punjab v. Jagdeep*, A. 1961 SC 521.

9 *Devasahayam v. State of Madras*, A. 1959 Mad 1. *Kamalamma v. State of Mysore*, A. 1960 Mys. 255.

10 *Jatindra v. R. Gupta* (1953) 58 CWN 128 (132).

11 *Ramaswamy v. I. G. P.*, A. 1966 SC 175 (181).

12 *Rameshchandra v. Union of India*, A. 1967 MP 79 (80).

13 *Narasimhachar v. State of Mysore*, A. 1960 SC 247 (51).

14 *Gangadhar v. Union of India*, A. 1963 Mys. 193 (197). [The obiter in *Prem Bahari v. State of M. P.*, A. 1954 MB 49 that 'reduction in rank' has reference to a permanent reduction or degradation in status is not it is submitted, sound].

15 *State of Punjab v. Sukh Raj*, A. 1968 SC 1069.

16 Mere 'regularisation' of an officiating appointment does not confer a right to permanency [*State of Mysore v. Narayanappa*, (1966) SC, (C.A. 1420/66)].

17 *Parshotam Dhingra v. Union of India*, A. 1958 S.C. 36 (1958) SCR 3.

18 *Ramaswamy v. I. G. P.*, A. 1966 SC 175 (180-1).

19 *State of Bombay v. Abraham*, A. 1962 SC 794 (796-7).

20 *Cf. State of Orissa v. Ram Narayan*, A. 1961 S.C. 177.

21 *Jagdish v. Union of India*, A. 1964 S.C. 449 (455).

the purpose of determining whether a disciplinary proceeding should be started against him.<sup>22</sup>

2. An order of reversion from an officiating post may attract art. 311 (2) only if the order "visits the servant with any *penal consequences*"<sup>23, 24</sup> other than the reversion, e.g.—

(a) stopping or postponing his future chances of promotion,<sup>27, 24</sup> even though for a limited period;

(b) affecting his seniority in the substantive rank;<sup>24, 1</sup>

(c) forfeiting his pay or allowances<sup>2</sup> or increment already earned.<sup>25</sup>

On the other hand, the mere deprivation of the higher emoluments of the officiating post is not a 'penal consequence' for the present purpose, because that is the *usual* consequence of the order of reversion from the officiating post which he had no right to hold.<sup>2-3</sup>

3. Where the name of particular employees is placed on a Seniority List on a *provisional basis*<sup>25</sup> and the Rules in question do not give an indefeasible right to retain that seniority, the reversion of a person higher in that List does not constitute a 'reduction in rank' merely on the ground that persons lower in that List have not been reverted.<sup>25</sup>

4. Where the reversion is ordered on the ground of unsuitability, without any additional penal consequences, the reversion would not amount to a 'reduction in rank', even though the order is made after making an inquiry for the purpose of determining the suitability of the employee for the post in which he was officiating;<sup>25, 4</sup> or a person junior to him is retained in the higher post.<sup>25</sup>

If the reversion takes place merely for administrative reasons, the rule of 'last come first go' should ordinarily be applied;<sup>6</sup> but it has no application where the reversion is ordered on the ground of unsuitability, after trial, of the employee in question.<sup>26</sup>

5. But there may be cases where a person has a right to hold a higher post by virtue of mere seniority of service, e.g., a Police Officer in the junior scale has a right to be promoted to the senior scale by virtue of his seniority in the junior scale,<sup>6</sup> provided a post in the senior scale is available, under the provisions of the All-India Service Act, 1951 and the Indian Police Service (Regulation of Seniority) Rules, 1954. In such a case, if an officer of the junior scale is appointed to a post in the senior scale by reason of his seniority, even in an *officiating* capacity, Art. 311 (2) must be complied with for reverting him from his officiating appointment,—

(i) if the reversion is made, not on administrative grounds, such as the return of the permanent incumbent on leave or deputation,<sup>6</sup> but on the ground of misconduct or with imputations, such as of inefficiency, or unfitness for the post;<sup>7</sup> or

22. *Lacy v. State of Bihar*, (1963 S.C. [C.A. 590/62, d. 23-10-63]).

23. *Union of India v. Jerwan Ram*, A. 1958 S.C. 905.

24. *Madhav v. State of Mysore*, A. 1962 S.C. 8; (1962) 1 S.C.R. 886 (891).

25. *Diul. Personnel Officer v. Raghavendrachar*, (1966) 3 S.C.R. 106.

1. *Wadhwa v. Union of India*, A. 1964 S.C. 423; (1964) 4 S.C.R. 589.

2. *Parshottam v. Union of India*, A. 1958 S.C. 36; (1958) S.C.R. 828.

3. *State of Bombay v. Abraham*, A. 1962 S.C. 794.

4. *State of Bombay v. Abraham*, (1962) 2 Supp. 2 S.C.R. 92. (But see *Debesh Chandra v. Union of India*, which was a case of reversion from a *leave post*.)

5. *Ramaswami v. I. G.P.*, A. 1966 S.C. 175.

6. *Wadhwa v. Union of India*, A. 1964 S.C. 423; (1964) 4 S.C.R. 589 (627).

7. *Madhan v. State of Mysore*, A. 1962 S.C. 8.

(ii) if he is not only reverted to the lower post but his seniority in the junior list is lost or his promotion to the senior scale is withheld or his chances of promotion to the senior scale by mere seniority on the occasion of a future vacancy is jeopardised by reason of the promotion of persons junior to him being appointed to the higher post.<sup>7</sup>

### Reversion from temporary appointment to substantive post.

1. It is settled by the Supreme Court decision in *Parshotam v. Union of India*<sup>8</sup> that when a person is appointed to a temporary post, without a fixed term, he acquires no right to hold that post, unless and until his service in the temporary post ripens into a quasi-permanent service, by a declaration to that effect.<sup>9a</sup> In such a case, the Supreme Court holds, it is an implied term of his employment in the temporary post (even though the appointment may have been on a substantive and not officiating basis) that it is terminable by the Government at any time, on reasonable notice. Reversion from such temporary post to the Government servant's substantive post does not, accordingly, *prima facie* constitute reduction of rank.<sup>9</sup> Hence, there is no question of application of Art. 311 (2) when such reversion takes place, *e.g.*,

(a) On account of the abolition of the post;<sup>10</sup>

(b) Where promotion to the higher post had been unauthorised or invalid<sup>11</sup> or made on a provisional basis till a senior returns from leave or deputation,<sup>12</sup> or made under a wrong application of the Rules<sup>13</sup> or under a mistake of facts,<sup>14</sup> or misrepresentation,<sup>15</sup> and a fresh selection on a regular basis is ordered by the Government;

(c) Where the officers is simply reverted to his substantive post without imposing any additional penalty, *e.g.* affecting his rank or chances of promotion in his substantive post,<sup>16</sup> even though such reversion is ordered on the ground of unsatisfactory work or misconduct.<sup>17</sup>

2. But if, instead of simply reverting the Government servant from his temporary post to his substantive post, Government intends to penalise the Government servant for some misconduct or the like by way of forfeiture of the benefits earned by him by service in that post, or to affect him in his future chances in his substantive post it will constitute reduction in rank and Art. 311 (2) will be attracted.<sup>17</sup>

It would be similarly penal if the officer is reverted not to his substantive post but to a post in a rank lower than the substantive post or the order entails penal consequences other than those flowing out of the reversion,<sup>12</sup> *e.g.*, exclusion from the 'fit list' for promotion,<sup>18</sup> a remark of censure in the Confidential Roll for misconduct;<sup>19</sup> or the order of discharge is made after a formal departmental inquiry is held and the employee is found guilty of the charges, and the order of discharge adds a stigma, *e.g.*, that the employee is 'undesirable to be retained in Government service'.<sup>1</sup>

8. *Parshotam v. Union of India*, A. 1958 S.C. 36.

8a. *State of Nagaland v. Vasantha*, A. 1970 S.C. 537.

9. *Dial. Personnel Officer v. Ravhavendrachar*, A. 1966 S.C. 1529.

10. *Prajanandan v. State of Bihar*, A. 1955 Pat. 353 (355); *Bhupathi v. State*, A. 1968 A.P. 307 (309).

11. *Srinivasan v. Union of India*, A. 1958 S.C. 419; (1958) S.C.R. 1295.

12. *Ramaswamy v. I. G. P.*, A. 1966 S.C. 175 (180).

13. *G. K. Sinha v. Collector*, A. 1957 All. 152.

14. *Mazhar v. State of U. P.*, A. 1961 All. 316.

15. *Ananthan v. State*, A. 1968 Kar. 234 (238).

16. *Dial. Personnel Officer v. Ravhavendrachar*, A. 1966 S.C. 1529.

17. *Jagdish v. Union of India*, A. 1964 S.C. 449.

18. *Hartwell v. Uttar Pradesh Govt.*, (1958) S.C.A. 1.

19. *Lacy v. State of Bihar*, (1963) S.C. [C.A. 590/62, d. 23-10-63].

3. It will be, however, for the Government servant to establish that the reversion has been attended with penal consequences, and if he fails to establish that, the reversion will not be invalid for non-compliance with Art. 311 (2).<sup>19</sup>

4. In the absence of any penal action resulting from reversion, Art. 311 (2) would not be attracted merely because a preliminary inquiry is held to determine whether disciplinary proceedings should be held against the Government servant and no steps for holding such inquiry by framing charges, appointing an inquiry officer or the like are actually taken.<sup>20, 21</sup>

5. But when the appointment to a temporary post is for a fixed term a termination of that appointment can be made only according to Art. 311 (2).<sup>21</sup>

### **Cancellation of order of confirmation.**

Though confirmation of an officiating appointment gives a right to hold that post, being an administrative order, it is revisable on the ground that it had been made through mistake.<sup>22</sup>

Cancellation of a confirmation order, in the above circumstances, can not be challenged as constituting 'reduction in rank'.<sup>22</sup>

### **Reversion from post held on deputation.**

1. When an officer on deputation is sent back to his original post at the end of the period of deputation, if that was specified, or at any time on account of administrative exigencies not connected with the work or conduct of the officer, there is no reduction in rank.<sup>23</sup>

2. But where the deputation is for a term and the officer is reverted during that period, not on account of any administrative exigency but only with a view to sending him to a post carrying a lower salary, with a stigma, Art. 311 (2) must be complied with.<sup>24</sup>

3. If, however, he is sent away from a tenure post before the expiry of the period of tenure, Art. 311 (2) must be complied with if—

(a) the reversion is to a post lower in rank than the post held on tenure, or

(b) there is a stigma attached to the order of reversion that is to say if the reversion is not due to a pure accident of service but his work or conduct is alleged to be unsatisfactory.<sup>25</sup>

4. Appointment of a member of the State cadre or the Indian Administrative Service to a tenure post under the Government of India is not a case of deputation but one of promotion to a higher post.<sup>26</sup>

### **Suspension.**

#### **(A) Pending Departmental inquiry**

1. Suspension of a Government servant pending departmental inquiry into allegations against his conduct is resorted to for facilitating inquiry.

II. Suspension pending departmental inquiry is something temporary and does not involve punishment.<sup>24</sup> It means a temporary deprivation of the officer's functions or the right to discharge his duties but does not amount to any lowering down or reduction of his rank or status.<sup>25</sup> Hence,

20. *State of Punjab v. Sukh Raj*, A. 1968 S.C. 1089 (1093).

21. *Rajendra v. State of Haryana*, A. 1970 Delhi 132.

22. *Sharma v. Transport Commr.*, A. 1968 All. 276 (278).

23. *Debesh Chandra v. Union of India*, (1969) 1 S.C.A. 579 (588); A. 1970 S.C. 77.

24. *Bedri Prasad v. Dt. Board*, A. 1952 All. 681 (683).

25. *Dandapani v. State of Orissa*, A. 1964 Orissa 329; *Prem Biharlal v. State of M. B.*, A. 1954 M.B. 49.

no opportunity to show cause under Art. 311 (2) is necessary before making an order of suspension of this nature.<sup>1,2</sup>

III. Suspension pending inquiry is an *administrative* and not a quasi-judicial order. It is not necessary to make any inquiry into the charges of misconduct or to obtain the explanation of the Government servant before making such order. It can be made if the authority concerned, on getting a complaint, considers that the alleged charge does not appear to be groundless, that it requires enquiry and that it is necessary to suspend the Government servant pending the enquiry.<sup>3</sup>

IV. Where the power to suspend is subject to statutory conditions or limitations, the order will be *ultra vires* if the conditions are violated,<sup>4</sup> e.g. —

In the case of a member of an All India Service, in view of the language of r. 7 (1) of the All India Service (Discipline and Appeal) Rules, 1955, an order of suspension can be made only when disciplinary proceedings are started and not when they are merely contemplated.<sup>5</sup>

#### (B) Pending criminal investigation or trial

The Rules of some Departments also authorise suspension pending criminal proceedings against a Government servant, as soon as an accusation or investigation connected with his position as Government servant is made or he is arrested.<sup>6</sup>

#### (C) Is a substantive penalty?

Suspension may also be awarded as a substantive punishment under the Civil Service Regulation. It would then amount to removal within the meaning of Art. 311 so that all the requirements of that Article must be complied with.<sup>7</sup>

### Whether there is any implied power to suspend pending inquiry.

1. Under the general law of master and servant while a contract of employment subsists the servant is bound to render service and the master is bound to pay. The power to suspend the workman is not an implied term of the contract. Hence unless there is an express term in the contract the master has no right to suspend and if he does forbid him to work he must pay for the period the servant was prevented from rendering his service.<sup>8</sup>

2. After some uncertainty it has been laid down by the Supreme Court that the general law of master and servant is also applicable broadly, to Government service. In the result,

(a) The contract of employment may be suspended exonerating either party from his obligations thereunder only if the contract of employment or the statutory rules governing the service expressly provide for such suspension.<sup>9,10</sup> Where there is such power conferred by the contract or

1. *Pratap Singh v. State of Punjab* A 1964 SC 72 (98)

2. *Chowse v. State of Andhra* A 1958 SC 246 (249)

3. *Tarak Nath v. Govt. of India* A 1967 Pat 81 (85)

4. E.g. under Reg. 17 of the Posts and Telegraphs Manual Vol II (cf. *Himanta v. Sen Gupta* (1952) 36 CWN 676) r. 11 (a) of the CCR and State Ry. Establishment Code (cf. *Pulin v. Divisional Supdt.* A 1953 Cal 451 or 93A Orissa Service Code Vol I (cf. *Narayan v. State of Orissa* A 1957 Orissa 51 (54))

5. Also under r. 49 (v) of the Civil Services (Classification Control and Appeal) Rules, r. 12 of the Punjab Tahsildari Rules, 1952

6. *Kapur v. Union of India* A 1964 SC 787

7. *Hotel Imperial v. Hotel Workers' Union*, A 1959 SC 1342

8. *S. D. O. v. Shambhao*, (1969) 1 SCC 825 (827)

9. *Balavantai Patel v. State of Maharashtra*, A 1968 SC 800 (803)

10. *Gudimanya v. State of M. P.* (1970) 1 SCWR 294 (299-300)

11. *State of Punjab v. Khem Ram*, (1969) 11 SCWR 718

the rules, the Government servant will not be bound to render service during the period of such suspension, nor will the Government be under any obligation to pay his remuneration.<sup>101</sup>

(b) Any such power to suspend the contract of employment is not an implied term of employment.<sup>8, 9</sup> In the absence of any such power conferred by the contract of employment, expressly, or by the Rules governing the service, therefore, the Government can only forbid the employee to work, pending an inquiry being held against him; but in such case, the contract of employment will not be suspended.<sup>10</sup> The result will be that—

(i) The employee will not be free to take up other employment;

(ii) The employer must pay him his wages;

(iii) Since the contract still subsists, either party is entitled to terminate the service by notice, if the Rules give such power to either party, e.g., in the case of temporary service.<sup>10</sup>

(c) But even where there is no contractual or statutory power to suspend the contract of employment pending inquiry, what amount of wages will be payable to the employee during the period when the employee is forbidden to work, pending inquiry, will depend on the Rules:

(i) If there is a provision as to the amount of remunerations or allowance to be paid to the Government servant during suspension, the payment will be made in accordance therewith.<sup>9, 12</sup>

It has been held that FR 53 54 of the Fundamental Rules<sup>12</sup> as well as other Rules which are similarly couched in general terms, such as 11 151 2 of the Bombay Civil Service Rules,<sup>12</sup> comprise in their scope both suspension as a penalty as well as suspension as an interim measure so that in the case of suspension pending inquiry (even in the absence of any specific power to do so), payment to the employee shall be made according to these Rules.

(ii) If there is no such rule providing for the withholding of the full wages during suspension, the Government servant must be paid his full emoluments during the period he is suspended pending inquiry.<sup>12, 13</sup>

(d) Where the power to 'appoint' is conferred by a statute or by the Constitution, the power of suspension may be drawn by interpretation of the word 'appoint', by virtue of s. 16 of the General Clauses Act.<sup>14</sup>

### **Position of a Government servant under suspension pending inquiry.**

1. A Government servant who has been suspended pending departmental enquiry or judicial proceeding does not cease to hold his office; he only ceases to exercise the powers and discharge the duties of his office for the time being. His powers, functions, salaries and other privileges remain in abeyance but he does not cease to be bound by his obligations as a Government servant. He continues to be subject to the same discipline and subject to the same authorities. It is something less than termination of service. Hence, during the period of suspension, the Government servant cannot seek employments elsewhere nor can the Government employ another person in his place.<sup>15</sup>

2. On the other hand, since the performance of the contract remains in abeyance, the employee cannot enforce the terms of the original contract

12. *Kapur v. Union of India*, A. 1964 S.C. 787 (797).

13. *Gandroniya v. State of M. P.*, (1970) 1 S.C.W.R. 294 (299).

14. *Pradyot v. Chief Justice*, (1966) 2 S.C.R. 1331 (1345).

15. *Divisional Supdt. v. Mukund*, A. 1957 Pat. (132) F.B.

and claim his salary or contractual wages, as of right. He is only entitled to 'subsistence allowance' as provided by the Rules or conditions of service.<sup>14</sup>

3. Even where the Payment of Wages Act, 1936 applies to any class of Government servants, an employee belonging to that class cannot, during suspension, claim full wages, or complain to the Authority under that Act that his wages have been 'deducted', since there has been no *deduction* of his wages. He is not entitled to wages during the period of suspension, according to the conditions of service, but is entitled only to get subsistence allowance.<sup>16, 25</sup>

### **An order of suspension cannot be made with retrospective effect.**

1. The basic idea underlying the word 'suspend' is that a person while holding an office and performing its functions or holding a position or privilege, should be interrupted in doing so and debarred for the time being from further functioning in the office or holding the position or privilege. There can be no meaning in suspending a man from working during a period when the period is past and he has already worked or suspending a man from occupying a position or holding a privilege in the past when he has already accupied or held it.<sup>1</sup> An order of suspension can be made to operate only as respect the period which commences from the date of the order and lies after it.<sup>2</sup>

2. While setting aside an order of dismissal, an authority *cannot* make an order of suspension with retrospective effect.<sup>3</sup>

3. When an order of suspension is made with retrospective effect, the Court may uphold it in so far as it is prospective, that is, give it effect from the date of the order, because the two parts of the order, namely, its effects anterior and posterior to the date of the order, are severable.<sup>2, 4</sup>

4. It would follow, accordingly, that when an order of suspension is subsequently found to be invalid (*e.g.*, because it was made by a person having no authority to make it) and a valid order is made, the Petitioner must be deemed to have been in service between the date of the previous invalid order and the subsequent valid order and is entitled to his salary during this intervening period.<sup>5</sup>

5. There are, however, certain Rules (*e.g.*, R. 12 (3)-(4) of the Central Civil Services (Classification, Control & Appeal Rules), which impose suspension with retrospective effect where a departmental authority decides to start fresh disciplinary proceedings after a previous order of dismissal or removal has been set aside either by departmental appeal or revision or by a court of law. The constitutionality of such Rules has been upheld by the Supreme Court in *Khem Chand v. Union of India*.<sup>6</sup> In such cases, the suspension takes retrospective effect not from the order of the departmental authority but from the relevant Rules of service, having the force of law.<sup>6</sup>

### **Suspension during leave.**

I. Leave being revocable, under the Service Rules, at the discretion

16-25. *Thillai Natarajan v. Fernandes*, (1956) 58 Bom.L.R. 821.

1. *Hemanta v. S. N. Mukherjee*, (1953) 58 C.W.N. 1 (7).

2. *Jeevaratnam v. State of Madras*, A. 1966 S.C. 951.

3. *U. P. Govt. v. Tabarakh*, A. 1956 All. 151.

4. Anything said to the contrary in *Abdul Hakim v. Dt. School Board*, 61 C.W.N. 880; *Sudhir v. State of W. B.*, A. 1961 Cal. 626, now stands overruled.

5. *Balden v. Govt. of Pepsu*, A. 1954 Pepsu 98 (109); *Om Prakash v. State of U. P.*, (1955) 2 S.C.R. 391; A. 1955 S.C. 600.

6. *Khem Chand v. Union of India*, A. 1964 S.C. 687.



of the granting authority, such authority may, at any time, revoke the leave and place the Government servant on suspension.<sup>7</sup>

II. The same holds good of leave preparatory to retirement. A Government servant who proceeds on leave preparatory to retirement cannot be said to have retired from that date. He remains in service until he reaches the age of superannuation or until dismissal or removal, if earlier. While on such leave, he retains lien on his permanent service. It is, therefore, competent for the Government to issue simultaneous orders revoking such leave and placing the Government servant under suspension, where the Rules so permit.<sup>7</sup>

III. Further, if the Government servant on such leave is placed under suspension prior to his date of superannuation, he cannot insist on retiring, on attaining the age of superannuation,—if the Rules of Service, having the force of law, provide to the contrary.<sup>7</sup>

### **Effect of termination of criminal proceedings on order of suspension.**

I. The general rule is that where suspension has been ordered on the ground that a Government servant has been arrested on a criminal charge or a criminal investigation or trial against him is *pending*, the order of suspension automatically ceases to be operative as soon as the criminal proceedings terminate<sup>8</sup> by an acquittal or discharge of the accused<sup>9</sup> or other wise.

Upon such acquittal or discharge, the Government servant is entitled to his full salary and allowances from the date of suspension till the date of acquittal. Government is not entitled to fix his salary during this period under F. R. 54<sup>6</sup> or any corresponding Rule, for, that Rule applies only where the employee is acquitted in a departmental proceeding.<sup>11</sup>

II. The question becomes complicated where upon the termination of one, fresh criminal proceedings are started on the identical charges.

#### *(a) Fresh criminal proceedings.*

(i) No difficulty arises where the Departmental Rules provide that a Government servant can be suspended on the ground of pendency of criminal proceedings only by a specific order.

In such a case, the order of suspension spends its force as soon as the first proceeding upon the pendency of which the order of suspension is made terminates and accordingly, if, thereafter, the Government wants to suspend the Government servant again because a fresh criminal proceeding has been started against him, there must be issued a fresh order of suspension in relation to the second criminal proceeding.<sup>9</sup> It follows that if there is any gap of time between the termination of the first criminal proceeding and the second order of suspension, the Petitioner must be deemed to have been in active service during the interval and entitled to his emoluments,<sup>9,10</sup> and the second order of suspension cannot be given retrospectively effect.<sup>9,11</sup>

(ii) But there are Rules which do not require a specific order of suspension under certain circumstances.<sup>6</sup>

Hence, if on the termination of the first proceedings, the Government servant is not released from detention or is re-arrested and fresh proceed-

7. *Partap Singh v. State of Punjab*, A. 1964 S.C. 72 (95), per Raghunath Dayal J.

8. *Om Prakash v. State of U. P.*, (1955) 2 S.C.R. 391.

9. *Meemanta v. N. N. Sen Gupta*, (1952) 56 C.W.N. 676 (678).

10. *Narayan v. State of Orissa*, A. 1957 Orissa 51 (55) approved in *Balwantai v. State of Maharashtra*, A. 1958 S.C. 200 (204).

ings are started, the initial suspension will continue by the deeming provision of such Rule and no fresh order of suspension will be required.<sup>6</sup>

(b) *Fresh departmental proceedings*

(i) After the termination of criminal proceedings in favour of the Government servant, it is open to the Departmental authority to initiate Departmental proceedings against the Government servant on the same allegations or charges upon which the criminal proceedings had been founded;<sup>11</sup> and the findings of the Criminal Court are not binding in the Department proceedings.<sup>12,13</sup> But in such a case, since the initial order of suspension ceases to operate upon the termination of the criminal proceedings by reason of the pendency of which the order of suspension had been made,<sup>14</sup> a fresh order of suspension upon the initiation of the departmental proceedings would be necessary if the Authority desires to continue the suspension of the Government servant.<sup>15</sup>

(ii) It has, however, been held that where the initial order of suspension pending criminal investigation used the words 'suspended pending further orders', that order of suspension would continue even after the acquittal in the criminal proceeding, because the words 'pending further orders' suggest that the order of suspension could not be terminated nor would the employee be entitled to be reinstated until there was another order of the Government to that effect,<sup>16</sup> except where the rule relating to suspension expressly provided that a Government servant could be suspended only during the period when he was 'actually detained in custody or imprisoned'.<sup>17</sup> Hence, in such a case, a right to reinstatement or payment of emoluments would not automatically arise *ipso facto* after the employee is acquitted in the criminal proceeding.<sup>18</sup>

**Effect of termination of Departmental proceedings on order of suspension.**

I It is evident from the foregoing discussion that suspension pending a departmental inquiry into the conduct of a Government servant is also in the nature of an interlocutory order which ceases to exist after the proceedings terminate by an order of acquittal, dismissal or removal.<sup>19</sup> "The order of dismissal replaced the order of suspension which then ceased to exist."<sup>20</sup> The result is the same whether the termination of service is ordered as a result of the departmental proceedings or otherwise,<sup>20</sup> for in either case, the relationship of master and servant ceases.<sup>21</sup>

II It follows, therefore, that if the order of dismissal is subsequently set aside or declared illegal by a Court that would not revive the order of suspension which had ceased to exist as soon as the proceedings had terminated by the making of the order of dismissal.<sup>22</sup> Consequently the civil servant is entitled to recover arrears of full salary since the date of the wrongful dismissal as if he were on duty.<sup>23</sup>

11. *Rajakopala v. State of Assam* A 1965 Assam 109.

12. *State of A. P. v. Rama Rao* A 1953 SC 1723 (1727).

13. *Partap Singh v. State of Punjab* A 1961 SC 72 (100).

14. *Cf. Om Prakash v. State of U. P.* (1955) 2 SCR 391 (401).

15. *Balvantrai v. State of Maharashtra* A 1968 SC 800 (806).

16. *Lakman v. State of M. P.* A 1959 MP 294 (295).

17. *Jauwant v. State of Rajasthan* A 1963 Raj 203 (206).

18. *Devendra v. State of U. P.* A 1962 SC 1334 (1337).

19. Unless there is a suspension with effect from the original order of dismissal by the operation of Rules like R 12 (3) (4) of the Central Civil Services (Classification, Control & Appeal) Rules; r 40 (4) of the Railway Protection Forces, 1969; which apply in case fresh disciplinary proceedings are started.

*Where fresh department proceedings started.*

1. The ordinary rule, as already seen, is that on the termination of the pending departmental proceeding, the order of suspension ceases to exist.<sup>20</sup> Hence, if fresh departmental proceedings are started and the suspension is sought to be continued, there must be a fresh order of suspension,<sup>21</sup> in the absence of anything to the contrary in the Rules.

2. But there are certain Rules which provide for the continuance of the original order of suspension in such cases.<sup>19</sup>

The result of such Rules is that where an order of dismissal is set aside by *any* Court, but the competent authority decides to hold a fresh departmental proceeding against the delinquent officer, he will not be entitled to be reinstated or to recover arrears of pay since the date of the original order of dismissal on the ground that it was declared by the Court to be a nullity, but he will be deemed to be under suspension, by operation of the Rule, with effect from the date of the original order of dismissal, thus leaving no gap in suspension. No express order of suspension will be necessary in this case. Though this Rule apparently causes hardship and virtually places the delinquent officer under suspension with retrospective effect and though the Rule will have this effect if the departmental authority makes his decision to start fresh proceedings at *any* subsequent point of time (no limitation in this behalf having been imposed by the Rule), the constitutionality of this Rule has been upheld by the Supreme Court against attacks on the ground of contravention of Arts. 14, 19 (f), 31, 142 and 144.<sup>22</sup>

**Right to salary where order of suspension or dismissal is set aside and the Government servant is reinstated.**

Where a Government servant who had been suspended or dismissed is reinstated as a result of the order of suspension or removal having been set aside the question arises as to the remuneration he should be entitled to in respect of the period he was prevented from being on duty by the order of suspension or dismissal until the date of reinstatement.

As will be presently seen, there are certain Rules of Service<sup>24</sup> which give a discretionary power to the competent authority to make orders in this behalf. The Supreme Court has, however, held<sup>23</sup> that these Rules do not apply where the order of suspension is set aside by a court of law as distinguished from the departmental superior. Hence, we have to distinguish between the two cases:

*I Where the order is set aside by Court*

1. Where an order of suspension or dismissal is set aside by a court of law, the effect would be that the employee was never deemed to have been lawfully suspended or dismissed and that he was *wrongfully* prevented from attending his duties as a public servant. In such a contingency, it would not be open to the departmental authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work.<sup>25</sup>

2. But the setting aside of an order of suspension will not mean an automatic cancellation of other orders which stood on an independent footing.<sup>26</sup>

20. *Om Prakash v. State of U. P.*, (1955) 2 S.C.R. 391 (401).

21. *Narayan v. State of Orissa*, A. 1957 Orissa 51 (55).

22. *Khem Chand v. Union of India*, A. 1963 S.C. 687 (692).

23. *Devendra v. State of U. P.*, A. 1962 S.C. 1334 (1337).

24. Cf. P. R. 54 (b) [*Devendra v. State of U. P.*, A. 1962 S.C. 1334].

25. *Narash v. Union Territory*, (1969) 2 S.C.C. 22.

## II. Where the order is set aside and reinstatement ordered by the departmental authority.

Since the determination by a departmental authority that the order of suspension or dismissal should be cancelled and the employee should be reinstated is not an adjudication, the order which has been set aside does not become a nullity; hence, it is competent for the departmental authority to fix the remuneration to be paid to the employee for the intervening period in a case where the suspension or dismissal was *not wholly* unjustified.<sup>1</sup> In other words, a sum less than the full pay and allowances may be fixed by such authority when he finds that though the employee is being ordered to be reinstated, he is not fully exonerated. But before making such order, the authority must apply his mind and come to a determination that the employee has not been fully exonerated or that the suspension was not wholly unjustified.<sup>2</sup>

## III. Where the order is withdrawn.

It follows that where an order of suspension is withdrawn, finding it untenable, Government must pay him his salary during the period of suspension.<sup>2</sup>

If such withdrawal takes place during the pendency of a proceeding under Art. 226, the Court may make an order in the nature of *mandamus* directing Government to make such payment, instead of leaving it to the Petitioner to resort to further proceedings.<sup>2</sup>

### Procedural safeguards.

#### (A) LAW PRIOR TO 6-10-63.

#### 'Reasonable opportunity to show cause'.

1. This expression requires that the person charged has ordinarily the right to reasonable opportunity of showing cause *twice*,<sup>3-4</sup> before the order of dismissal, etc., is passed. There are two stages in a proceeding under the present Article: the first being when the charges are enquired into and at this stage, the person required to meet the charges should be given a reasonable opportunity to enter into his defence; and the second stage is when after the enquiring authority has come to its conclusion on the charges and there arises the question of the proper punishment to be awarded. A notice has then again to be given to show cause against the punishment proposed.<sup>3-4</sup>

2. As observed by the Supreme Court in *Khem Chand's case*,<sup>4</sup> 'reasonable opportunity' in Art. 311 (2) implies opportunity in three respects<sup>4-5</sup>—

- (i) To deny the guilt alleged and to establish innocence.
- (ii) To defend, by examining the Government servant himself and his witnesses and cross-examining the witnesses produced against him.
- (iii) To make representation as to why the punishment proposed, after the inquiry is over, should not be inflicted.

In short, this clause requires that the civil servant in question is entitled to have an opportunity to show cause at two stages:<sup>4</sup> (a) once at the enquiry stage, against the charges levelled against him; (b) again, after he is found

1. *Vasant v. State of Maharashtra*, A. 1963 Bom. 137 (141).

2. *Shyam Sundar v. Union of India*, A. 1965 Cal. 281.

3. *Cf. John v. State of T. C.*, A. 1955 S.C. 160.

4. *Khem Chand v. Union of India*, A. 1958 S.C. 300: (1958) S.C.R. 1080 (1096).

5. *State of Assam v. Bimal*, A. 1963 S.C. 1612.

guilty and punishment is provisionally proposed,—against the punishment so proposed upon the finding.<sup>4</sup>

3. This does not mean that when the opportunity to show cause against the proposed punishment is offered to the delinquent officer, after a proper inquiry made into the charges, the delinquent officer can ask for a repetition of the inquiry stage<sup>6</sup> or a second opportunity to meet the charges.<sup>6</sup> Assuming that a proper inquiry has been made before the notice to show cause against the punishment proposed is served, the only right of the delinquent officer at this subsequent stage is to represent against the punishment proposed as the result of the findings of the inquiry, and the grounds upon which the punishment is proposed.<sup>4</sup> He is, therefore, entitled to show not only that the punishment proposed is not warranted by the findings but also that the decision is not warranted by the facts on the record,<sup>5</sup> or, in other words, at the second stage, he is entitled to contend—(a) that he has not been guilty of any misconduct to merit any punishment at all;<sup>6</sup> (b) that the particular punishment proposed is much more drastic and severe than he deserves.<sup>4</sup>

4. It is for the Court to determine whether an opportunity was given and, if so, whether such opportunity was 'reasonable.' The reasonableness of the opportunity has to be determined with reference to all the circumstances of each case,<sup>5</sup> e.g., the nature of the action proposed, the grounds on which it is proposed, the materials on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause, the nature of the plea raised by him, the requests for further opportunity, his admissions by conduct or otherwise.<sup>5, 6</sup>

#### What 'reasonable opportunity' implies.

1. Subject to the Proviso to Cl. (2), the Courts have jurisdiction to determine whether reasonable opportunity has been given in any case,<sup>6, 7</sup> having regard to the circumstances of that case.<sup>7</sup>

2. The Court has to enquire whether reasonable opportunity has been offered to the civil servant at both the stages viz., the inquiry stage when the charges against him were enquired into and the final stage when he was to show cause against the punishment provisionally proposed against him.<sup>8, 9</sup>

3. Hence, an order of dismissal, removal or reduction would contravene Art. 311 (2), if—

(a) At the inquiry stage, the delinquent officer is not given 'reasonable opportunity' to defend himself, and to establish his innocence.<sup>4, 8</sup>

(b) After the inquiry,—if a further opportunity to show cause against the punishment proposed is not given.<sup>8</sup>

(c) A combined notice is served upon the delinquent officer, embodying the charges as well as the punishment proposed.<sup>8</sup>

(A) *At the inquiry stage.*—'Reasonable opportunity' at this stage requires that

(a) the authority must (i) frame specific charges<sup>10</sup> with the allegations on which they are based;<sup>11</sup> (ii) intimate those charges to the Government

6. *Bhatt v. Union of India*, A. 1962 S.C. 1344.

6a. *Secy. of State v. Lall*, A. 1945 F.C. 47 (57); *Kapur Singh v. Union of India*, A. 1960 S.C. 493 (500).

6b. *Cj. Fedco v. Bilgrami*, A. 1960 S.C. 415.

7. *Kapur Singh v. Union of India*, A. 1960 S.C. 493.

8. *Ebrahim Chand v. Union of India*, A. 1959 S.C. 536 (540).

9. *State of Mysore v. Manche Gowda*, A. 1964 S.C. 506.

servant concerned;<sup>11</sup> (iii) give him an opportunity to answer those charges;<sup>11</sup> (iv) give him an opportunity to defend himself against those charges by cross-examining witnesses<sup>10</sup> produced against him and by examining himself or any other witnesses in support of his defence;<sup>4</sup> (v) after considering his answers take its decision;<sup>12</sup> (b) the rules of natural justice should be observed in coming to the finding against the accused.<sup>13</sup>

The Supreme Court<sup>19, 20</sup> has summarised the principles of natural justice thus—

"Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence in which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials<sup>17</sup> should be relied on against him without his being given an opportunity of explaining them".<sup>19</sup>

Hence,—

A. The rules of natural justice are violated—

(a) Where the accused officer is denied the right to call material<sup>21</sup> defence witnesses,<sup>22</sup> or to produce documents which were essential for the defence,<sup>21</sup> or to cross-examine the prosecution witnesses,<sup>21</sup> or he is not given sufficient time to answer the charges, or the Inquiring Authority acts upon documents not disclosed to the accused officer.<sup>21</sup>

(b) Where the inquiring officer has a personal bias against the person charged.<sup>23</sup>

(B) *After the inquiry*—a further opportunity to show cause against the punishment proposed must be given.

1. This requires that the competent authority, after the inquiry is over, and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments specified in cl. (2) of Art. 311, communicates the same to the Government servant and gives him a reasonable time and opportunity to make his representation why the proposed punishment should not be inflicted on him.<sup>22</sup>

2. Hence, the authority requiring the Government servant to show cause should communicate to him not only (a) the punishment proposed but also (b) the *grounds* on which it is proposed to award such punishment,<sup>24</sup> including the finding on the charges held proved, indicating the punishment proposed on each of such charges.<sup>25</sup>

But it is not necessary for the punishing authority to state specifically that he *agreed* with the findings of the inquiring officer.<sup>1</sup>

10. Cf. *Sur Enamel Works v. Workmen*, A. 1963 S.C. 1914 (1916).

11. *Jagdish v. State of M. P.*, A. 1961 S.C. 1070 (1074).

12. *Bachittar v. State of Punjab*, A. 1963 S.C. 395; *State of Assam v. Bimalkumar*, A. 1963 S.C. 1612.

13. *State of U. P. v. Nooh*, (1958) S.C.R. 595 (601); *John v. State of T. C.*, A. 1955 S.C. 160; *Union of India v. Verma*, A. 1957 S.C. 882.

14-17. Cf. *Sur Enamel Works v. Workmen*, A. 1963 S.C. 1914 (1916).

18. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1317).

19. *Union of India v. Verma*, A. 1957 S.C. 882.

20. Also *State of M. P. v. Chintaman*, A. 1961 S.C. 1623.

21. *Kapur Singh v. Union of India*, (1960) 2 S.C.R. 569 (590).

22. *Khem Chand v. Union of India*, (1958) S.C.R. 1080; A. 1958 S.C. 300.

23. *State of U. P. v. Nooh*, (1958) S.C.R. 595 (6001).

24. *State of Mysore v. Manche Gowda*, A. 1964 S.C. 506 (509).

25. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126 (132).

1. *State of Assam v. Bimal*, A. 1963 S.C. 1612; *State of Madras v. Srinivasan*, A. 1966 S.C. 1827.

Similarly, where the inquiry was by a Tribunal constituted under the Rules and the Government, issuing the notice, simply referred to the report of the Tribunal, held, that it showed that Government had agreed with the findings of the Tribunal, and that the punishment proposed in the report is the punishment proposed to be inflicted by the competent authority.<sup>2</sup>

3. Even where the facts constituting the grounds are known to the delinquent officer, they must be stated in the second 'show cause notice' inasmuch as it cannot be known to the officer that those facts or any of them will be taken into consideration in inflicting the punishment on him.<sup>24</sup>

Thus, if the proposed punishment is based on his previous punishments or his bad record, that must be stated in the second notice.<sup>21</sup> The punishment will be quashed where the notice does not state the grounds, but Government has the liberty of proceeding afresh after giving a proper second notice.<sup>24</sup>

4. Where the action proposed is based on the report of an inquiry officer, a copy thereof should be supplied to the delinquent officer.

5. At the second stage, the delinquent Government servant is entitled to contend—

(a) That the inquiry, at which the findings were arrived at was vitiated by a breach of the principles of natural justice.<sup>3</sup>

(b) That the findings are not supported by the evidence in the proceedings,<sup>8</sup> or that the evidence against him is not worthy of credence<sup>4</sup> or that he is not guilty of the charges<sup>4-6</sup> to merit any punishment at all.<sup>4</sup>

(c) That the punishment proposed could not be properly awarded on the findings arrived at,<sup>3,6</sup> that is to say, the charges proved do not require the particular punishment proposed to be awarded,<sup>3</sup> that is to say, it was unduly severe.<sup>4-5</sup>

The President or the Governor is not, however, bound to award the particular form of punishment recommended by the Enquiry Officer or the Public service Commission. Subject to the obligation under Art. 311 (2) to give a reasonable opportunity, the discretion of the President or Governor in the matter of the punishment, is unfettered.<sup>7</sup>

It follows, therefore, that where the notice to show cause at the second stage specifically states that the Petitioner would be heard *only* with regard to the quantum of punishment, reasonable opportunity in compliance with Art. 311 (2) has not been given to the Petitioner and the order of dismissal or removal must be set aside.<sup>8</sup>

6. Reasonable opportunity at this stage requires that the person should be asked to show cause against the punishment that has been provisionally determined upon the finding at the inquiry stage.

Where an administrative tribunal which inquired into the charges recommended that the services of the delinquent officer be dispensed with and a notice is served upon him by the Government, with a copy of the report of the tribunal, and directing him to show cause why "the proposed punishment" should not be inflicted upon him, it cannot be urged that the notice was not in conformity with Art. 311 (2) because it did not mention

2. *State of Orissa v. Govindadas*, (1958) S.C. [C.A. 412/58].

3. *Khemchand v. Union of India*, A. 1958 S.C. 300 (307).

4. *Union of India v. Goel*, A. 1964 S.C. 364.

5. *Champaklal v. Union of India*, A. 1964 S.C. 1854 (1861-2).

6. *High Commrs. v. Lall*, A. 1948 P.C. 121 (126).

7. *D'Silva v. Union of India*, A. 1962 S.C. 1130 (1133).

8. *State of M. P. v. Ladli Saran*, A. 1958 M.P. 326 (330).

the *specific* penalty of 'removal from service', because in the context of the copy of the report served upon him, it was clear to him that it was the penalty of removal that was being proposed<sup>9</sup>

7 It has further been held<sup>10</sup> that if the punishing authority, in *determining the quantum of punishment*, takes into consideration some material of which the Government servant was not given any notice<sup>11</sup> e.g., his service record, there would be a contravention of Art 311 (2),<sup>12</sup> unless the Government servant himself asks for a consideration of his service record,<sup>13</sup> or information about such intention of the punishing authority is given in the second show cause notice<sup>14</sup>

8 Where a due inquiry into the charges has been already held, the delinquent public servant cannot insist that at the second stage of showing cause against the punishment proposed he must be given a fresh opportunity of exonerating himself by examining and cross examining witnesses etc.,<sup>15</sup> or by making an oral representation<sup>16</sup>. Nor can a public servant who has refused to take part in the proceeding at the Enquiry stage insist for an inquiry at this second stage<sup>17</sup>

### How the requirement of Art. 311 (2) is satisfied.

1. What Art 311 (2) requires is a proper departmental inquiry, (a) after supplying the delinquent officer a charge sheet and (b) then allowing him a reasonable opportunity to meet the allegations contained in the charge sheet<sup>18</sup>

Hence,—

A Government servant cannot be dismissed on the basis of an admission made by him in a proceeding directed against some other Government servant, without holding a fresh inquiry directed against himself<sup>19</sup>

2 If the order complained of is based on a proceeding which satisfies the requirements of Art 311 (2) the Petitioner cannot complain if the Government had made an earlier confidential inquiry in order to determine whether formal proceedings should be drawn up against him. If however the report of that confidential inquiry is sought to be used in the proceeding, the Petitioner must be given full opportunity of meeting the allegations contained therein.<sup>16-19</sup>

3 When an order of dismissal is challenged as being in contravention of Art 311 (2) what the Court has to see is whether the Government servant was afforded a reasonable opportunity of showing cause against the action proposed to be taken against him and it is immaterial whether Government adopted one particular procedure or the other in making that order<sup>20</sup>. A proceeding under the Public Servants (Enquiries) Act, 1950 for instance, is nothing but a means to help the Government to come to a definite conclusion<sup>21</sup>

On the other hand,—

1 Once the opportunity to show cause is given, the constitutional requirement is satisfied<sup>22</sup>

9 *State of Orissa v. Gound Das* (1958) SC (unrep)

10 *Jalindra v. R. Gupta* (1953) 58 CWN 128

11 *State of Mysore v. Manchi Gouda A* 1964 SC 506 (510)

12 *Dulal v. Bose* (1958) 62 CWN 521

13 *Keshto Rai v. State, A* 1967 Pat 184 (185)

14 *Bhatt v. Union of India, A* 1962 SC 1344 (1347).

15 *State of Punjab v. Amar Singh A* 1966 SC 1313 (1317)

16-19. *Tribhuvan v. State of Bihar A* 1960 Pat 116

20. *Kajmer Singh v. Union of India* (1960) 3 SCR 569 (585)

21. *Venkataraman v. Union of India* (1954) S.C.R. 1150 (1160)

22. *John v. State of T. C., A* 1958 S.C. 160



2. If the officer does not avail of the opportunity to show cause<sup>23</sup> but throws himself on the mercy<sup>24</sup> of his departmental heads or tenders unqualified apology<sup>25</sup> or resignation, he is not entitled to relief on the ground that his services have been terminated in contravention of Art. 311 (2).

(A) *At the inquiry stage.*

1. If, at the enquiry stage, the officer is given an opportunity to adduce evidence and cross examine witnesses but he then does not avail himself of that, he cannot, at a later stage of the proceeding complain that there was no compliance with Art. 311 (2).<sup>1</sup> The position is the same where the officer is given an opportunity of being heard in person but he goes on unreasonably insisting upon his demand for representation by a lawyer. Similar is the case where he does not appear in person when that demand is rejected. In such cases, where the officer goes on unreasonably applying for time<sup>2</sup> and does not show cause after a frivolous application for time is rejected,<sup>3</sup> the Enquiring Officer is entitled to proceed *ex parte*.<sup>2</sup>

But where a preliminary inquiry under r 55 of the Civil Services (Classification, Control and Appeal) Rules is held before a departmental inquiry under Art. 311 (2), the fact that the delinquent officer failed to give his defence does not debar him from defending himself at the inquiry under Art. 311 (2).<sup>3</sup>

2. If he has been given a reasonable opportunity of defending himself at the inquiry stage, he cannot, at the second stage, claim that another opportunity should be given to him to examine or cross-examine witnesses or to reopen the case.<sup>4</sup>

Hence, if, at the inquiry stage, the officer did not ask for the copy of a Police report nor complain that he was unable to meet the charges without the copy,<sup>7</sup> or allowed the inquiry to be held *ex parte*,<sup>8</sup> he cannot, at the second stage, contend that he cannot show cause against the action proposed for want of the copy of the report.<sup>7</sup>

If, however, he can make out that at the inquiry stage he was not given reasonable opportunity of adducing evidence or of cross-examining the witnesses against him, he would be entitled to such opportunity at the second stage.<sup>9a</sup>

(B) *At the second stage.*

1. The obligation, at the second stage, is to give a reasonable opportunity to show cause against the action proposed. There is no obligation that this show cause notice must be issued after the Public Service Commission is consulted or the delinquent officer should be given an opportunity of commenting on the advice tendered by the Commission.<sup>9</sup>

23. *Bhatt v. Union of India*, A. 1962 S.C. 1344 (1348); *Champaklal v. Union of India*, A. 1964 S.C. 1854.

24. *Naubat Rai v. Union of India*, A. 1953 Punj. 137 (141).

25. *Meghraj v. Rajasthan*, A. 1956 Raj. 28.

1. *Ranga Rao v. Director*, A. 1957 Orissa 21.

2. *Lakshmi Narayan v. Puti*, A. 1954 Cal. 335 (337).

3. *Cf. Tata Oil Mills v. Workmen*, A. 1965 S.C. 155.

4. *John v. State of T. C.*, A. 1955 S.C. 160.

5. *Dadarao v. State of M. P.*, A. 1958 Bom. 204.

6. *High Commr. v. Lall*, A. 1948 P.C. 121; *Kapur Singh v. Union of India*, A. 1956 Punj. 58 (64).

7. *Jasindra v. Union of India*, (1957) 61 C.W.N. 815 (828).

8. *Nepal v. Dt. Magistrate*, (1906) 12 F.L.R. 88 (90) Cal.

9a. *Tandon v. State*, A. 1960 Punj. 644 (651).

9. *Venkataramulu v. State of Madras*, (1961) 1 M.L.J. 46.

2. At the second stage, the delinquent Government servant is entitled to contend—

(a) That the inquiry at which the findings were arrived at was vitiated by a breach of the principles of natural justice.<sup>10</sup>

(b) That the findings are not supported by the evidence in the proceedings, or that the evidence against him is not worthy of credence or that he is not guilty of any misconduct to merit any punishment at all.<sup>10</sup>

(c) That the punishment proposed could not be properly awarded on the findings arrived at, that is to say, the charges proved do not require the particular punishment proposed to be awarded.<sup>10</sup>

3. (i) There is a failure to comply with Art. 311 (2) where the notice is of such a character as to lead to the inference that the authority did not apply its mind<sup>11</sup> to the question of punishment to be imposed on the Government servant, *e.g.*, where the notice called upon the Government to show cause why "disciplinary action, such as reduction in rank, withholding of increments *etc.*", should not be taken against him, or where, instead of specifying two penalties in the alternative, one penalty is specified in one part of the notice and another penalty is specified in another part of the notice.<sup>7</sup>

(ii) Where the punishment proposed in the notice is of a lesser kind, a graver form of punishment cannot be imposed by the authority.<sup>12</sup>

Thus, if the notice asks the civil servant to show cause why he shall not be 'removed' the punishment of 'dismissal' cannot be awarded without offering further opportunity to show cause against the penalty of dismissal,<sup>12</sup> but if the notice asked the civil servant to show cause why he should not be 'dismissed', the punishment of removal may be awarded without any further formality. But on a notice to show cause against 'dismissal' or 'removal', the penalty of 'reduction in rank' cannot be awarded, for the penalty is different in nature and the plea of the civil servant may be somewhat different in the two cases.<sup>12</sup>

(iii) But there is nothing to bar the issue of a fresh notice proposing a graver punishment at any time the final order is passed.<sup>13</sup>

(iv) It is not necessary, as was supposed in some cases, that only one punishment should be mentioned in the notice. The notice would not be vague merely because *all* the three penalties referred to in Art. 311 (2) are specified (in the alternative) in the notice, on the other hand, it would give a fuller opportunity to the Government servant to show cause why none of the three punishments should be imposed on him.<sup>14, 23</sup>

(v) Where a graver punishment is proposed in the notice, it is competent for the authority to award a *lesser* punishment.<sup>13</sup>

### Rights relating to 'charge'.

The delinquent cannot be held guilty without proof of the charges<sup>24</sup> and any rule which provides that a public servant can be punished on a charge of corruption without proof of any corrupt practice if he has been *suspected* to be corrupt in a number of instances must be held to be void,<sup>24</sup> being in contravention of Art. 311 (2).

10. *Khemchand v. Union of India*, A. 1958 S.C. 300 (307).

11. *State of Orissa v. Govind Das*, (1958) S.C. [unrep.].

12. *Debanidhi v. Mohanty*, A. 1955 Orissa 33.

13. *Ct. State of Mysore v. Manche Gowda*, A. 1964 S.C. 506.

14-23. *Hukam Chand v. Union of India*, A. 1959 S.C. 536.

24. *State of Madras v. Srinivasan*, A. 1966 S.C.

There is no compliance with the requirements of natural justice—

(i) Where the inquiry is not directed against the alleged misconduct of the Government servant in question but is a general investigation to find out who is responsible for an accident or the like, without any charge against any particular person, and the penalty is proposed on the basis of such investigation.<sup>25</sup>

(ii) If a person is not apprised of the charge upon which it is proposed to take action, he is not in a position to defend himself and show cause against the proposed action.<sup>1</sup> On the same principle, the proceedings are vitiated if the punishing or appellate authority makes a confusion and finds the Petitioner guilty of the violation of a Departmental Rule for which he was never charged.<sup>2-3</sup>

(iii) The result is the same where the charge does not give sufficient particulars to apprise the delinquent of the case he has to meet,<sup>1</sup> or sufficient time is not given to show cause against the charges.<sup>4</sup>

(iv) The inquiry must be directed to the ingredients of each charge as laid down in the relevant Rules. If the Inquiry Officer acts on irrelevant considerations, his finding must be held to be perverse.<sup>5</sup>

(v) No question of punishment arises until the charge is established and until then the competent authority must keep his mind open.<sup>6</sup>

It follows, therefore, that the charge should not ask the delinquent to show cause against the particular punishment,<sup>6-7</sup> which is proposed. But the charge would not be necessarily bad if it merely recites the various punishments that might possibly be imposed if he was found guilty, instead of particularising any one of them.<sup>8-9</sup>

### Rights relating to prosecution witnesses.

1. The prosecution witnesses must, ordinarily, be examined in the presence of the delinquent,<sup>10</sup> so that he may hear their evidence in support of the charge and cross-examine them before he is called upon to enter into his defence.<sup>11</sup>

2. The delinquent should be given a reasonable opportunity of cross-examining the witnesses who are examined for the prosecution for the departmental inquiry.<sup>12</sup>

This requirement is satisfied if a witness examined in the absence of the delinquent at an earlier stage of the proceeding, is offered for cross-

25. *Amalendu v. D. T. S. A.* 1960 S.C. 992

1. *Cf. Sur Enamel Works v. Workmen*, A. 1963 S.C. 1914.

2. *Krishna Gopal v. Director of Telegraphs*, (1955) 60 C.W.N. 692.

3. *Cf. Lakshmi Sugar Mills v. Ram Sarup*, A. 1967 S.C. 916.

4. *Bibhuti v. Divl. Supdt.*, A. 1964 Orissa 279, *Shyama Charan v. Commr.*, A. 1969 All 11.

5. *S. N. Sur v. Divl. Supdt.*, (1968) 16 F.L.R. 484 (489) Cal.

6. *Khem Chand v. Union of India*, A. 1958 S.C. 300 (308); *State of Assam v. Bimal*, A. 1963 S.C. 1612; *Hukum Chand v. Union of India*, A. 1969 S.C. 536 (540).

7. The contrary view taken in some High Court decisions [*Jatindra v. R. Gupta*, (1954) 58 C.W.N. 129 (133); *Jyotinath v. State of Assam*, A. 1955 Assam 171; *Ramshakar v. State of Bombay*, A. 1967 M.P. 91 (93)], does not appear to be sound in view of the Supreme Court decisions just cited.

8. *Felix Fernandes v. Integral Coach Factory*, (1966) 11 LL.J. 881 (884) (Mad.).

9. *Vithal v. Union of India*, (1967) 1 LL.J. 639.

10. *Kesoram Mills v. Gangadhar*, A. 1964 S.C. 708.

11. *Meenglass Tea Estate v. Workmen*, A. 1963 S.C. 1749 (1750).

12. *Khem Chand v. Union of India*, A. 1958 S.C. 300.

examination when the charge is being inquired into,<sup>13-14</sup> after supplying copies of his previous deposition.<sup>14</sup>

3. Even where it is permissible to tender the statements of witnesses examined previously and at the back of the delinquent, the copies of such statements must be supplied to the delinquent well in advance of the time when he is called upon to cross-examine such witnesses.<sup>15</sup>

4. On the other hand, though the delinquent has the right to cross-examine a prosecution witness, the Inquiry Officer has the right to stop irrelevant cross-examination,<sup>15</sup> recording his reason.<sup>15</sup>

5. The opportunity to cross-examine prosecution witnesses must be *effective*. Hence, if documents which are relevant for the purpose of cross-examination are withheld, there will be a failure of natural justice.<sup>16</sup>

### Interrogation of the delinquent.

1. It is an elementary principle of natural justice that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported.<sup>17</sup> As a general rule, therefore, the delinquent should not be interrogated before some witness or witnesses have been examined in support of the charge.<sup>17-18</sup> He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him.<sup>17</sup> A departure from his requirement throws the burden upon the person charged to repel the charge without first making it out against him.<sup>17</sup>

2. This does not mean that at a disciplinary inquiry no questions may be put to a delinquent. He can be interrogated not only where he volunteers to make a statement in his defence,<sup>19</sup> after the prosecution is over, but also where such interrogation at the beginning of the enquiry may be to his advantage by way of explaining an admission he may have made,<sup>18, 20</sup> or the accusation is based on matters of record.<sup>21</sup>

3. It would, however, be a contravention of natural justice where the delinquent is asked to answer a questionnaire which includes questions which are perverse,<sup>22</sup> or the examination of the delinquent savours of an inquisition.<sup>23</sup>

Once the opportunity to show cause is given,<sup>24</sup> the constitutional requirement is satisfied.

13. *State of Mysore v. Shivabasappa*, A. 1963 S.C. 375.

14. A stricter requirement has been laid down in domestic inquiries conducted against industrial workmen [*Kesoram Cotton Mills v. Gangadhar*, A. 1964 S.C. 708 (709); *Khardah Co. v. Workmen*, A. 1966 S.C. 719 (720)], laying down that all witnesses relied on by the management must be examined in the presence of the workman charged.

14a. *Kesoram Cotton Mills v. Gangadhar*, A. 1964 S.C. 708 (715).

15. *State of Bombay v. Natul Latif*, (1966) 2 L.J. 595 (601) S.C. (1965) 3 S.C.R. 135.

16. *State of M. P. v. Chintaman*, A. 1961 S.C. 1623.

17. *Meenglass Tea Estate v. Workmen*, A. 1963 S.C. 1719 (1720); *Associated Cement Co. v. Workmen*, (1964) 3 S.C.R. 652 (661).

18. *Kahetra Mohan v. Dt. Controller*, A. 1970 Cal. 131 (133).

19. *State of U. P. v. Sharma*, A. 1968 S.C. 158 (160).

20. *Central Bank of India v. Karunamoy*, A. 1968 S.C. 266.

21. *Prestons Tyre Co. v. Workmen*, A. 1968 S.C. 236.

22. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1317).

23. *Central Bank of India v. Karunamoy*, A. 1968 S.C. 267 (271).

24. *Bhatt v. Union of India*, A. 1962 S.C. 1344 (1348).

**Rights relating to defence witnesses.**

1. Natural justice is denied where the delinquent is not allowed to call<sup>23</sup> or examine<sup>1</sup> material defence witnesses,<sup>2</sup> or to examine himself.<sup>1</sup>

The Enquiry Officer may refuse to call a witness whose evidence is irrelevant to the charges,<sup>2</sup> but he has no right to refuse to call a witness asked for by the delinquent officer merely on the ground that the witness is a high official or that the witness being himself a dismissed official his evidence would be unreliable.<sup>2</sup>

2. Although the Enquiry Officer has no power to compel the attendance of witnesses cited by the delinquent officer, by issuing summons or the like, nor the legal obligation to do so,<sup>4</sup> where such witnesses are the employees of the Department and within the control of the Department, an effort must be made to assist the delinquent by extending all possible help for the production of such witnesses.<sup>5</sup>

3. This right is also denied where the Enquiry Officer does not allow the delinquent to examine his own witnesses but himself takes notes of their statements to him.<sup>6</sup>

**Right to evidentiary documents.**

1. If any document, not being a secret document, is withheld by the State from the delinquent officer and such document is necessary to enable the latter to exercise his right of cross-examine the prosecution witnesses,<sup>7</sup> or to plead in his defence,<sup>8</sup> there is a denial of natural justice,<sup>7</sup> e.g., the document on the strength of which the preliminary inquiry was started,<sup>7</sup> e.g., the first information report<sup>9</sup> or the complaint,<sup>10</sup> which led to the inquiry; or copies of the statements of witnesses examined against him at a preliminary inquiry,<sup>8</sup> if such witnesses are examined at the formal disciplinary proceeding, in order to cross-examine them.<sup>7</sup>

But—

(i) Non-supply of a document relating to one of several charges will not vitiate the proceedings if it does not prejudice the disposal of the rest of the charges.<sup>13</sup>

(ii) There is no right to a disclosure of confidential or secret documents, such as those of the Anti-Corruption Department; it is sufficient compliance with the principles of natural justice if the substance of such reports is communicated to the delinquent.<sup>14</sup> But no disclosure of such report would be necessary if the report was made by the Government only to consider whether disciplinary proceedings should be initiated against the delinquent.<sup>15</sup>

25. *Kapur Singh v. Union of India*, (1960) 2 S.C.R. 569 (590)

1. *State of U. P. v. Sharma*, A. 1968 S.C. 158 (160).

2. *State of Bombay v. Nurul Latif*, (1965) 3 S.C.R. 135; A. 1966 S.C. 269.

3. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126.

4. *Cf. Tata Oil Mills v. Workmen*, A. 1965 S.C. 155.

5. *Krishna Gopal v. Director of Telegraphs*, (1956) 60 C.W.N. 692 (698-9); *Ram*

*Subhak v. Commr. of Police*, (1966) 12 F.L.R. 50 (Cal.).

6. *D. I. G. of Police v. Amalanathan*, A. 1966 Mad. 203 (219) F.B.

7. *State of M. P. v. Chintaman*, A. 1961 S.C. 1623 (1628).

8. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1317).

9. *Trilok Nath v. Union of India*, (1960) S.C. [L.A. 322/57, d. 1-11-60].

10. *Kamla v. State of Bihar*, A. 1970 Pat. 23.

11. *Sharma and v. Supdt.*, A. 1961 M.P. 178; *Ramchandra v. D. I. G.*, A. 1957

M.P. 126; *James v. Collector*, A. 1959 Orissa 152 (155).

12. *Shew Lal v. Director Military Farms*, A. 1968 Punj. 312 (313); *Narayani v. General Manager*, (1970) Lab. I.C. 488 (Myn.).

13. *D. I. G. of Police v. Amalanathan*, A. 1966 Mad. 203 (216) F.B.

14. *Poojit v. State of Bihar*, A. 1967 Pat. 357 (360).

15. *State of Assam v. Mahendra*, A. 1970 S.C. 1255 (1261).

(iii) Withholding of a document or report would not vitiate the proceeding if the finding against the delinquent does not rest upon it,<sup>18-19</sup> or the delinquent never asked for it,<sup>20</sup> or there are charges which may sustain the punishment other than the charges in respect of which the documents have been withheld.<sup>20</sup>

2. Where the furnishing of a copy is required by a mandatory Service Rule having the force of law, such Rules must be complied with or the order made in the proceedings becomes invalid.<sup>19</sup> But—

Where the Rules provide (e.g. r 1711 of the Ry Establishment Code, Vol. I) that the delinquent should be allowed an opportunity to inspect and to take extracts from such evidentiary documents, and that has been done, the delinquent cannot complain that the proceedings have been vitiated because he was not supplied copies thereof by the Department, of its own initiative.<sup>20</sup>

### (B) LAW AFTER 6-10-63

(a) The substitution of the word inquiry for the words 'reasonable opportunity of showing cause against the action proposed' does not minimise the requirements of natural justice at the inquiry stage, for, the word 'inquiry' is followed by the words 'reasonable opportunity of being heard in respect of those charges'. Conversely, the holding of an inquiry was implicit in Art. 311 (2) even before the amendment.

(b) The opportunity of showing cause at the post inquiry stage has not been taken away by the amendment. The expression 'reasonable opportunity of making representation on the penalty proposed' will give such opportunity to the delinquent, and the case law on the point does not appear to have been dislodged by the verbal changes introduced by the amendment. The right to represent against 'the penalty proposed' does not mean that, under the amended clause, at the second stage he will have the right to represent only against the *quantum* of punishment. He is also entitled to urge that the charges levelled against him have not been established and that no penalty of any kind should be imposed upon him.

(c) Nor does the insertion of the words 'on the basis of the evidence adduced during such inquiry' introduce any material change because even prior to the amendment it was settled that the delinquent cannot at the post-inquiry stage ask for a repetition of inquiry into the charges on taking fresh evidence.<sup>17</sup>

The words 'but only on the basis of the evidence adduced during such inquiry' have been added at the end of Cl (2) in order to dispel any contention that the Government servant was entitled to adduce fresh or additional evidence at the second stage.

(d) On an additional point, the position seems to be more favourable to the delinquent. Under Proviso (b) or (c) as it stood before the amendment, once the power conferred by either of those Provisos was exercised, the delinquent would have lost his right to show cause both against the charges as well as against the punishment proposed.

But the amendments of Proviso (b) and (c) simply refer to 'hold such inquiry'. Hence, only the inquiry against the charges may be dis-

16. *N. P. T. Co. v. N. S. T. Co.*, A 1957 SC 232

17. *Prabakar v. State*, A 1957 MP 215 (FB)

18. *State of Orissa v. Bidyabhusan*, A 1963 SC 779

19. *Pillai v. Comptroller & Auditor-General*, A 1963 Punj 390 (392)

20. *K. N. Gupta v. Union of India*, A 1968 Delh 85 (87).

pensed with under either of this Provisos. *The delinquent will still retain his right of 'representation on the penalty proposed.'*

It has been held<sup>20a</sup> that the power of the disciplinary authority to delegate the function of making inquiry into the charges<sup>21</sup> has not been affected by the amendment.

### **Preliminary or fact-finding Inquiry.**

I. The amendment of cl. (2) of Art. 311 in 1963 makes it clear that the right of the delinquent employee to be heard and of making a representation on the penalty proposed arises only from the stage when charges are brought against him in the disciplinary proceeding and not at any stage anterior to the framing of the charge. In many cases, a preliminary or fact-finding inquiry is held for the very object of determining whether there is a *prima facie* case for making a formal departmental inquiry against the delinquent.<sup>22</sup> Art. 311 (2) is attracted to the latter inquiry but not to the preceeding inquiry, the object of which is not to punish the delinquent but only to decide whether a formal proceeding to punish him should be initiated.<sup>23</sup>

II. A preliminary inquiry may also be held to determine whether the power of the Government to terminate the services of the employee in accordance with the terms of the contract of employment or the Service Rules should be used. Thus,—

(i) In the case of a temporary or officiating Government servant,—even though Government does not intend to take action by way of punishment, on a report of bad work or misconduct, Government may, and usually does, hold a preliminary inquiry to satisfy itself that there is reason to dispense with the services of the employee, say, by notice under the Temporary Services Rules or to revert him to his substantive appointment.<sup>24</sup>

(ii) Similarly, in the case of a Probationer, when the Government receives an adverse report against him, *e.g.*, that he submitted travelling allowance bills for journeys not made, Government may, instead of terminating the probation forthwith, give an opportunity to the delinquent to show cause why the relevant rule for terminating the probation for unsatisfactory work or conduct should not be resorted to.<sup>24</sup>

III. A preliminary inquiry in any of the foregoing cases may be held *ex parte*.<sup>25</sup>

Even if the Government, in fairness, gives an opportunity to the employee to submit an explanation, or makes an inquiry into the allegations received against him, the proceeding or the order made therein cannot be challenged on the ground that Art. 311 (2), with all its incidents, such as an opportunity to be heard, were not complied with.<sup>24</sup>

IV. A Government servant cannot be punished on the findings of a preliminary inquiry, without holding a disciplinary inquiry after serving a charge-sheet.<sup>22</sup>

V. Art. 311 (2) has to be complied with only where disciplinary proceedings are instituted in order that one of the three major punishments mentioned in that Clause may be inflicted on the Government servant.<sup>26</sup>

\* It is also immaterial if, in a memorandum issued against a temporary servant, Government mentions certain charges and asks him to state "why disciplinary action should not be taken against him", but, eventually, instead

20a. *Thimmarayappa v. State*, A. 1968 Mys. 926 (301).

21. *Ghanshyamdas v. State*, A. 1968 M.P. 132 (135).

22. *Cf. Amalendu v. N. E. F. Ry.*, A. 1960 S.C. 992 (994).

23. *Champaklal v. Union of India*, A. 1964 S.C. 1594.

24. *State of U. P. v. Ashraf*, A.I.R. 1966 S.C. 1842 (1845).

of punishing him, discharges him under r. 5 of the Central Civil Services (Temporary Service) Rules, 1949.<sup>25</sup> It cannot be said that once Government issues a memorandum but later decides not to hold a departmental inquiry for taking punitive action, it can never thereafter proceed to take action against a temporary servant in terms of r. 5 of the said Rules, even though it is otherwise satisfied that his conduct and work are unsatisfactory.<sup>26</sup> In short, it is the nature of the penalty, if any, which is ultimately imposed that determines the question whether Art. 311 (2) should have been complied with.<sup>27</sup>

VI. The report of the preliminary inquiry cannot be used at the departmental inquiry, without furnishing a copy thereof to the delinquent.<sup>28</sup>

The evidence taken at the preliminary inquiry also cannot be used at the disciplinary inquiry unless the witnesses are examined afresh or, at least, they are tendered for cross-examination.<sup>1</sup>

### Joint inquiry.

I. Some disciplinary rules provide that where the case is against two or more co-delinquents, the appropriate authority may direct that action against them may be taken in a common inquiry.<sup>2</sup>

II. But even in the absence of any such specific rule, there is nothing wrong in holding a joint inquiry against several delinquents where the evidence is common and there is no prejudice caused, *e.g.*, by the denial of a right of cross-examination.<sup>3</sup>

### Who can hold the inquiry.

1. As has been stated earlier the punishing authority need not initiate the proceeding or make the inquiry himself.<sup>4</sup> He may delegate this function to some other person.

But where there is a statutory rule providing by whom and in whose favour the power to make an inquiry may be delegated; a delegation made otherwise would be *ultra vires* and vitiate the entire proceedings.<sup>5</sup>

2. Though an inquiry into the charges held by an Inquiry Officer who is actually biased against the delinquent must be invalid owing to contravention of the principles of natural justice,<sup>6</sup> it has been held that the inquiry will not be vitiated *merely because* it is held by an officer who made a preliminary inquiry and then drew up the charges.<sup>7</sup> The reason is that a departmental inquiry is not like a trial in court, and there is no bar to the person who drew up the charges to be the Inquiry Officer to investigate into the charges, provided the principles of natural justice are otherwise observed at the inquiry.<sup>1</sup>

### Form of inquiry.

1. Except to the extent provided in Art. 314 as regards members of the I.C.S., the Constitution does not guarantee any particular mode of inquiry under any specific statutory provision or administrative Rules.

2. If two sets of rules relating to disciplinary proceedings are open

25. *High Commis. v. Lal*, A. 1948 P.C. 121.

1. *Shivananda v. Dir. Supdt.* (1969) 18 F.L.R. 137 (143); *Sharmannad v. Supdt.*, A. 1960 M.P. 177 (179).

2. *E.g.*, 18 (1) of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, (C.S. Vol. 8, p. 1464).

3. *Made Gowda v. State of Mysore*, (1969) 11 L.L.J. 345 (319).

4. *State of M. P. v. Sardul Singh*, (1969) S.C. [A. 2554/66, d. 2-12-69].

5. *E.g.*, r. 11 (2) of the Mysore Civil Services (Classification & Control) Rules [*Prabhu v. Dy. Commr.*, (1969) 18 F.L.R. 292 (Mys.)]; r. 1710, Ry. Estab. Settlement Code [*Union of India v. Munsaff*, (1968) 17 F.I.R. 14 (16) S.C.].

6. *State of U. P. v. Nook*, A. 1958 S.C. 86 (91).

7. *Changpahal v. Union of India*, A. 1964 S.C. 1854 (1861).



to the Government for taking action against an employee, the action taken will be violative of Art. 14 if the Rules resorted to are substantially more drastic or prejudicial to the other set of Rules available in the matter.<sup>8</sup>

3. But where none of the Rules can be said to be discriminatory so as to attract Art. 14, Government has a free choice to resort to any particular set of Rules or any mode of inquiry authorised by the Rules,<sup>9</sup> provided the requirements of Art. 311 (2) are complied with.<sup>9</sup> The employee cannot, accordingly, complain if, instead of proceeding under r. 55 of the Civil Service Rules, Government proceeds under the Public Servants (Inquiries) Act, 1950.<sup>8</sup> The reason is that, the inquiry, under whatever Rules it is held, is only to advise<sup>10</sup> the punishing authority in the matter of investigating into the charges brought against the delinquent officer<sup>11</sup> and that the responsibility both in finding him guilty as well as punishing him rests with the punishing authority<sup>10, 12</sup>

4. Nor is there any question of *mala fides* where the Government uses one of two powers equally available, *e.g.*, the power to discharge under the Rules instead of holding a disciplinary inquiry.<sup>13</sup>

### Where some charges are bad or not proved.

Though a contrary view has been expressed in other spheres (such as preventive detention), as regards disciplinary proceedings, it has been held by the Supreme Court<sup>14-15</sup> that if a public servant is held guilty of several charges and it is subsequently found that in respect of *some* of those charges the rules of natural justice were not complied with or the findings were based on no evidence, but there are other charges duly arrived at, the punishment would not be quashed by the Court.<sup>14</sup>

### Duty of Inquiry Officer to submit report.

Since the inquiry stage under Art 311 (2) is also a quasi-judicial proceeding,<sup>16</sup> it follows that the Inquiry Officer must write a report, giving his finding on the charges, with reasons.<sup>17</sup>

### Obligation to supply copy of Enquiry Officer's Report.

#### I. According to natural justice

1. Broadly speaking, the rules of natural justice require that the persons discharged must be apprised of all the statements or reports upon which the order of discharge is based,<sup>18</sup> and which indicate the grounds on which the order of removal was made.<sup>19</sup> Hence,

A copy of the report, containing the findings of the enquiring officer<sup>18, 19</sup> must be supplied to the person concerned when it is proposed to punish him *on the results* of the enquiry, or *on the findings* contained in any report,<sup>20</sup>

8. *Kapur Singh v Union of India*, (1960) 2 S.C.R. 569 (582; 590): A. 1960 S.C. 493.

9. *State of Orissa v. Dharendra Nath*, A. 1961 S.C. 1715.

9a. *Cf. Venkataroman v. Union of India*, (1954) S.C.R. 1150 (1159).

10. *D'Silva v. Union of India*, A. 1962 S.C. 1130 (1134).

11. *State of Assam v. Bimal Kumar*, A. 1963 S.C. 1612 (1616).

12. *Union of India v. Goel*, A. 1964 S.C. 364.

13. *Cf. Tata Engineering Co. v. Prasad*, (1969) 19 F.L.R. 150 (156) S.C.

14. *State of Orissa v. Bidyabhusan*, (1963) S.C.W.R. 309.

15. *Railway Board v. Niranjan*, (1969) 11 L.L.J. 743 (746) S.C.; *State of M. P. v. Om Prakash*, A. 1970 S.C. 670.

16. *Bachittar v. State of Punjab*, A. 1963 S.C. 395.

17. *Cf. Sur Enamel Co. v. Workmen*, A. 1963 S.C. 1914.

18. *State of M. P. v. Chintaman*, A. 1961 S.C. 1623.

19. *Jagdish v. State of M. P.*, A. 1961 S.C. 1070; (1963) 1 L.L.J. 325 (S.C.).

20. *Kapur v. Pratap Singh*, (1963) S.C. [C.A. 75/63]; *State of Assam v. Bimal*, A. 1963 S.C. 1612 (1618).

together with his recommendations as to punishment, if any, as may be contained in the report,<sup>21</sup> even though his recommendations may not be binding upon the punishing authority.<sup>22</sup>

2. Even though the object of holding an inquiry is to investigate into the charges and the Inquiry Officer is not required to make any recommendations as to the punishment that may be imposed upon the delinquent officer when he finds him guilty,<sup>21</sup> it has been held that if the Inquiry Officer does, in his report, make any recommendation as to the punishment, a copy of the report including such recommendation must be supplied to the delinquent officer in order to enable him to make a proper representation.<sup>21</sup>

But—

(a) Where the action proposed is *not based* on a report the omission to supply a copy thereof to the delinquent will not vitiate the proceedings.<sup>21</sup> He cannot complain if a copy of a preliminary report which is not taken into consideration at the departmental inquiry is not supplied to him.<sup>22a</sup>

If, however, the report of that confidential inquiry is sought to be used in the proceeding, the Petitioner must be given full opportunity of meeting the allegations contained therein.<sup>2</sup>

(b) There is no right to a disclosure of confidential or secret documents, such as those of the Anti-Corruption Department. It is sufficient compliance with the principles of natural justice if the substance of such reports is communicated to the delinquent.<sup>24</sup>

### 11. *According to Service Rules*

Where the furnishing of a copy is required by a mandatory Service Rule having the force of law, such Rule must be complied with, or, the order made in the proceedings becomes invalid.<sup>2</sup>

R. 15 (4) (i), (a) of the Central Civil Service (Classification, Control and Appeal) Rules, 1965,<sup>1</sup> is an instance to the point. It says—

"If the disciplinary authority having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 11 should be imposed on the Government servant, it shall—

- (a) furnish to the Government servant a copy of the report of the inquiry held by it and its findings on each article of charge or, where the inquiry has been held by an inquiring authority appointed by it a copy of the report of such authority and a statement of its findings on each article of charge together with brief reasons for its disallowance, if any, with the findings of the inquiring authority

### **Right to challenge the Inquiry Officer's report.**

Though the punishing authority is not bound to act according to the findings or the recommendation of the Inquiry Officer, nevertheless, where he agrees with the findings or the report of the Inquiry Officer, the delinquent can assail the Report of the Inquiry Officer on the ground that it violates the principles of natural justice. Thus,

21. *State of Gujarat v. Teredesai*, (1959) 2 S.C.R. 128 (131) (1969) 2 S.C.A. • 228; *State of Maharashtra v. Bhaskar*, A. 1969 S.C. 1534

22. *Union of India v. C.A.I.*, (1964) 4 S.C.R. 718

22a. *Shermanand v. Supdt.*, A. 1960 M.P. 178; *Gopikishore v. State of Bihar*, A. 1955 Pat. 372.

23. *Tribhuvan v. State of Bihar*, A. 1960 Pat. 110

24. *Punit v. State of Bihar*, A. 1957 Pat. 357 (360).

25. *Cf. Pillai v. Comptroller & Auditor General*, A. 1963 Punj. 390 (392).

*Sudhakar v. Sinari*, (1969) Lah. 1.C. 1441

1. Vide C.S. Vol. 8, p. 1463; See also r. 5 (9) of the All India Services (Discipline & Appeal) Rules, 1955.

The delinquent may show that the finding on a charge is perverse, *e.g.*, that it is not based on any evidence at all<sup>2,3</sup> or that the conclusion is such that no reasonable man would arrive at it from the material before the Inquiry Officer.<sup>3</sup>

### Scope of the Report of the Inquiry Officer.

I. The power to dismiss a Government servant under Art. 310 (1), subject to the procedural requirements of Art. 311, is vested in the President or the Governor and not in the Inquiring Officer. Hence, the Report of the Inquiry Officer is merely advisory and is not binding upon the Government,<sup>4</sup> or the punishing authority<sup>4</sup> who is competent to exercise the power of dismissal on behalf of the President or Governor.

II. The task of the Inquiring Officer is merely to hold an enquiry into the charges and make his report setting forth his conclusions and findings in respect of the said charges.<sup>3</sup>

III. In the absence of rules or any statutory provisions to the contrary, the enquiring officer is not required to specify the punishment which may be imposed on the delinquent officer.<sup>2,5</sup>

If, however, the Enquiry Officer does make any recommendation as to the punishment which may be imposed on the delinquent, that recommendation, like his findings on the merits, are intended merely to supply appropriate material for the consideration of the Government. Neither the findings for the recommendations are binding on the Government.<sup>2,4</sup>

### Powers of the punishing authority on receipt of the report of the Inquiry Officer.

I. It is clear from the foregoing that neither the finding of the Enquiry Officer on the charges nor the recommendation as to the punishment, if any, made by him is binding upon the punishing authority.<sup>4,5</sup>

(A) It is, accordingly, competent for the punishing authority to differ from the findings of fact arrived at by the Enquiry Officer<sup>2</sup> and to hold the employee guilty of the charges even though the Enquiry Officer has held that the charges have not been proved.<sup>2,6</sup>

It is obviously open to the punishing authority to accept the findings of the Enquiry Officer on some of the charges and reject others, where there are charges more than one.<sup>2</sup>

But—

(a) Where the punishing authority differs from the findings of the Enquiry Officer, in whole or in part, he must indicate in the second notice, i.e., the notice calling upon the employee to show cause against the proposed punishment, the conclusions on which the authority intends to act in imposing the punishment specified in the notice.<sup>2,5</sup>

(b) Though the Government is entitled to hold the employee guilty of the charges or any of them against the findings of the Enquiry Officer or the report of the Public Service Commission, the Government (or the authority) is not entitled to come to its conclusion on *no evidence at all*<sup>2</sup>. Notwithstanding the power of the Government to differ from the findings in the report of the Enquiry Officer or the Public Service Commission, the Court has jurisdiction to enquire whether the conclusions on which the

2. *Union of India v. Goel*, A. 1964 S.C. 364 (369-70).

3. *S. N. Sur v. Divl. Supdt.*, (1969 Lab. I.C. 773 (777)).

4. *D'Silva v. Union of India*, A. 1962 S.C. 1130 (1134).

5. *State of Assam v. Bimal Kumar*, A. 1963 S.C. 1612 (1616).

6. *Ry. Board v. Niranjan Singh*, A. 1969 S.C. 966 (968).

impugned orders rests is not supported by any evidence at all. Under Art. 226, the High Court is entitled to quash the order where it is not based on any evidence whatever, without any further proof of *mala fides*.<sup>7</sup>

(c) Once the punishing authority awards the punishment and communicates it to the delinquent officer, it cannot be varied at the will of the authority.<sup>7</sup>

(B) If the Government agrees with the findings of the Enquiry Officer which are all in favour of the delinquent, the delinquent who may have been suspended is entitled to reinstatement and consequential reliefs.<sup>8</sup>

(C) It is competent for the punishing authority to punish the employee even where, out of several charges, he is found guilty of one charge only, provided that charge is such that the punishment awarded can be lawfully imposed on such charge.<sup>9</sup>

(D) The *propriety* of a punishment, in relation to the charge cannot be reviewed by the Court.<sup>8</sup>

II Where the punishing authority holds the employee guilty, differing from the finding of the Inquiry Officer, the High Court, in a proceeding under Art. 226, cannot interfere unless the finding is perverse or based on no evidence at all.<sup>6</sup>

#### Notice before considering service records for awarding punishment.

I. Natural justice requires that a Government servant should not be punished on the basis of any material of which he has had no notice.

II Hence even in determining the *quantum of punishment*, the punishing authority cannot take into consideration the service records of the delinquent, unless information about such intention of the punishing authority is given in the second show cause notice<sup>10</sup> or by a separate notice so that the delinquent may give an explanation.<sup>11</sup>

III No such notice will however, be required where—

(i) The Government servant himself asks for a consideration of his service records.<sup>12</sup>

(ii) It is clear from the Inquiry Report, a copy of which is supplied to the delinquent with the show cause notice, that the service records would be taken into consideration by the punishing authority.<sup>13</sup>

(iii) If the records are looked into for the purpose of imposing a *lesser* punishment.<sup>14</sup>

#### Administrative appeal against disciplinary order.

I Most of the Departmental Rules provide for an administrative appeal against an order of punishment to a higher administrative authority.<sup>15</sup> But, in the absence of such statutory provision, no appeal would lie, because an appeal is a creature of statute<sup>16</sup> and there is no inherent right of appeal.

II. Of course, there is nothing to prevent the Government to provide for a departmental appeal by non-statutory rules. But in such a case, the

7 *Bachhattar v State of Punjab* A 1963 SC 395

8 *State of Orissa v. Bidyabhusan A* 1963 SC 779

9. *State of M. P. v Om Prakash*, (1970) 1 SCWR 139 (117)

10. *State of Mysore v Manche Gowda A* 1964 SC 506 (510).

11 *State of U. P. v Harish Chandra* (1969) 1 SCC 403 (406)

13. *Dulal v Bose*, (1958) 62 CWN 531

14. *State of U. P v. Harish Chandra*, (1969) 1 SCC 403 (406-7)

15. E.g., r. 23 of the Central Services (Classification, Control & Appeal) Rules, 1957 (vide C5, Vol. 7, p. 961)

16. *Colonial Sugar Refining Co v. Irving*, (1905) A.C. 369, *D C M v I T. Commr.*, 54 I.A. 421, *Markaik v. Tribunal*, A 1962 AP 303

delinquent having no legal right to appeal, the Court cannot interfere on the ground that the non-statutory rules or the requirements of natural justice have it been complied with.

III. On the other hand, where the right of appeal is conferred by statutory rules, the quasi-judicial obligation would attach to it and the rules of natural justice must be complied with by the departmental appellate authority.<sup>18</sup>

### Appeal does not cure defect of non-compliance with Art. 311.

1. When an order of punishment is invalid because of non-compliance with Art. 311 (2), it is void *ab initio* and the defect cannot be waived by the fact that the Petitioner has appealed to a higher authority,<sup>19</sup> nor can the defect be cured by the fact that the order has been affirmed in appeal,<sup>20</sup> even though the original order merges in the appellate order.

2. Where the disciplinary authority is himself the inquiring officer and he acts upon materials collected at the back of the delinquent, his decision will be invalid, even though it may have been confirmed by the appellate authority.

Where, however, the inquiry officer is a person other than the disciplinary authority, the fact that he has received any materials at the back of the delinquent will not vitiate the order if the disciplinary authority as well as the appellate authority have come to their conclusion *independently*, on the basis of the materials on the records.<sup>21</sup>

### Natural justice at the appellate stage.

It has been already stated that a statutory power of appeal, even if vested in an administrative authority, must be exercised quasi-judicially. Hence, the following principles, in conformity with natural justice, must be observed by such appellate authority:

(i) He must give a reasonable opportunity to the parties to place their respective cases before him,<sup>22</sup> which means that he must give notice to the parties to the appeal, appoint a time and place of hearing and allow them to appear with such further materials as they like and to present arguments in support.<sup>23</sup>

It follows that, in the absence of a statutory provision to that effect, a statutory appellate authority cannot dispose of the appeal upon a mere consideration of the memorandum of appeal.<sup>24</sup>

In some cases it has been held that the appellate authority is obliged to hear the appellant *only* if he claims to be heard in person.<sup>24, 25</sup> But this would be debatable if hearing of the appellant be one of the incidents of the appellate function,<sup>11, 17</sup> as explained above.

The Author is also unable, with respect, to agree with the Gujarat High Court,<sup>18</sup> that the Constitution does not intend that personal hearing would be required at the appellate stage, because such hearing has been obviated at the second show cause notice stage, by making it clear that at the

17. *Jogendra v. Dy. Commr.*, A. 1962 Assam 28.

18. *Nagendra v. Commr.*, A. 1958 S.C. 398 (406).

19. *D. C Das v. Union of India*, (1969) Lab. I.C. 409 (422) (S.C.).

20. *Suraj Narain v. N. W. F. Ry.*, A. 1942 F.C. 3; *Somasundaram v. State of Madras*, A. 1956 Mad. 9.

21. *State of Assam v. Mahendra*, A. 1970 S.C. 1255 (1261).

22. *Nagendra v. Commr.*, A. 1958 S.C. 399 (406).

23. *Babar Ali v. Mominchahon*, (1966) IV R.L.R. 118 (124) Cal.

24-25. *Bhubaneswar v. Union of India*, (1969) Lab. I.C. 215 (223) Cal.

1-17. *Dharami v. State of Assam*, A. 1963 Assam 163. \*

18. *State v. Rumatibai*, A. 1969 Guj. 260.

stage the only right of the delinquent is to make a 'representation against the proposed penalty',—for the simple reason that the scope of the two stages is not the same and the proceeding before the punishing authority after the second notice is *not appellate in nature*.<sup>19</sup>

(ii) He must hear the appeal impartially

(iii) He must hear the appeal objectively,<sup>20</sup> and with an open mind.<sup>21</sup>

(iv) He must pass a 'speaking order'.<sup>21</sup>

### **Appellate authority must give reasons.**

1. It is now well established that an appellate authority, even though administrative, must give reasons,<sup>22 23</sup> because it is a quasi-judicial function, even though such reasons may not be as elaborate as those of a court of law.

2. It follows that an authority, hearing a statutory appeal from a disciplinary order, must give reasons,<sup>24</sup> so that, the supervisory jurisdiction of the superior Courts may not be rendered nugatory,<sup>25</sup> and such reasons must show that he has applied his mind to the questions which he was required to consider, by the Rules governing his appellate power.<sup>26</sup>

3. It has, however, been held by the Supreme Court that where the Appellate Authority agrees with the order of the punishing authority, he need not give reasons.<sup>24</sup>

### **Scope of power of appellate authority.**

I. Where the power of an appellate authority is conferred by statutory rules, it is evident that his powers must be strictly circumscribed by the terms of such rules, or, his decision would be *ultra vires*. Thus, in the absence of a specific rule to that effect, he cannot re-uscite a charge which has not been proved, according to the punishing authority.<sup>27</sup>

II. The *vires* of the statutory rule itself will be open to challenge from the delinquent.<sup>28</sup>

III. On the other hand, where no limits are imposed by the statutory rules upon the power of appeal, the general principle that an appellate authority has the same powers as the original authority will apply.<sup>29</sup> At the same time, the appellate authority will be subject to the procedural or other limitations as the primary authority was.

### **The Provisos:**

#### **A. Prior to the Amendment of 1963.**

##### **Proviso (a): 'Conviction on a criminal charge'.**

1. This clause makes an officer who has convicted on a criminal

19. In *State of M. P. v. Narasinghda* (1939) 11 SCWR 815 (818) the Supreme Court has held that even in a departmental revision proceeding it would be proper to give a personal hearing in order to enable him to clarify the contentions raised by him if the matter is complicated or requires elucidation.

20. *Nagendra v. Commr.* A 1958 SC 398 (406)

21. *Amulya v. Dy. Chief Engineer* A 1961 Cal 40

22. *Harinagar Sugar Mills v. Shyam Sundar* A 1961 SC 1969

23. *Mahabir v. State of M. P.* (1970) 1 SCWR 713 (718); *Bhagat Raja v. Union of India*, (1967) 3 SCR 302, *State of Gujarat v. Patel*, (1969)<sup>31</sup> 1 SCWR 1106

23a. *Anil v. Union of India*, (1969) 19 FLR 114 (116) Cal

23b. E.g., r. 1731 r. 1731 (2) of the Ry. Establishment Code

24. *State of Madras v. Srinivasan* A 1966 SC 1827

25. *Shivananda v. Dist. Supdt.* (1964) 18 FLR 137 (139) Cal; *Anil v. Union of India*, (1969) 19 FLR 114 (116) Cal

1. *State of Madras v. Gopal*, A 1963 Mad. 14

2. *Cf. Rangyan v. S. J. Bank*, A 1963 Mad 76

3. *Nagendra v. Commr.* A 1958 SC 398 (407-8).

charge, liable to dismissal without any further proceeding under Art. 311(2). It includes conviction under any law which provides for punishment for a criminal offence,<sup>4</sup> whether by fine or imprisonment.<sup>4</sup> No distinction is made between crimes involving moral turpitude and other crimes<sup>5-6</sup> or statutory offences.<sup>7</sup> Thus, conviction for drunkenness would attract the operation of this Proviso;<sup>8</sup> similarly, conviction under s. 29<sup>7</sup> or 34<sup>8</sup> of the Police Act.

2. The word 'charge' in this clause contemplates some accusation and not merely a charge in the technical sense of the Code of Criminal Procedure. Hence, conviction for contempt of court, consisting in making defamatory accusations against the presiding officer of a Court is a conviction within the purview of the present clause, even though a contempt of this nature may not be an 'offence' under the Indian Penal Code.<sup>6</sup> Nor does it mean that the Proviso will not be applicable to conviction in a case because no formal charge is framed in such cases.<sup>4</sup>

3. To apply this Proviso, it is not necessary for the Government to wait until the disposal of appeal or revision presented against the conviction.<sup>9</sup>

But if the conviction is subsequently *set aside*, on appeal or otherwise, the order of dismissal ceases to have effect and the employee is entitled to be reinstated forthwith and to recover arrears of salary from the date of dismissal till he is properly dismissed in compliance with Art. 311 (2).<sup>9</sup>

4. On the other hand, Government is not estopped from applying this Proviso merely because an inquiry has already been held.<sup>7</sup>

**Proviso (b): Decision of the authority not to give opportunity, where it is not reasonably practicable.**

1 Under this Proviso, no opportunity to show cause need be given if the appointing authority records it in writing that it is not reasonably practicable to give to that person an opportunity of showing cause. In order to apply this protection to the order of dismissal etc., the following conditions must be satisfied:

(i) The satisfaction must be that of the authority who is empowered to dismiss, remove or reduce the officer in rank and he must apply his mind to it.<sup>10</sup> Where he simply carries out the orders of some superior authority and dismisses a subordinate outright, the validity of the order cannot be sustained on the ground that the power under the present Proviso was exercised.<sup>11</sup> As cl. (3) clearly says, there must be 'decision' of the authority empowered to dismiss, etc., and then the reasonableness of the decision will be immune from being challenged in a court of law.

(ii) The authority empowered to dismiss etc., must record his reasons in writing for denying the opportunity under cl (3), before making the order of dismissal etc. After an order in contravention of Art. 311 (2) is made and challenged, it cannot be contended that the order is valid by reason of this Proviso.<sup>11</sup>

4. *Narabhushan, in re.* A. 1966 A.P. 72.

5. *Durga Singh v. State of Punjab*, A. 1957 Punj. 97 [conviction of offence under s. 34 of the Police Act, 1861].

6. *Venkatarama v. Prov. of Madras*, A. 1946 Mad. 375; *Jagadindra v. I. G.*, A. 1959 Assam 134.

7. *Sunil v. State of W. B.*, (1970) 1 L.L.J. 588 (591) Cal.; A. 1970 Cal. 384.

8. *Cf. State of U. P. v. Nooh*, A. 1958 S.C. 86 (95); *Kunwar v. Union of India*, (1969) Lab. L.C. 990 (993).

9. *Union of India v. Akbar*, A. 1961 Mad. 486 (491); *Dilbagh v. Dist. Supdt.* A. 1959 Punj. 401; *Dass v. Dist. Supdt.*, A. 1960 All. 538; *Dhanu v. Union of India*, A. 1965 Punj. 153; *Tariel v. Chief Cupdt.*, A. 1965 Cal. 75.

10. *State of Orissa v. Krishnaswami*, A. 1964 Orissa 29.

11. *Bhugram v. Supdt. of Police*, A. 1954 Assam 18 (22).

(iii) The power must be exercised *bona fide*, having regard to relevant considerations.<sup>10</sup>

2. Though the competent authority is entitled to apply this Proviso on the ground that the employee was avoiding service of the notice to show cause against the charges or it was not reasonably practicable to have it served on him, the Court may interfere if it appears that the authority did not apply his mind to the question of practicability of service or there was any negligence on his part in the attempt to serve the notice.<sup>11</sup>

### Proviso (c): "Interest of security of the State".

There might be cases where the mere disclosure of the charge might affect the security of the State. In such cases the President or Governor might exempt the giving of notice to show cause, or the opportunity to defend, as required by Art 311(2).<sup>12</sup>

### Satisfaction of the President or the Governor.

I. The satisfaction referred to in this clause of the Proviso is not circumscribed by any conditions. The result is that no inquiry need be made by the President or Governor<sup>13</sup> and no reasons need be assigned<sup>14</sup> for an order under this clause. The satisfaction of the President under this clause is not justiciable,<sup>15</sup> and the Public Service Commission need not be consulted before making an order under the present clause of the Proviso.<sup>12</sup>

II. The satisfaction, however, need not be the *personal* satisfaction of the President or the Governor. It will be enough if it is exercised in compliance with Art 166, because the power to take disciplinary action against a Government servant is the 'executive power of the Union or the State, as the case may be'.<sup>15</sup>

On the other hand,—

(i) Though the factum of satisfaction need not be recited in the order under the Proviso, if the order is challenged on the ground of absence of such satisfaction, it is incumbent upon the authority to establish that the requisite satisfaction had been achieved before issuing the order.<sup>1</sup>

(ii) It would also follow that, as in other cases of exercise of subjective satisfaction, the charge of *mau fides*<sup>16</sup> may be levelled against an order under the present clause, though it may not be easy to establish it.<sup>17</sup>

The satisfaction may, however, be based on the antecedents of the Government servant concerned, including his conduct prior to the order of the President or Governor or the Rules which are sought to be applied.<sup>2</sup>

(iii) Where, however, the President or the Governor has made any Rules under Art 369 and proceeds under those Rules e.g., the Security Rules, the procedure prescribed by those Rules must be observed and if the requirements of the Rules are not complied with the President or the Governor cannot fall back upon the power under the present clause of the Proviso.<sup>20, 21</sup>

12. *Jagdish v. Accountant General* A 1958 Bom 783 (290), *12am v. State of Hyderabad* A 1958 AP 619 (621), *Akhatar v. Union of India*, (1967) 2 Lab LJ 767 (All).

13. *Narendra v. State of W. B.* A 1962 Cal 481 (483)

14. *Satyendra v. Union of India*, A 1962 Punj 400

15. *Cf. Kapur Singh v. Union of India*, A 1960 SC 493 (197)

16. *Khawar v. Union of India* A 1969 All 422

17. *Chhatar Singh v. Union of India*, A 1967 Raj, 194 (196)

18. *Hyder v. State of A. P.* A 1960 AP 479

19. *Eswariah v. State of Andhra*, A 1958 AP. 288 (291)

20. *Balakrishna v. Union of India*, A 1958 SC 232 (239)

21. *Menon v. Union of India*, A 1963 SC (1164). [The view to the contrary, expressed in *Eswariah v. State of Andhra* A 1958 AP 288 (291) or *Shanker Lingam v. Union of India*, A 1960 Bom. 431 is no longer tenable].



### Central Civil Services or Railway Services (Safeguarding of National Security) Rules.

1. An order of compulsory retirement under these Rules does not amount to 'dismissal' or 'removal' within the meaning of Art. 311.<sup>20</sup>

2. But when action is taken or proposed<sup>22</sup> to be taken against an employee under these Rules, the Court can, under general principles, interfere on the following grounds—

(a) Where the charges made in the notice are so vague that it is not reasonably possible for the employee to meet them<sup>23</sup> or are not covered by the Rules.<sup>24</sup>

(b) Where the termination of services is proposed in the notice itself, before the explanation of the employee is received.<sup>25</sup>

(c) Where the grounds for which the Rules are applied against a Government servant have no relevancy<sup>22</sup> to the requirements of the Rules or when the Rules are used for a purpose other than for which they had been made.<sup>25</sup>

(d) Where the procedure prescribed by the Rules has not been followed.<sup>20</sup> Where the authority proceeds and takes action under the Security Rules but fails to follow the procedure laid down therein, the validity of the order cannot be maintained by invoking *other* Service Rules.<sup>21</sup>

Thus, the Rules cannot be relied upon unless there is a finding that after due inquiry under r. 4, the competent authority had come to the conclusion that retention of the particular employee in service was prejudicial to 'national security'.<sup>1</sup>

3. R. 3 may be applied against a Government servant on the following conditions—

(i) That he is engaged in subversive activities or is reasonably suspected to be so engaged or is associated with others in subversive activities.<sup>1</sup>

The Court is entitled to examine whether the grounds stated are relevantly related to 'subversive activities',<sup>2-3</sup> e.g.,

Taking part in the political activities of the Communist Party continued to be a recognised political organisation.<sup>2</sup>

(ii) To say that he is associated with other persons who are engaged in subversive activities is not sufficient to apply the Rule.<sup>4</sup>

(iii) Even if any of the foregoing conditions are present, the competent authority must be further satisfied that the manner of his activities is such as to raise doubts about his reliability as also that his retention in the public service is prejudicial to national security.<sup>2</sup>

### Constitutionality of the Security Rules.

It has been held that the National Security Rules do not offend Art 14;<sup>20</sup> 19 (1) (a),<sup>4</sup> or 19 (1) (a);<sup>20</sup> or 311.<sup>20</sup>

### B. After the amendment of 1963.

The amendment of Cl. (3) makes it clear that the competent authority may dispense with an inquiry but not the opportunity to make representation against the penalty proposed.

22. *Chintamani v. P. M. G.*, A. 1965 Bom. 59 (62).

23. *Ananthanarayanan v. S. Ry.*, A. 1956 Mad. 220.

24. *Menon v. Union of India*, A. 1963 S.C. 1160 (1161).

25. *Lachman v. I. G. P.*, A. 1956 Pepsu 19 (26).

1. *Mohan Singh v. Day*, (1955) O.C.J. Misc. Application 38/53 (Bom.) referred to in *Shankerlingam v. Union of India*, (1959) 62 Bom L.R. 1 (7).

2. *Menon v. Union of India*, A. 1963 S.C. 1160 (1164).

3. *Chintamani v. P. M. G.*, A. 1965 Bom. 59 (64).

4. *Enwereak v. State of Andhra*, A. 1958 A.P. 288 (294).

**Effect of non-compliance with Art. 311 (2).**

1. Both Cls. (1) and (2) of Art. 311 are mandatory. They constitute express provisions of the Constitution which qualify Cl. (1) of Art. 310. Hence, dismissal by an authority lower than the appointing authority, and dismissal without giving reasonable opportunity of showing cause, are equally void and inoperative,<sup>5,22</sup> and therefore, actionable.

2. Where there is a failure to comply with Art. 311 (2) at the original stage, the order of punishment becomes null and void<sup>24</sup> and nothing done by the appellate authority can cure the illegality<sup>25</sup>.

But—

Where the inquiry relating to some of the charges violates the principles of natural justice but there are still some charges upon which the delinquent officer has been found guilty and the punishment prescribed by the Rules can be awarded upon those charges, the Court cannot quash the order or direct the authority to reconsider his order.<sup>1</sup>

**Remedies for violation of Art. 311.**

1. According to the Supreme Court decision in *Abdul Majid's case*<sup>2</sup> in case of a wrongful termination of service in contravention of the constitutional requirements in cl. (1) or (2) of Art. 311, the aggrieved Government servant is entitled to relief in a Court of law like any other person, under the ordinary law, inasmuch as the doctrine of 'service at pleasure' has been subjected to constitutional limitations in India. Such relief must be regulated by the Code of Civil Procedure. It follows, therefore, that when a Government servant has been dismissed in contravention of either cl. (1) or cl. (2) of Article 311, or of a mandatory statutory rule, he would be entitled to bring a suit against the Government for the following reliefs:<sup>3</sup>

(1) A declaration that the order of dismissal or reduction in rank<sup>4</sup> or compulsory retirement was void and inoperative and that the plaintiff remained a member of the service at the date of institution of the suit.<sup>2,6</sup>

(2) A decree for arrears of pay and allowances<sup>5</sup> since the order of dismissal up to the date of institution of the suit or the date of superannuation, if earlier.<sup>4</sup>

2. A suit would also lie where the services are terminated in contravention of the contract of employment.<sup>7</sup>

**Dismissal cannot be ordered with retrospective effect.**

1. An order of dismissal or discharge can be given effect to only from the date of the order and not from any earlier date when the Government servant was actually in service.<sup>8</sup>

5-22 *Union of India v. Jeevan Ram*, A. 1958 S.C. 95.

23 *State of Bihar v. Abdul Majid*, 1954 S.C.R. 780, *Union of India v. Varma*, A. 1957 S.C. 882 (188J).

24 *State of U. P. v. Avdh Naram*, A. 1965 S.C. 260 (364).

25. *Rhugiram v. Suptd. of Police*, A. 1951 Assem. 18.

1. *State of Orissa v. Vidyabhusan*, A. 1953 S.C. 779 (opinion to the contrary in *Arupendra v. Chief Secy.*, A. 1961 Cal. 1 (21) is no longer good law).

2. *State of Bihar v. Abdul Majid*, (1951 S.C.R. 785) *Union of India v. Varma*, A. 1957 S.C. 882 (884).

3. *State of Bombay v. Narul Lath*, 1966 2 L.L.J. 395 (602) S.C.

4. *Madhav v. State of Mysore*, A. 1962 S.C. 8.

5. *Ram Parshad v. State of Punjab*, A. 1966 S.C. 1607.

6. *Bhagat Singh v. State of Punjab*, A. 1960 S.C. 1210. *Dalip Singh v. State of Punjab*, A. 1960 S.C. 1305.

7. *Satis Chandra v. Union of India*, (1953) S.C.R. 655 (660).

8. *Jeevaratnam v. State of Madras*, A. 1946 S.C. 951 (953).

9. *Debandra v. State of Bihar*, A. 1965 Pat. 186 (191).

2. The same view has been taken regarding an order of compulsory retirement.<sup>9</sup>

3. When a retrospective order of dismissal is made, it will be valid from the date of the order,<sup>8</sup> though not from any earlier date.<sup>9</sup>

4. 'Date of order', in this context, means the date when the order is communicated to the Government servant concerned or otherwise published.<sup>10</sup>

#### **Declaration that the order of dismissal was void.**

1. Under the ordinary law of specific relief contained in s. 34 of the Specific Relief Act, 1963, any person whose legal character or right to any property has been denied by any person (including the Government) is entitled to bring a suit for declaratory relief, in compliance with that section. Hence, when the services of a civil servant have been terminated in violation of any statutory or constitutional<sup>11</sup> provision, he may obtain a declaration from the civil court that—

"the order purporting to dismiss the Plaintiff was void and inoperative and that the Plaintiff remained a member of the service at the date of institution of his suit".<sup>12,13</sup>

2. But the relief under s. 42 of the Specific Relief Act being discretionary, the Plaintiff cannot obtain such declaration as above where—

(a) the plaintiff has already reached the age of superannuation at the date of institution of his suit for the declaration,<sup>4</sup> or

(b) where in view of the plaintiff's age or state of health, no purpose would be served by restoring him to office.<sup>14</sup>

3. On the death of the aggrieved employee his legal representatives are entitled to maintain an action for such declaration.<sup>15</sup>

#### **No decree for reinstatement.**

In view of s. 14(1)(b) of the Specific Relief Act, 1963 (corresponding to s. 21(b) of the Sp. Rel. Act, 1877), a Court cannot directly order an employer to reinstate a dismissed employee,<sup>16</sup> even though as a result of the declaration of the Court that the dismissal was wrongful or unconstitutional the Government may be obliged to put him back to his post or another post of the same status.<sup>17</sup>

#### **Limitation for declaratory relief.**

1. The period of limitation for the *declaratory relief* was 6 years under Art. 120 of the Limitation Act, 1908 and not Art. 14.<sup>18</sup>

Under the Limitation Act of 1963, the period has been reduced to three years only, by the corresponding Article 113.

2. The period of limitation will run from the date of communication of the order to the Government servant in question inasmuch as an order of dismissal cannot be said to be effective until it is communicated to the person sought to be dismissed.<sup>19</sup>

10. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1318.

11. Cf. *Jagdish v. Union of India*, A. 1964 S.C. 449.

12. *High Comrs. v. Hall*, A. 1948 P.C. 121.

13. *Jai Shankar v. State of Rajasthan*, (1966) 13 F.L.R. 133 (S.C.).

14. *Rangachari v. Secy. of State*, A. 1937 P.C. 27.

15. *Ibrahimhai v. State*, A. 1968 Gaj. 202 (208, 210).

16. *Banta Singh v. N. C. D.C.*, A. 1968 Pat. 300 (301); *S. Dutt v. University of Delhi*, A. 1958 S.C. 1050.

17. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1314).

18. *Ranjit v. State of W. B.*, A. 1958 Cal. 551; *Jagdish v. U. P. Govt.*, A. 1956 All. 114 (116).

19. Cf. *State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1314).

### Effects of the declaration.

1. Though the Court cannot directly order reinstatement, it cannot be expected that the Government would act in a capricious manner, in utter disregard for the pronouncement of the Court that the dismissal was void and that, accordingly, the public servant must be deemed to have been all along in service. In such a case, therefore, it would be fit and proper for Government to correct the wrong done and to reinstate the person.<sup>20</sup> For the reason given below an order of reinstatement is, in fact, superfluous.<sup>21</sup>

2. The effect of the declaration by the decree of a Civil Court [as distinguished from a departmental appeal] which may not necessarily have such effect] is that the plaintiff was never deemed to have been lawfully dismissed from service and the necessary consequences will follow from the decree,<sup>22</sup> e.g., he will be entitled to be posted to the office from which he had been dismissed or to another office of the same status.<sup>23</sup>

### Right to salary after re-instatement.

Where an employee is suspended pending disciplinary proceedings and thereafter the suspension is revoked or held to be invalid or an order of termination of services is set aside, the question arises as whether the employee should get his pay etc., for the period during which he remained absent from his duty on account of the invalid order of suspension or removal. On this question the Supreme Court has made a distinction between a case where the order in question has been held invalid by a Court and a case where it has been set aside by a superior Departmental authority.

I. Once the dismissal is declared by the Civil Court as wrongful, the aggrieved Government servant is entitled to his full salary for the period during which he was wrongfully prevented from performing his duties.<sup>24</sup> Government cannot fix the salary for that period.

II. There are, however, certain Departmental rules<sup>25 26</sup> having statutory authority which empower the authority competent to order reinstatement upon setting aside the order of suspension or removal, to fix the emoluments which be payable to the employee during his period of absence while the order of suspension or removal is in force.<sup>27</sup>

1. The Supreme Court has held that such rules are applicable only to cases where the dismissal has been set aside in a departmental appeal and not where it is set aside in a competent court.

2. In such a case whether the employee was fully exonerated or honourably acquitted<sup>28</sup> is a question which has to be determined by the competent authority objectively, after giving an opportunity to the employee to show cause against the order proposed, in order to comply with the rules of natural justice, even though F. R. 54 does not expressly require any such opportunity to be given.<sup>29</sup>

3. If the prescribed authority does not make any determination as to whether the employee has been fully exonerated or not and makes no order for paying him salary during the period of suspension even after he is reinstated, the authority may be directed to make such determination.

20. Cf. *Om Prakash v. U. P.* 11, R. (1952) 2 All 567 (568).

21. *Devendra v. State of U. P.* A. 1962 S.C. 1331.

22. Cf. F.R. 54; [*Gopal Krishna v. State of M. P.* A. 1968 S.C. 240]; r. 2044 of the Railway Establishment Code.

23. Cf. R. 9 (2) of the All India Services (Discipline & Appeal) Rules, 1955.

24. *Devendra v. State of U. P.* A. 1962 S.C. 1331.

25. *Gopal Krishna v. State of M. P.* A. 1968 S.C. 240 (243), the view taken to the contrary in *Gopchand v. Western Ry.* A. 1967 Guj 27 (35) is therefore, no longer good law].

under the relevant statutory provision and to pay the sum due to the employee according to such determination.<sup>1</sup>

**Whether departmental proceedings can be held against a Government servant relating to the same charge, after he has been exonerated at a previous proceeding.**

1. It is evident that neither the constitutional provision in Art. 20 (2) nor the principle of *res judicata* is applicable to departmental proceedings so that *prima facie* there is nothing to prevent the Government to proceed against a Government servant departmentally even where he has been exonerated on the same charge by a departmental proceeding previously.

2. It has, however, been held by the Rajasthan High Court<sup>2</sup> that where Rules have been framed under Art. 309, and such Rules do not provide for holding a second inquiry after one has terminated in favour of the Government servant, Government cannot exercise its pleasure under Art. 310 (1) to hold another inquiry, outside the provisions of the Rules. This Rajasthan decision<sup>2</sup> was referred to and distinguished by the Supreme Court,<sup>3</sup> without questioning its correctness. But where one of the charges only is held proved at an inquiry, there is nothing to prevent a reopening of the inquiry to determine whether the other charges were also proved.

The Mysore High Court<sup>4</sup> has held that where the punishing authority accepts the explanation offered by the delinquent in one proceeding, he cannot start fresh proceedings on the same charges. These views seem to be of doubtful authority.

In a subsequent case<sup>5</sup> the Supreme Court has refused to subscribe the proposition that after an inquiry has been already held, a second departmental inquiry would be bad in law.

### **Whether further inquiry barred after judicial decision**

The question whether further inquiry against a delinquent officer would be barred when the penalty imposed against him in a proceeding has been quashed would depend upon the circumstances.

1. Where the delinquent officer has been exonerated on the merits by a competent court, finding him not guilty of the charges, no further inquiry can be commenced against him on the same charges.<sup>6</sup>

This principle has been extended to a similar finding in a departmental proceeding, so as to bar a fresh proceeding.<sup>7</sup>

2. Similarly, where a Civil Court holds an order of dismissal invalid on the ground that the officer making the order was *not competent* to make it as he was inferior to the appointing authority a fresh proceeding cannot be started by the same officer, so long as the judgment of the Civil Court is not set aside in proper proceedings.<sup>8</sup>

3. On the other hand, where the suit brought by the delinquent officer has been decreed only on the ground that *he had not been afforded a reasonable opportunity of showing cause* against the charge in the disciplinary proceedings, there is nothing to prevent the Government from starting fresh proceedings upon him on the charge, after complying with the requirements of Art. 311(2).<sup>9</sup>

1. *Union of India v. Kapur*, (1968) S.C. [C.A. A. 239/66, d. 5-1-68]

2. *Dwarkanand v. State of Rajasthan*, A. 1958 Raj. 38 (41).

3. *Harbans v. State of Rajasthan*, A. 1962 S.C. 439; (1962) Supp. 1 S.C. 104.

4. *Andrews v. Dt. Educational Officer*, (1966) 13 F.L.R. 248 (Mys.).

5. *Tandon v. State of Punjab*, (1960) S.C. [C.A. 102/60].

6. *Devendra v. State of U. P.*, A. 1962 S.C. 1334 (1137).

7. *Ct. State of Punjab v. Amar Singh*, A. 1966 S.C. 1313 (1314).

8. *Mohan v. Dist. Personnel Officer*, A. 1969 Punj. 37.

**Whether departmental proceedings can be held pending civil or criminal proceedings on the same charges.**

1. There is nothing to prevent departmental proceedings to be started and pursued merely because criminal proceedings on the same charges are pending,<sup>9</sup> so long as the criminal proceedings have not ended in acquittal.<sup>10</sup>

In such a case, there is no violation of natural justice on the ground that evidence is common to both the proceedings.<sup>10</sup>

2. Nor is there anything to debar the Departmental authorities to initiate and continue disciplinary proceedings merely because a proceeding is pending in a criminal court, on the same charges.<sup>11</sup> There would be no contempt of court by the departmental authorities, in the absence of a stay order from the court.<sup>9</sup>

**Departmental proceedings after acquittal.**

1. Even where the Government servant has been acquitted in the criminal case, it is open to the Government 'to proceed against him departmentally on the same charge,' after complying with Art. 311 (2).<sup>12</sup> Such proceeding after acquittal by the Criminal Court is not barred by Art. 20 (2), inasmuch as a departmental proceeding does not constitute a 'prosecution' within the meaning of Art. 20 (2).<sup>13</sup>

2. The above proposition holds good even where the acquittal has been made by the High Court and the initiation of departmental proceedings after such acquittal cannot be held to constitute a contempt of the High Court,<sup>14</sup> because the two proceedings are entirely different in nature and scope.<sup>14</sup>

3. In some cases,<sup>15</sup> it has been held that where the acquittal by the Criminal Court is on the *merit*, a distinguished from technical grounds, the authorities cannot proceed against the delinquent departmentally, on the same charges and that if they seek to punish him on the same charges, the proceedings would be quashed as being in contravention of the principles of natural justice.

This view requires further examination inasmuch as the very standards of proof in the two proceedings differ, as pointed out by the Supreme Court.<sup>16</sup>

**Recovery of arrears of pay.**

From the decision of the Supreme Court in *Abdul Majid*,<sup>17, 18</sup> case, it follows that—

1. A suit lies for recovery of arrears of pay<sup>19, 20</sup> and other allowances<sup>2</sup> to which he is legally entitled, by a Government servant for the period he was in office and until his service is lawfully terminated,<sup>20, 21</sup> together with

9. *Jung Bahadur v. Bai Nath*, A. 1909 S.C. 30.

10. *Delhi Cloth Mills v. Kunal Bhar*, A. 1960 S.C. 806.

11. *Venkataraman v. Union of India* (1952 51) 2 C.L.J. 296; (1951) S.C.R. 1150.

12. *Radhakanta v. State of Orissa*, A. 1962 Orissa 124 (127).

13. *State of A. P. v. Rama Rao*, A. 1963 S.C. 1723 (1726).

14. *Motising v. Mehta*, A. 1966 Guj. 233 (235).

15. *Ponnuram v. Mysore Govt.*, A. 1967 Mys. 84 (86); *Kayam v. Supdt. Post Offices*, A. 1965 Mad. 502 (505); *D'Silva v. R.T. 1*, A. 1952 Mad. 853; *Banta Singh v. N. C. D. C.*, A. 1968 Pat. 303; *Qamarali v. State of M. P.*, A. 1959 M.P. 46 (49); *Isral v. Sia Sutan*, A. 1961 Pat. 411 (412); *Radhakanta v. State of Orissa*, A. 1962 Orissa 125.

16. *State of Bihar v. Abdul Majid*, (1955) 1 S.C.R. 786.

17. *State of M. P. v. Mandawar*, A. 1951 S.C. 493.

18. *Madhav v. State of Mysore*, A. 1962 S.C. 8.

19. *Om Prakash v. State of U. P.*, A. 1955 S.C. 600.

21. *Jai Shanker v. State of Rajasthan*, (1965) S.C. [C.A. 575/64].

such sums as are due to him under the Rules of such Provident Fund.<sup>23</sup> In such suit, the Court has the power to decree the arrears up to the date of superannuation, if that falls during pendency of the suit.<sup>23</sup>

2. Where the Government has paid him at a rate lower than what was due to him according to the terms of his appointment, he can recover the balance by suit, with interest.<sup>24</sup>

3. The Proviso to s. 34 of the Specific Relief Act, 1963, says that no Court shall make a declaration under that section where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Hence, inasmuch as in case of wrongful dismissal the aggrieved civil servant is entitled to recover arrears of pay since the date of such dismissal by ordinary action against the Government, the plaintiff who brings a declaratory suit must necessarily claim recovery of arrears of pay up to the date of the suit so far as it has not already become barred by limitation,<sup>25</sup> because O. 2, r. 2 of the C. P. Code would be applicable.<sup>1</sup> For any claim for arrears subsequent to the institution of the suit for declaration up to the date when a valid order of dismissal is eventually made, plaintiff may, however, bring a separate suit.<sup>2</sup>

4. Though a declaration that a Government servant's dismissal was illegal cannot be obtained on his death by his legal representatives, where a suit was duly instituted by the Government servant for a declaration and recovery of arrears for pay, etc., and he died during the pendency of the proceedings, his legal representatives are entitled to a decree for the arrears up to the date of the plaintiff's death upon the finding that the dismissal was void.<sup>3</sup>

6. The right to recover the arrears of salary accrues whether the dismissal is in breach of contract or tortious.<sup>19</sup>

#### Limitation for suit to recover arrears of pay.

The limitation for a suit for recovery of arrears of pay of a Government servant is three years from the time when the salary fell due under Art 7 of the Limitation Act of 1963.<sup>2</sup> The result is that the plaintiff would be entitled to recover all arrears of pay which fell due to him within a period of three years before institution of the suit,<sup>4</sup> with the addition of two months for the statutory notice under s. 80 C. P. Code, 17,<sup>6</sup> but not beyond that.<sup>6</sup>

#### Right to salary etc., at a particular rate.

1. Though a Government servant is entitled to recover *arrears* of salary for a period of service already rendered at his usual rate of pay which existed during that period he has no *legal* right to have his pay fixed at a particular rate, either by way of raising the scale of pay already sanctioned for him or by way of preventing a reduction,<sup>6a</sup> unless -

22. *Jogesh v. Union of India*, A. 1954 Assam 17 (20).

23. *Ramanurrah v. State of Bihar*, A. 1966 Pat. 97 (109).

24. *Jamini v. Union of India*, A. 1955 Cal. 45 (51).

25. This point does not appear to have been considered in *Qamarali v. State of M. P.*, A. 1969 M.P. 47.

1. *Angal v. State of Maharashtra*, A. 1968 Bom. 304 (305-6).

2. Cf. *Siraj Narain v. N. W. F. P.*, (1942) F.C.R. 113.

3. Cf. *Jagdish v. U. P. Govt.*, A. 1956 All 114 (117); *Ibrahimkhaj v. State*, A. 1968 Guj. 202 (209).

4. *Punj. Prov. v. Tarachand*, A. 1947 R.C. 23.

5. Corresponding to Art. 102 of the Limitation Act of 1908 [cf. *State of A. P. v. Khutubuddin*, (1966) II L.L.J. 350 (359); *Union of India v. Jagannath Rao*, A. 1966 M.P. 204].

6. *Ramanurrah v. State of Bihar*, A. 1966 Pat. 97 (109).

6a. *Aswini Kumar v. Mukherjee*, A. 1965 Cal. 484 (488).

(a) he has a *statutory right* to the same,—as was guaranteed to members of the Indian Civil Service by the Proviso to s. 247 (1) of the Government of India Act, 1935;<sup>7</sup> or

(b) he has a right secured by an express contract binding upon the Government, *e.g.*, under a contract entered under Art. 310 (2) of the Constitution; or

(c) he has a constitutional right *e.g.*, under Arts. 59 (3); 125 (1); Proviso to Art. 221, against the salary guaranteed by or under the Constitution being varied to his disadvantage after his appointment.

2. Similarly, though a Government servant can bring a legal action for the recovery of dearness allowance which *has clearly accrued*,<sup>8</sup> he cannot bring any proceeding for enforcing his *right* to get dearness allowance at any particular rate prescribed by the Service Rules, the reason being that dearness allowance is a compassionate or *ex gratia* allowance and that the Government servant has *no legal right* to the allowance.<sup>9</sup>

### Whether damages can be had for wrongful dismissal.

1. The observation of the Supreme Court in *Abdul Majid's case*<sup>10</sup> to the effect that in India, the theory that service is held at the pleasure of the Government is subject to statutory or constitutional requirements and that in case of violation of these requirements—

“the Government servants are entitled to relief like *any other person* under the ordinary law”

suggests the conclusion that in case of a dismissal in contravention of the provisions of Art. 311 (2), the aggrieved Government servant would be entitled to recover damages for wrongful dismissal as a private employee would have been entitled.<sup>11-12</sup>

2. The measure of damages, ordinarily, would be salary for such period as would reasonably be sufficient to enable the employee to secure an alternative employment, with due diligence.<sup>13</sup>

3. But he cannot get both a declaration that his employment subsists and a decree for damages.<sup>14</sup>

### Remedies under Art. 226 lies for wrongful dismissal contravention of Art. 311 (2).

1. *Certiorari*.—Since the decision of the Supreme Court in *John v. State of T. C.*,<sup>15</sup> it may be taken as settled that Art. 311 (2) requires a hearing which conforms to the principles of natural justice because it is a quasi-judicial proceeding<sup>16</sup> and accordingly, *certiorari* lies for quashing the proceeding on the ground that it violates natural justice<sup>16-17</sup> or denies ‘reasonable opportunity’.

7. *Accountant-General v. Bakshi*, A. 1962 S.C. 565 (508).

8. *U. P. Govt. v. Tabarak*, A. 1956 All. 151 (152).

9. *State of M. P. v. Mandawar*, A. 1954 S.C. 493: (1952-4) 2 C.C. 157 (139).

10. *State of Bihar v. Abdul Majid*, (1955) 1 S.C.R. 786.

11. See also *Brahmbhati v. State of Bombay*, A. 1956 Bom. 351; *Banarasi v. U. P. Govt.*, A. 1959 All. 393.

12. Damages for mental harassment were awarded in *Ramanugrah v. State of Bihar*, A. 1966 Pat. 97 (110).

13. *Cf. Shett v. Bharat Nidhi*, A. 1958 S.C. 12.

14. *John v. State of T. C.*, A. 1955 S.C. 160.

15. *Union of India v. Goel*, A. 1964 S.C. 364 (369); *Bachittar Singh v. State of Punjab*, A. 1963 S.C. 395 (397).

16. *Union of India v. Verma*, (1958) S.C.R. 493 (507); *State of M. P. v. Chintamani*, A. 1961 S.C. 1623 (1629).

17. *Majumdar v. Rathod*, (1966) 13 F.L.R. 77 (79) S.C.



*Certiorari* has also been granted where an appellate authority *enhanced* the punishment awarded by the competent authority, having no jurisdiction under the rules to enhance the punishment;<sup>18</sup> or the Rule upon which the disciplinary proceedings or the charges are founded, was unconstitutional;<sup>19</sup> or no opportunity to show cause has been afforded for removal,<sup>20</sup> dismissal or reduction in rank.

*Certiorari* would, however, be available only after a *final* order has been passed in the disciplinary proceeding.<sup>21</sup>

### II. *Prohibition.*

Prohibition would lie to restrain disciplinary proceedings –

(i) Where the charge or the Rule upon which the proceedings are founded is unconstitutional.<sup>22</sup>

Unconstitutional proceedings may be quashed at any time before they result in any final order or punishment.<sup>23</sup>

(ii) Where the order directing the inquiry was vitiated by *mala fides*.<sup>24</sup>

(iii) Where the impugned proceedings lacked initial jurisdiction.<sup>25</sup>

### III. *Mandamus.*

(1) *In the matter of appointment or promotion.*

1. Since appointment or promotion<sup>26</sup> is at the discretion of the employer and no one has a legal right to be appointed to an office under the Government, mandamus does not lie to compel an appointment or promotion of a person aggrieved unless—

in refusing appointment to the Petitioner, there has been a violation of a constitutional guarantee, e.g., Art. 14<sup>27</sup> or Art. 16 (1).<sup>28</sup> In case of such violation, the Petitioner may have a mandamus to direct the State to consider his application on the merits.<sup>29</sup>

2. Even where a person is successful at an examination held for the purpose of recruitment, he cannot obtain a *mandamus* to compel Government to appoint him, particularly where the Rules expressly lay down that “success in the examination confers no right to appointment” or the Rules reserve the right to Government to determine how many vacancies it would fill up,<sup>30</sup> for, mandamus will not lie unless is a legal right to the performance of a legal duty.<sup>31</sup>

3. Promotion to a selection post cannot be claimed as a matter of right by seniority.<sup>32</sup>

(II) *In the matter of disciplinary proceedings.*

(a) Mandamus will not lie to reinstate a dismissed employee where the service is held at the pleasure of the State.<sup>33</sup>

18. *Poonamram v. State of Rajasthan*, A. 1960 Raj. 56.

19. *Ghosh v. Jogesh*, A. 1963 S.C. 812.

20. *State of M. P. v. Anand Narain*, A. 1965 S.C. 360.

21. *Amrikhan v. State of Gujarat*, (1966) 13 F.J.R. 45 (53) Bom.

22. *Cf. Partap Singh v. State of Punjab*, A. 1954 S.C. 72.

23. *Shanlaram v. Chudasama*, A. 1954 Bom. 361.

24. *State of Orissa v. Durgacharan*, (1966) 2 S.C.R. 907 (911): A. 1966 S.C. 1517.

25. *Dwarika v. Board of Revenue*, A. 1961 Pat. 328.

1. *Cf. Banarasi v. State of U. P.*, (1956) S.C.R. 357 (361).

2. *Garula Dasratha v. State of A. P.*, (1961) 2 S.C.R. 931 (948).

3. *Hadi v. I. T. Commr.*, A. 1963 A.P. 325.

4. *Puttaraju v. State of Mysore*, (1967) S.C. [C.A. 412/65].

5. *State of Orissa v. Durgacharan*, A. 1966 S.C. 1547 (1549).

6. *State of Bombay v. Hospital Mazdoor Sabha*, A. 1960 S.C. 610.

(b) But it will issue where the employee has a *statutory right to be reinstated*, e.g., in case of a retrenchment in contravention of the provisions of the Industrial Disputes Act.<sup>6</sup>

(c) An order of dismissal or an order initiating disciplinary proceedings may be quashed by mandamus where it is in contravention of a statutory rule or regulation having the force of law,<sup>7</sup> which is mandatory.<sup>8-9</sup>

(d) An order in the nature of mandamus, not to give effect to an order of dismissal or reduction in rank of reversion, may be made if it has been made without complying with the requirements of Art. 311 (2).<sup>10</sup>

### (III) *As regards service conditions.*

It is now settled<sup>8</sup> that *mandamus* will lie to quash an order of the Government or an administrative authority which is in contravention of a *mandatory*<sup>7</sup> Rule, relating to service conditions, which has been framed under statutory authority and has, therefore, the force of law. All the rules and Regulations relating to Government servants are not, however, framed under statutory authority and some of them are merely administrative or Departmental instructions.<sup>11</sup> It is evident that *mandamus* will not lie to enforce non-statutory administrative instructions or orders.<sup>12</sup>

When, therefore, *mandamus* is sought to quash an order affecting a Government servant on the ground that the order is in contravention of a Service Rule, the first thing to be determined is whether the Rule in question has been framed under the authority of any statute.

(IV) *Mandamus* will lie where the Government order has been issued under Rules which themselves are *ultra vires*, e.g.,—

(i) Being in contravention of some mandatory provision of the Constitution, e.g., Art. 314;<sup>13</sup> 19.<sup>14</sup>

(a) Being in contravention of statutory rules, e.g., where an appointment or promotion has been made by some person other than the person who is empowered by the relevant Rules;<sup>8</sup> or a seniority list has been prepared in contravention of statutory rules.<sup>15</sup>

In such case, the Court may grant *mandamus* to adjust the seniority according to law, and draw up a fresh list.<sup>16</sup>

(V) *Mandamus* will also lie where an order, made to the prejudice of the Petitioner, itself contravenes some mandatory provision of the Constitution, e.g., Art. 16.<sup>17</sup>

### **Scope of inquiry in a proceeding for certiorari.**

(I) 1. The question that the Court may determine is an application under Art. 226 against an order of illegal dismissal or reduction in rank

7. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751. affirming *Babu Ram v. U. P. Govt.*, A. 1958 All. 584.

8. *State of U. P. v. Jogendra*, A. 1963 S.C. 1618.

9. *Ranendra v. Union of India*, A. 1963 S.C. 1552 (1555).

10. *Sukhbans v. State of Punjab*, A. 1962 S.C. 1711 (1716), reversing *State of Punjab v. Sukhbans*, A. 1957 Punj. 191.

11. *Ct. Niranjan Singh v. State of U. P.*, A. 1957 S.C. 142.

12. *Elavuni v. State of Kerala*, A. 1961 Ker. 52 [relating to fixation of rank].

13. *Accountant-General v. Bakshi*, A. 1962 S.C. 505 (507).

14. *Kameshwar v. State of Bihar*, A. 1962 S.C. 1166.

15. *Panduranga v. State of Mysore*, A. 1965 Mys. 244 (247).

16. *Malhotra v. Union of India*, (1967) S.C. [C.A. 1039/65]; *Nim v. Union of India*, (1967) S.C. [C.A. 371/65]; *Jaisinghani v. Union of India*, (1967) S.C. [C.A. 1058/65].

17. *Krishan Chand v. Tractor Organisation*, A. 1962 S.C. 602.

is whether the provisions of Art. 311 have been complied with,<sup>18</sup> or the rules of natural justice have been complied with.<sup>19</sup>

2. Once the rules of natural justice are found to have been complied with, the Court will not enter into a scrutiny of the evidence and the findings of the Enquiry Officer, as if sitting in appeal.<sup>20-21</sup>

On the other hand—

(a) Where the constitutional requirement of Art. 311 (2) has not been complied with, it is immaterial whether the inquiry officer or the dismissing authority acted *bona fide* in the exercise of his discretion.<sup>18</sup>

(b) The Court may also interfere on the ground that the Rule upon which the proceedings are founded or the charges upon which the Government servant is sought to be punished, is unconstitutional.<sup>22</sup>

(c) The Court can interfere where there is *no* evidence at all<sup>23-24</sup> or where the evidence is such that no reasonable person can arrive at the conclusion which is impugned or the finding is, on the face of it, arbitrary and capricious.<sup>21</sup> In such a case, it is not necessary to establish, further, that the finding was *mala fide*.<sup>21</sup>

But if there is *some* evidence which can justify the finding, the Court cannot interfere with the finding on the ground that the *best* evidence has not been produced.<sup>25</sup>

### Whether relief under Art. 226 can be refused for violation of Art. 311, on the ground for existence of alternative relief.

1. Where the decision rests on disputed facts which cannot be satisfactorily determined without taking evidence, e.g. whether the Petitioner was prevented from cross-examining witnesses who gave evidence in support of the charge, the Court may, in the exercise of its discretion, refuse to interfere under Art. 226, and refer the Petitioner to a suit.<sup>1</sup>

2. The question whether reasonable opportunity has been given to the Government servant within the meaning of Art. 311 (1) is ordinarily a question of fact.<sup>2</sup> But there may be cases where the question of reasonable opportunity may be so inextricably mixed up with the nature and content of the constitutional guarantee under Art. 311 (2) as to constitute a substantial question as to the interpretation of that Article,<sup>3</sup> e.g., where the constitutionality of a Departmental Rule is challenged.<sup>4</sup>

3. The Court would not refuse to have the petition under Art. 226 where a suit is already time-barred at the date of the Court's order.<sup>5</sup>

### Appeal.

From an order in a proceeding under Art. 226 for violation of Art. 311 (2), appeal has been entertained by the Supreme Court under Arts. 132 (2),<sup>6</sup> 133 (1) (c),<sup>7</sup> 136.<sup>8</sup>

18. *State of M. P. v. Chintaman*, A. 1961 S.C. 1623.

19. *State of A. P. v. Rama Rao*, A. 1963 S.C. 1723 (1727).

20. *State of Orissa v. Murlidhar*, A. 1963 S.C. 404 (408).

21. *State of Madras v. Sundaram*, A. 1965 S.C. 1103.

22. *Ghosh v. Joseph*, A. 1963 S.C. 812.

23. *Union of India v. Goel*, A. 1964 S.C. 364.

24. *State of A. P. v. Rama Rao*, A. 1963 S.C. 1723 (1727).

25. *Bhagwati Singh v. N. E. Ry.*, A. 1966 Pat. 205.

1. *Union of India v. Varma*, A. 1957 S.C. 882 (884).

2. *Krishnaswami v. Governor-General in Council*, A. 1947 F.C. 37.

3. *State of Mysore v. Chabiani*, A. 1958 S.C. 325.

4. *Priya Gupta v. General Manager*, A. 1959 All. 463 (648).

5. *Babu Ram v. U. P. Govt.*, A. 1958 All. 584 (587).

6. *State of U. P. v. Manbodhan*, A. 1957 S.C. 912.

7. *State of Bombay v. Subhagchand*, A. 1957 S.C. 892.

8. *Narasimhaiah v. State of Mysore*, A. 1960 S.C. 248 (249).

### Disciplinary action in contravention of statutory Rules.

It is now settled that, apart from a contravention of Art 311 of the Constitution, a public servant is entitled to remedy under Art 226 where disciplinary action has been taken against him in contravention of mandatory provisions<sup>9</sup> of a statute or statutory rules or regulations having the force of law,<sup>10,11</sup> which lay down the procedure for such action, e.g.,—

(i) Where it specifies the authority who alone can order the initiation of departmental proceedings or make the order of punishment<sup>12</sup>

(ii) Where it lays down the procedure to be followed at the inquiry<sup>13</sup>

### R. 55 of the Civil Services (Classification, Control & Appeal) Rules, 1930.

I While the requirement of Art 311 (2) is couched in general language, r 55 of the Civil Services (C & A) Rules lays down the procedure in details. Since the rules lay a statutory force the aggrieved employee can seek for relief on the ground of violation of the requirements of this rule, irrespective of the question whether those requirements are in excess of those of Art 311 (2).<sup>14</sup>

#### II Under r 55

(i) (a) It is obligatory upon the Inquiry Officer to hold an oral inquiry if the delinquent so insists on the High Court of the Government may depend exclusively on documentary evidence or that it charges *prima facie*, may not require an oral inquiry.

(b) Oral inquiry may not be cancelled on the ground such that it necessarily requires oral evidence to be given.

In cases other than the oral inquiry, it will be necessary<sup>15</sup>

(ii) At such oral inquiry the procedure shall be of the trial type and the delinquent officer shall be entitled to call the evidence<sup>16</sup> and to cross examine the prosecution.<sup>17</sup>

He would thus be entitled to be informed of the place and date of hearing<sup>18</sup>

(iii) In order to enable a delinquent an adequate opportunity of defending himself he must be given copies of the documents upon which the prosecution case rests. If the delinquent insists on copies. Where such documents are not supplied this right to a fair inquiry officer eventually relies on them the delinquent's case becomes almost quashed<sup>19</sup>

But the Inquiry Officer has the power to refuse production or supply of copies of documents which are irrelevant.

III Sub-rule (3) of the rule applies where the charge is one of a specific fault in the execution of the public servant's work but when it

<sup>9</sup> *State of U P v Jogendra A* 1957 SC 1118, *Ramendra v Union of India A* 1963 SC 1552 (1955)

<sup>10</sup> *State of U P v Babu Ram A* 1951 SC 751

<sup>11</sup> As distinguished from non-statutory instructions for administrative guidance [*State of Rajasthan v Ram Saran A* 1951 SC 1361]

<sup>12</sup> *Sher Singh v Union of India A* 1956 Punj 370

<sup>13</sup> *Garg v, State of Bihar A* 1966 Pat 241

<sup>14</sup> *State of Bombay v Narul Lati* (1957) 211 J 595 (6012) SC A 1966 SC 269.

<sup>15</sup> *Union of India v Hari A* 1969 All 512 (515)

<sup>16</sup> *Dhruva v. M P Electricity Board A* 1969 MP 216

<sup>17</sup> *Union of India v. Hari A* 1969 All 542

<sup>18</sup> *Purna v. S T. A. A* 1970 Orissa 1

<sup>19</sup> *Twish Nath v Union of India* (1960) SC 322/57 d 11160

<sup>20</sup> *Krishan Lal v Union of India A* 1949 Delhi 145

amounts to a misconduct, such as the taking of bribe, the full-fledged inquiry under sub-rule (1) must be made.<sup>21</sup>

On the other hand—

(i) R. 55 is concerned only with the holding of an inquiry and lays down the procedure therefor; it does not deal with the question of passing an actual order of punishment.<sup>22</sup>

(ii) No opportunity under r. 55 need be given for the imposition of any penalty other than removal, dismissal, reduction or compulsory retirement, e.g., censure or suspension.<sup>23</sup>

### Police Regulations, 1943.

I. Since these have statutory force, being made under s. 7 of the Police Act, 1861,<sup>24</sup> the requirements of these Regulations must be complied with even though they are in addition to those required by Art 311 (2) of the Constitution Under these Regulations—

(i) Personal hearing of the delinquent is essential at the inquiry stage.<sup>25</sup>

(ii) Personal hearing is also required where the revising authority wants to make an order prejudicial to the employee, after calling for the records *suo motu* (Reg 884)<sup>26</sup>

(iii) But no personal hearing is required in the case of a regular appeal, governed by Regs 882-3.<sup>27</sup>

II. Reg. 486 has three parts; Rule I thereof relates to a cognizable offence; Rule II relates to a non cognizable offence and Rule III relates to an offence which is an offence only under s. 7 of the Police Act a non cognizable offence

Under Rule I, in respect of cognizable offences, there cannot be any departmental proceeding without first resorting to Ch XIV of the Criminal Procedure Code<sup>28</sup>

### Punjab Police Rules, 1934.

R. 1638 of these Rules provide that when a Superintendent of Police receives information as to the commission by a Police Officer of a criminal offence in connection with his relations with the public, he must inform the District Magistrate who will then decide "whether the investigation of the complaint shall be conducted by a police officer or made over to a selected Magistrate having first class power". If any inquiry is held by the Superintendent of Police without first obtaining orders of the District Magistrate under this Rule, the inquiry and any orders made therein will be invalid<sup>29</sup>

### Railway Establishment Code.

1. R. 1707 requires that evidence at the disciplinary inquiry must be recorded in the presence of the delinquent Railway servant.

But there is no violation of this rule if the evidence of a witness which had been recorded before is brought on the record of the disciplinary proceeding and the statement is put to him and admitted by him to be correct and then the Railway servant is allowed to cross-examine that witness<sup>30</sup>

21. *State of U. P. v. Sharma*, A. 1968 S.C. 158 (160).

22. *Tarak Nath v. State of Bihar*, (1968) 2 S.C.J. 697.

23. *Brahmananda v. State*, A. 1969 Ori. 224 (226).

24. *Cf. State of U. P. v. Baburam*, A. 1961 S.C. 751 (758).

25. *Pratulla v. I. G. P.*, A. 1967 Cal. 321 (322).

26. *Delhi Administration v. Channon Shah*, A. 1969 S.C. 1108 (1111).

27. *Divl. Commercial Supdt. v. Somayajulu*, (1964) S.C. [C.A. 420/64, d. 8-2-64].

2. R. 1709 requires that along with the charges the allegations upon which they are based, must be supplied to the delinquent; otherwise the proceedings will be invalid.<sup>3</sup>

3. R. 1712 lays down the procedure to be followed by the Inquiry Authority. But there is nothing in the Rule to suggest that the proceeding would be vitiated if one member of an Inquiry Committee is substituted by another during the inquiry.<sup>4</sup>

4. R. 1713 requires the disciplinary authority to record his findings on each charge.

(a) But when he agrees with the findings of the Inquiry Officer and records that all the charges had been proved that would fulfil the requirements of the Rule.<sup>5</sup>

(b) When, however, he differs from the findings of the Inquiry Officer, he must give reasons for his findings on each of the charges,<sup>6</sup> though, of course he is not required to write anything like a judgment of a judicial tribunal.<sup>7</sup>

### Non-constitutional grounds of attack on disciplinary orders.

Apart from the grounds available under Art 309 II or under Part III or the other provisions of the Constitution (*e.g.*, Art 166), a disciplinary action may be impugned by a Government servant on non constitutional grounds available under the general law

• (a) That there is no proper order of termination of his services, where it has been made by a resolution or letter which is ineffective for the purpose of revoking the formal order of appointment

(b) That the order is without jurisdiction being *ultra vires* the statutory rule under which it is purported to have been made *e.g.*

(i) Where an appellate authority not being empowered in that behalf by the Rules relating to appeal, revives the charges which were held not proved and abandoned by the Inquiry Officer<sup>8</sup> or enhances the punishment without being empowered in that behalf by the Rules.<sup>9</sup>

(c) That of the grounds on which the order complained of is based one is non-existent<sup>10</sup>

(ii) Where the inquiry or the disciplinary proceedings have been started under a statutory provision but the requirements of that provision have not been complied with<sup>11</sup> thus rendering all subsequent action *ultra vires*, *e.g.*, where the Tribunal did not possess the qualifications required by the relevant statute<sup>12</sup>

(iii) Where the proceedings have been initiated<sup>13</sup> or ordered to be initiated or held<sup>14</sup> by an authority having no jurisdiction under the relevant law.<sup>15</sup>

(iv) Where the punishment awarded is not authorised by the Rules<sup>16</sup> *e.g.*, withholding the pay of the Government servant without suspending him.<sup>14-15</sup>

3. *Narayana v General Manager* (1970) Lah IC 168 (Mys) (1970) 11 LLJ 726

4. *General Manager v Jawala Prasad* A 1970 SC 1095

5. *Union of India v Rajappa* A 1970 SC 748

6. *Cf. Sur Enamel Co v Workmen* A 1963 SC 1914 *State of Madras v Srinivasan*, A 1966 SC 1827

7. *Cf. State of Bombay v Adams* A 1963 Bom 12 (15)

8. *State of Madras v. Gopala* A 1963 Mad 14 (16)

9. *Poonamram v State of Rajasthan* A 1960 Raj 56 (58)

10. *Railway Board v Niranjan* (1963) 7 FJR 58 (62) Punj

11. *Cf. Ramappa v. Govt of A P* (1963) SC IC A 356 621

12. *State of A P v Rama Rao* A 1963 SC 1723

13. *State of U P. v. Jogendra* A 1963 SC 1618

14-15. *Suraj Ndrain v. State of M P* A 1960 MP. 303 (304)

(d) That the impugned order is *mala fide*.<sup>16,17</sup>

### **Mala fides.**

Malice is of two kinds (a) express malice and (b) malice in law.

(a) An instance of express malice or *improper* motive is to be found in the case of *Pratap Singh v. State of Punjab*<sup>18</sup> in which the Supreme Court by a majority judgment, set aside an order of suspension and departmental proceedings against a Civil Surgeon on the ground that the order of the Government was made at the instance of the Chief Minister who had grudge against the appellant.

(b) Malice in law is malice which is implied by *law* in certain circumstances, even in the absence of a malicious intention or improper motive.

When a disciplinary action taken against an employee is challenged before a court of law, the Court is not, in general, concerned with the motive behind the action.<sup>19</sup>

But the Court is entitled to inquire whether the punishing authority has committed an excess or abuse of his power or has exercised the power for a purpose wholly extraneous to the purpose for which it was vested in the authority, namely, "to ensure probity and purity in the public services by enabling disciplinary penal action against the members of the service suspected to be guilty of misconduct."<sup>20</sup> The state of a man's mind is hardly capable of proof by direct evidence, but it may be deduced as a reasonable and inescapable inference from proved facts that the authority had used his power for a purpose other than the purpose just mentioned, and in such a case, the Court is bound to give relief, under Art. 226.<sup>21</sup> Thus—

(i) The order is vitiated by *mala fides*, if it is passed by the authority, without applying its mind<sup>22-24</sup> either as to the guilt of the person charged or the penalty to be imposed<sup>25</sup> or upon extraneous considerations, e.g., the directions issued by a superior administrative authority which were not disclosed to the delinquent Government servant,<sup>26</sup> or it was made for a purpose or upon a ground other than what is mentioned in the face of the order.<sup>27</sup>

1. The order of reversion of the Petitioner from his higher post held on probation, to his substantive post, which was alleged as *mala fide*, was sought to be justified by the State on the ground that it had been made in the *bona fide* exercise of the Government's right to revert a Probationer because of his *unsuitability* for the post. The Petitioner showed from the materials on the record that his service career was extremely satisfactory and had so been accepted by the authorities until the order of reversion was made. *Held*, that the order was vitiated by *mala fides* because it was issued by the Government without applying its mind to the question of suitability of the officer, upon which the order had been purported to have been made.<sup>28</sup>

2. An officer was reverted from his officiating higher appointment, after a departmental proceeding had been started, with formal charges on the ground of misconduct, with a view to facilitate the departmental proceedings after such reversion; the order

16. *Sukhbans v. State of Punjab*, A. 1962 S.C. 1711.

17. *Ramchandra v. State of W. B.*, A. 1964 Cal. 265 (272).

18. *Pratap Singh v. State of Punjab*, A. 1964 S.C. 72 (82-4) [per Ayyangar, J.].

19. *Madhosingh v. State of Bombay*, A. 1960 Bom. 285 (289).

20-25. *Sukhbans v. State of Punjab*, A. 1962 S.C. 1711 (1716) [see the comments in *Jagdish v. Union of India*, A. 1964 S.C. 449 as to the *ratio decidendi* in *Sukhbans' case*]; Cf. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (378).

1. *Ram Choudhury v. State of W. B.*, A. 1964 Cal. 265.

2. *State of Orissa v. Govind Das*, (1956) S.C. [C.A. 288/58].

3. *Ramrao v. Accountant-General*, A. 1963 Bom. 121 (133).

4. Cf. *Paranilal v. Union of India*, A. 1958 S.C. 163 (173).

of reversion was quashed on the ground of *mala fides* even though it purported to have been made on the ground of unsuitability of the officer for the higher post. The *ratio decidendi* for this view seems to be that the order of reversion was made not because of unsuitability for the higher post as it professed but because the Government wanted to punish him for an offence.<sup>5</sup>

(ii) *Mala fides* may also be established by showing that the order was intended to be a punishment for a misconduct, even though no reasons were given, for the order, say, an order of reversion.<sup>6</sup> It is the substance and not the character of the order that matters.<sup>7</sup>

(iii) Even where the Government acts on the advice of the Public Service Commission, the responsibility for the final action is that of the Government or other disciplinary authority,<sup>8</sup> so that if it acts mechanically on the advice tendered by the Commission without applying its own mind to facts of the case and the considerations relevant to the exercise of its decision (e.g., gravity or otherwise of the charges),<sup>9</sup> its decision will be struck down as vitiated by *mala fides*.<sup>10</sup>

This does not, however, mean that simply because the Government had come to a view previously, it cannot change that view on receipt of the advice of the Commission, if the other relevant materials are also taken into consideration along with the advice of the Commission.<sup>11</sup>

### **Inquiry under the Public Servants (Inquiries) Act, 1850.**

1. This Act makes a statutory provision for making "inquiries into the behaviour of public servants who are not recommended for their appointment without the sanction of Government". It is, however, not obligatory on the part of the Government to proceed under this Act when Government proposes to take action against a public servant of the aforesaid class, for misbehaviour. This is a mere enabling provision and it is left to the option of Government whether the inquiry should be held under this special procedure or under the ordinary procedure. The scope of the proceeding under this Act is only to make a fact-finding inquiry in order to enable Government to determine provisionally if punishment that should be imposed upon the public servant, prior to giving him reasonable opportunity of showing cause, as is required by Art. 311(2) of the Constitution.

2. The Commissioners appointed under this Act do not constitute a judicial tribunal, though they possess some of the trappings of a Court. The findings of the Commissioners upon each of the charges are mere expression of opinion and do not partake of the nature of a judicial pronouncement, and Government is free to take any action it likes upon the report. A proceeding under this Act does not, for the same reasons, consti-

5. *Wadhwa v. Union of India*, A. 1964 S.C. 127 per Mudholkar J. for himself, Subba Rao & Dayal JJ.

6. *Jagdish v. Union of India*, A. 1964 S.C. 449.

7. *Ramsaran v. State of Punjab*, (1963) S.C. (C.A. 20, 63).

8. *Venkataraman v. Union of India*, A. 1951 S.C. 375.

9. *Nagabhushanam, in re*, A. 1966 AP 72.

10. *D'Silva v. Union of India*, A. 1962 S.C. 1344 (1346).

11. *Cf. Khem Chand v. Union of India*, A. 1958 S.C. 300.

12. *Ram Chandra v. Govt. of W. B.*, A. 1964 Cal. 265.

13. *Iswar Chandra v. State of Orissa*, A. 1966 Ori. 173.

14. *Mair v. State of Punjab*, A. 1968 Punj. 324 (328).

15. *State of Bombay v. Nurul Idris* (1966) II L.L.J. 595 (601-2) S.C.

16. *Union of India v. Hari*, A. 1969 All. 542 (515).

17. *State of U. P. v. Sharma*, A. 1968 S.C. 158 (160).

18. *Trilok Nath v. Union of India*, (1967) S.C. (C.A. 322/57, d. 111 60).

19. *Krishan Lal v. Union of India*, A. 1949 Delhi 145.

20. *Venkataraman v. Union of India*, A. 1954 S.C. 375.



stitute a 'prosecution and punishment' for the purposes of Art. 20.(2) of the Constitution,<sup>20</sup> nor does it dispense with the requirements of Art. 311 (2), as already pointed out.

### **Deduction from Provident Fund.**

Some of the Provident Rules<sup>21</sup> empower a prescribed authority to deduct from the sum at the credit of an employee-subscriber 'any amount due under a liability incurred by the subscriber to the Government', e.g., any loss due to negligence, misappropriation or the like. It has been held that if the employee disputes his liability, the dispute must be decided by a Civil Court before such deduction can be made, because Government cannot be a judge in its own cause.<sup>22</sup>

**312. (1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.**

**(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.**

### **CL (1): 'Parliament may by law'.**

These words do not mean that the rules regulating the recruitment or the conditions of service must be made by Parliament itself and that no delegation whatsoever is possible.<sup>23</sup> Delegation of the power to frame rules to carry out the purposes of an Act made by Parliament is not taken away by the words, even though the power to make such delegation has been expressly reserved in some articles by use of the words 'by or under any law made by Parliament'.<sup>24</sup>

### **'Common to the Union and the States'.**

Since members of the all-India Services are common to the Union and the States, the posting of a member of such Services, working in a State, to a post under the Union should be considered as on deputation, unless the order of posting says so specifically.<sup>24</sup>

**313. Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.**

### **Art. 313: Existing laws relating to the services.**

Under the Constitution, the Union and State Legislatures have power to make laws to regulate the respective Services under the Union and the State Government (Entries 70, List I and 41 of List II). But until such

21. E.g., r. 1341 of the Ry. Provident Fund Rules.

22. *General Manager v. Dinabandhu*, (1970) S.C. [C.A. 2439/66, d. 19-2-70].

23. *Garewal v. State of Punjab*, A. 1950 S.C. 512 (517).

24. *Debesh Chandra v. Union of India*, (1960) S.C. [C.A. 2058/60, d. 8-4-69].

laws are made, the existing laws relating to the Services shall continue to be in force.

**'Until other provision is made'.**

1. These words refer either to an Act or the Rules made under Art 309.<sup>21</sup> Hence, even though the Order of the Ruler of an Indian State had the force of an Act of a sovereign Legislature, it is competent for a Governor (or the President exercising powers under Art 356) to make Rule under the Proviso to Art 309, superseding the orders of the Ruler, relating to the Services.<sup>22</sup>

2. Instead of making new Rules, the Rule making authority, under art 309, is competent to amend the existing Rules, by reason of art. 372 (1).<sup>1</sup>

3. But existing conditions of service which have entered into the guarantee offered by Art 314 cannot be altered either by Rules or by legislation short of constitutional amendment -

**'Laws in force'.**

1. *Laws in force* include the rules framed under statutory powers, e.g., Rules framed under 260 (5) of the Government of India Act 1935 or s 96B of the Government of India Act 1947.

2. By virtue of this provision, the following Rules have been held to continue as 'laws in force' -

(a) Rules made under 90b, Government of India Act, 1910

(i) The Fundamental Rules (1922)<sup>23</sup>

(ii) The Civil Services (Classification Control and Appeal) Rules (1920)<sup>24</sup>

(iii) The Civil Service Regulations which were made sometime prior to 1914, do not appear to have been made in exercise of any statutory powers<sup>25</sup> but they subsequently acquired statutory authority under s 96B (1) of the Government of India Act 1947.

(iv) The Superior Civil Services (Revision of Pay and Pension) Rules 1924<sup>26</sup>

(c) Rules made under s 211 (2) of the Government of India Act, 1935

(i) The Central Services (Temporary Service) Rules 1949<sup>27</sup>

(ii) Madras Civil Services (Leave, Inquiry Proceedings) Tribunal Rules 1948<sup>28</sup>

(iii) The Regulations made under s 209 (2) of the Government of India Act 1935 exempting certain cases from the requirement of consultation with the Public Service Commission<sup>29</sup>

(c) Rules made in exercise of statutory power -

(i) Police Regulations, made under the Police Act 1861 - the U. P. Disciplinary Proceedings (Administrative Tribunal) Rule 1947, made under the same Act.<sup>30</sup>

25. *State of Punjab v Ram Parshad*, A 1963 Punj 45 (319)
1. *Partap Singh v State of Punjab*, A 1951 Punj 298 (306)
2. *Accountant-General v Bakshi*, A 1962 S.C. 505 (510)
3. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1343 f)
- 4-13 *Harendra v State of W. Bengal* (1954) 59 C.W.N. 450 (451 d), *Baishnab v State of Orissa*, A 1958 Orissa 70 (72)
14. *Pradyat v. Chief Justice* 1955) 2 S.C.R. 1331 (1343 f), *Venkataraman v Union of India*, A. 1954 S.C. 375
15. *Shyam Lal v State of U. P.* (1955) S.C.R. 26 (32 3f)
16. *Accountant General v Bakshi*, A 1962 S.C. 505 (508 g)
17. *Kamacharan v P. M. G.* A 1955 Pat 311
18. *Ghouse v State of A. P.* A 1959 A.P. 497 (500); *Ramanand v Divisional Engineer*, A 1962 Raj. 265 (267)
19. *Karamdeo v. State of Bihar* A 1956 Pat 228 (232)
20. *Jagannath v. State of U. P.*, A. 1961 S.C. 1245.

(ii) Punjab Tehsildari Rules, 1932, made under the Punjab Land Revenue Act, 1887.<sup>21</sup>

(iii) Rules made by the Board or the General Manager in exercise of the power conferred by rr. 157-8 of the Railway Establishment Code, Vol. I, e.g., Discipline and Appeal Rules for Non-Gazetted Railway Servants,<sup>22</sup> including orders having a general application, since r. 157 does not prescribe any particular form for making rules under it.<sup>24</sup>

3. On the other hand, the following Rules or regulations have been held to have no force of law since they do not appear to have been made under any statutory authority.

(a) The Army instructions No 212 dated 25-6-49, which were issued in pursuance of a Resolution of the Government of India (Military Department)--No. 2228, dated 22-12-17.<sup>23</sup>

(b) Madras Public Service Commission Rules of Procedure.<sup>1</sup>

(c) The Manual of Government Orders.<sup>2</sup>

(d) Standing orders, issued by the Inspector-General of Police, in Rajasthan.<sup>1</sup>

(e) Provisions in the Posts and Telegraphs Manual, excepting specific rules which expressly purport to have been issued under statutory power.<sup>1</sup> Thus, the following have no statutory force—No. 32A-36A of Vol IV and Sch 3 of Vol. III

(f) Mysore Public Service Commission (Function) Rules, 1957, r 4 (1).<sup>1</sup>

#### **'So far as consistent with this Constitution'.**

1. If any 'existing rule' be inconsistent with any provision of the Constitution, it cannot continue to be valid under Art 313. Thus

(i) R. 15 of the Police Regulations, 1915, is void on account of contravention of Art. 311 (1).<sup>3</sup>

(ii) Rr. 148 (3) and 149 (3) of the Railway Establishment Code are void for contravention of Art. 311 (2).<sup>1</sup>

(iii) R. 20 (c) of the Madras Civil Services (Classification, Control and Appeal) Rules which provides for an appeal from an order of the Provincial Government to the Governor 'acting in his individual judgment' is void inasmuch as under the Constitution, the Governor cannot exercise any such function in his individual judgment.<sup>1</sup>

2. The existing Rules relating to the subordinate Judiciary must be read subject to the provisions in Arts 233-7.<sup>2</sup>

#### **314. Except as otherwise expressly provided by this Constitution,**

Provision for protection of existing officers of certain services.

**every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of**

21. *State of U. P. v. Babu Ram*, A. 1961 S.C. 751 (758).

22. *Gian Singh v. State of Punjab*, A. 1962 S.C. 219 (223).

23. *Surjit Singh v. Northern Ry.*, A. 1967 All. 112 (114).

24. *Patil v. Khanna*, (1966) II L.L.J. 34 (39) Bom.

25. *Alindra v. Gilloi*, (1955) 59 C.W.N. 835 (842, 844); *Chandra Bhan v. Union*, A. 1956 Bom. 601; *Tara Singh v. Union of India*, A. 1960 Bom. 101.

1. *State of Andhra v. Kameshwara*, A. 1957 Andhra 794 (805).

2. *Bhagelu v. Civil Surgeon*, A. 1960 All. 353 (356).

3. *State of Rajasthan v. Ram Saran*, A. 1964 S.C. 1361.

4. *Kamatil v. Union of India*, A. 1955 Cal. 166; 58 C.W.N. 492.

5. *Abhay v. Director of Postal Services*, (1964) 9 F.L.R. 74 (75) Cal.

5a. *Nagarajan v. State of Mysore*, (1966) S.C. [C.A. 430/64].

6. *Suresh v. Himangshu*, A. 1963 Cal. 316.

7. *Moto Ram v. N. E. F. Ry.*, A. 1964 S.C. 600 (612).

8. *Devanahayam v. State of Madras*, A. 1958 Mad. 53 (56).\*

this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

### Scope of Art. 314.

The special provisions of this Article are applicable only to those persons who were appointed by the Secretary of State and cannot be claimed by one who was appointed to the I. C. S. by the Governor of a Province.<sup>9</sup>

### 'Remuneration'.

This word has the same meaning as in s. 19 (4) of the Indian Independence Act, 1947, so as to include 'leave pay, allowances and the cost of any *privileges or facilities* provided in kind,'<sup>10</sup> and would, thus, include the 'passage benefit' which was a part of the remuneration of members of the I. C. S. under the Rules framed under the Government of India Act, 1919.<sup>10</sup>

### 'Same rights as respects disciplinary matters'.

1. Persons appointed by the Secretary of State who are members of an All-India Service hold office during the pleasure of the President [Art. 310 (1)].

2. But when such person is serving in connection with the affairs of a State, there is nothing in the Constitution to debar the State Government from exercising its statutory power under s. 2 of the Public Servants (Inquiries) Act, 1850 to direct an inquiry against him.<sup>11</sup> Nor is there anything to prevent the President from exercising his power of dismissal on the report of the Enquiry Commissioner appointed by the State Government.<sup>12</sup> Where there has been a regular hearing at the inquiry stage, Art. 311 (2) does not require the President to give such person an oral hearing before issuing a notice to show cause why the proposed action should not be taken against him.

In practice, all disciplinary proceedings against members of the all-India Services are instituted by the State Government where the offending officer was serving at the time of commission of the offence but if as a result of the proceedings it is proposed to award the penalty of dismissal, removal or compulsory retirement, the State Government has to obtain the orders of the Union Government. The report of inquiry has therefore to be submitted to the Central Government which would take the steps necessary for imposing punishment.<sup>14</sup>

3. By reason of the words 'same rights', before a disciplinary action may be taken against a member of the Indian Civil Service, he is entitled to an inquiry into his alleged misdeemeanour either under the Public Servants (Inquiries) Act, 1850 or under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution.<sup>15</sup> The reason why Government has the option of making the inquiry either under the Public Servants (Inquiries) Act or under r. 55 of the Civil Services (Classification, Control and Appeal) Rules is that r. 55 itself opens with the words—"without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850."<sup>16</sup> Hence, where there has already been an inquiry

9. Cf. *Banarasidas v. State of U. P.* (1966) SC [C.A. 947/64]

10. *Attendant-General v. Bakshi* A. 1962 SC 505 (509-10)

11. *Rapur Singh v. Union of India* A. 1960 SC 493 (497)

12. *Garewal v. State of Punjab*, A. 1959 SC 512 (517-8)

under this Act, it cannot be contended that there must be another inquiry under r. 55 of the Rules before the officer may be dismissed.<sup>13</sup>

**'As changed circumstances may permit'.**

1. The Patna High Court<sup>13</sup> had held that the words 'changed circumstances...' qualify the *latter part* of the guarantee offered by the Article, viz., 'rights as respects disciplinary matters or right as similar thereto' and *not* the first part, viz., 'conditions of service as respects remuneration, leave and pension.' Hence, the consideration of changed circumstances cannot affect the guarantee with respect to conditions of service, including remuneration etc. which applied to members of the I.C.S. at the commencement of the Constitution.

It follows from the above that the rights to overseas pay and passage cannot be denied to these members even though the circumstances have changed after Independence and the Rules 1 (2) and 3 of the All India Services (Overseas Pay, Passage and Leave Salary) Rules, in so far as they deny this right, are unconstitutional.<sup>14</sup> This construction of art. 314 was not disturbed by the Supreme Court on appeal.<sup>15</sup>

2. Since a memorial to the Secretary of State can no longer exist under the Constitution, Art. 314 is not violated by the absence such right under the new Rules. At any rate, a 'memorial' to the President against an order of the State Government may be taken as a substitute of the right of appeal 'as changed circumstances permit'.<sup>16</sup>

## CHAPTER II—PUBLIC SERVICE COMMISSIONS

**315. (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.**

Public Service Com  
missions for the Union  
and for the States

**(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.**

**(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.**

**(4) The Public Service Commission for the Union, if requested so to do by the Governor.....<sup>16</sup> of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.**

**(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as reference to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.**

13. *Bakshi v. Accountant General*, A. 1957 Pat. 515 (523).

13a. *Accountant General v. Bakshi*, A. 1962 S.C. 505 (508).

14. *Kapur v. Union of India*, A. 1963 Punj. 87.

15. The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956.

**316. (1)** The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor.....<sup>15</sup> of the State.

Appointment and term  
of office of members

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

*<sup>15</sup>(1A) If the office of the Chairman of the Commission becomes vacant or if any Chairman is by reason of absence or for any other reason unable to perform the duties of his office these duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission may appoint for the purpose.*

•(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission the age of sixty years, whichever is earlier.

Provided that -

(a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor.....<sup>15</sup> of the State, resign his office;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

**Amendment.**--Cl (1A) has been inserted by the Constitution (Fifteenth Amendment) Act, 1936 to enable the President to discharge the Chairman until either the Chairman resume his duties or a new Chairman appointed under clause (1).

**'Member'.**

1. The word 'member' in the following provisions includes the Chairman: Proviso to Cl (1) and (2) and (3) of Art 316 Proviso to Art. 318.

2. In the result, where a member is subsequently appointed as the Chairman he cannot claim a fresh tenure of 6 years from the date of his appointment as Chairman, for the purposes of Art 316 (2).

<sup>15</sup> Cl. (1A) was added by the Constitution (Fifteenth Amendment) Act, 1963.

**317. (1)** Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor....., in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a public Service Commission if the Chairman or such other member, as the case may be,—

- (a) is adjudged an insolvent; or
- (b) engages during his term of office in any paid employment outside the duties of his office; or
- (c) is in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purpose of clause (1), be deemed to be guilty of misbehaviour.

**318.** In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor.....<sup>17</sup> of the State may by regulations—

Power to make regulations as to conditions of service of members and staff of the Commission.

- (a) determine the number of members of the Commission and their conditions of service; and
- (b) make provision with respect to the number of members of the staff of the Commission and their conditions of service:

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

#### Proviso.

While the Proviso to Art. 221 (2) safeguards the allowances, leave and pension rights of a High Court Judge, specifically, against variation during his tenure, the present Proviso seeks to achieve the same object by using the general expression 'conditions of service'. But it

<sup>17</sup>. The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956.

would not prevent the salary of a member of the Public Service Commission being adjusted according to the Regulations of the Commission itself, where such adjustment is necessitated by the fact that the Member, who was a member of another Service at the time of his appointment to the Commission, ceased to be a member of that Service subsequently.<sup>18</sup>

**316. On ceasing to hold office—**

Prohibition as to the holding of offices by members of Commission on ceasing to be such members

- (a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;
- (b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;
- (c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of a Union Public Service Commission, or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;
- (d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

**CL (d):** This clause makes a member eligible for being appointed the Chairman of that very Commission of which he is a member, but it does not mean that such appointment can take place after he has crossed the term or age limit for membership under Art. 316 (2).<sup>19</sup>

**320. (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.**

Functions of Public Service Commissions.

**(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.**

**(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—**

- (a) on all matters relating to methods of recruitment to civil services and for civil posts;

18. *K. P. Sen v. State of W. B.*, A. 1966 Cal. 356 (358)

19. *Dhirendra v. Corpn. of Calcutta*, A. 1966 Cal. 290 (293).



- (b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;
- (c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;
- (d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;
- (e) on any claim for the award of a pension in respect of inquiries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor.....<sup>20</sup> of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor.....<sup>21</sup> as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions or article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor.....<sup>20</sup> of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

#### Art. 320: Functions of the Public Commission.

Arts. 320-321 lay down the functions of a Public Service Commission

<sup>20</sup>, References to the Rajpramukh have been omitted by the Constitution (Seventh Amendment) Act, 1956.

and it cannot assume any function which is not authorised by either of these two Articles.<sup>21</sup>

### Cl. (1). 'Examinations'.

Nothing is said in the clause as to whether the examinations are to be selective or competitive in nature nor does the clause *per se* confer any right upon the candidate or candidates who stand highest in order of merit, at such examination.<sup>22</sup>

**'Services of the State'.--**This expression includes the staff of the High Court whose salaries etc. are charged upon the Consolidated Fund of the State under Art. 229 (3). But, as the Proviso to Art. 229 (1) expressly provides, in the exercise of his power of appointment to these posts, under the Constitution, the Chief Justice shall be required to consult the State Public Service Commission only if the Governor makes a rule specifying the cases in which such consultation shall be necessary.<sup>23</sup> Subject to this, the Chief Justice is under no obligation to consult the Public Service Commission in making appointments to the staff of the High Court.

### Judicial Service.

As regards judicial service, there is a special provision in Art. 234, to which Art. 320 (1) is subject.<sup>24</sup>

### Cl. (3): Not mandatory.

It is now settled by the Supreme Court<sup>25</sup> that the words *shall be consulted* are not to be construed in the sense that in default of consultation the action of Government under any of the sub-clause of this clause would be null and void.

### When the Commission is to be consulted.

(a) The consultation of the Commission should normally take place at two stages. (i) To determine whether the Government servant is guilty of the charges and whether he shall be called upon to show cause against the punishment tentative proposed. (ii) To determine whether the action proposed shall not be taken against him, after he has shown cause.

If, however, the Government servant *does not avail* himself of the second opportunity and does not show any cause, there is nothing on which the Public Service Commission has to be consulted *again*, for the Commission had already been consulted regarding the action proposed, and the Government servant has not offered any materials for further consideration.<sup>1</sup>

(b) The sub clause does not require that the Commission should be consulted whenever a Government servant presents a petition relating to disciplinary matters affecting him. It requires that the Commission shall be consulted before the decision to take action against him is made. There is no obligation to consult the Commission if the Government servant presents a petition for review after action is taken against him,<sup>2</sup> after due consultation with the Commission.

21. *Kesava v. State of Mysore*, A. 1946 Mys 21 (22)

22. *Pradyat v. Chief Justice*, A. 1956 S.C. 285

23. *Chandra Sekhara v. State of Mysore*, A. 1963 Mys. 292.

24. *State of U. P. v. Srivastava*, A. 1957 S.C. 922. (1958) S.C.C. 533.

25. *State of Bombay v. Korgaonkar*, (1960) S.C. [C.A. 389/58]; *Ram Gopal State of M. P.*, A. 1970 S.C. 158 (160).

1. *John v. State of T. C.*, (1955) 1 S.C.R. 1011.

### Effect of non-consultation.

This clause, and sub-cl. (3) in particular, has lost much of its importance since the decision of the Supreme Court<sup>2</sup> that while Art. 311 confers a right upon the Government servant, Art. 320 (3) (c) does not confer any such right. The consultation prescribed by the sub-clause is only to afford proper assistance to the Government in assessing the guilt or otherwise of the delinquent officer as well as the suitability of the penalty to be imposed. But, for the omission of or irregularity in such consultation, the aggrieved officer has no remedy in a Court of law nor any relief under the extraordinary powers conferred by Arts. 32 and 226 of the Constitution.<sup>3</sup>

Art. 311 is not controlled by art. 320.<sup>3-4</sup>

### Value of the Commission's advice.

The Commission's function is purely *advisory*.<sup>2</sup> Not only is its advice not binding upon the Government,<sup>4</sup> the Government cannot act mechanically upon such advice, without applying its mind to the matter in question, *e.g.*, the taking of disciplinary action against a Government servant. If the Government acts blindly the order would be vitiated by *malu fides*.<sup>5</sup>

### Sub-cl. (a) (b): 'Civil services and posts'.

This expression in sub-cl. (a) and (b) of Art. 320 has the same meaning as in Arts. 310 (1) and 311 (1). It means services and posts other than military.<sup>7</sup>

### 'Suitability of candidates for appointments' etc.

The provisions of Art. 320 not being mandatory, non-consultation with the Commission for making an appointment does not render it invalid.<sup>6</sup>

### Sub-Cl. (c): Disciplinary matters.

1. This expression is wide enough to include any kind of disciplinary action proposed to be taken against an officer,<sup>8</sup> such as dismissal, removal, reduction in rank, suspension.<sup>10</sup>

2. But if it is not a disciplinary measure (*e.g.*, fixing the age of retirement of certain officers) such consultation would not be required.<sup>11</sup>

### Jurisdiction of Commission on disciplinary matters.

The Commission, being an advisory body, is free to agree with or differ from the conclusions of the Enquiry Officer. It is not an appellate authority over the latter. It is the duty of the Government to arrive at its own conclusion after taking into consideration the finding or recommendations of both the Inquiry Officer and the Commission.<sup>1</sup> The Commission's advice is not binding upon the Government.<sup>4</sup>

2. *State of U. P. v. Srivastava*, A. 1957 S.C. 912.

3. *D'Silva v. Union of India*, A. 1962 S.C. 1130 (1133-4).

4. *Bhatt v. Union of India*, A. 1962 S.C. 1344 (1346).

5. *Ram Chaudhury v. Secy. of Govt., W. B.*, A. 1964 Cal. 265.

6. *Inwar Chandra v. State*, A. 1966 Orissa 173 (183).

7. *Amar Singh v. State of Rajasthan*, A. 1956 Raj. 104 (106).

8. *State of Bombay v. Advani*, A. 1963 Bom. (16).

9. *Pradyat v. Chief Justice*, (1956) S.C.A. 79 (92).

10. *Ibrahim v. Principal*, A. 1958 Ker. 72.

11. *Vicherry v. State of M. P.*, A. 1952 Nag. 288.

**'Person serving under the Government of India or the Government of a State'.**

The expression 'serving under . . . ' refers to persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or of the Governor. The officers and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is vested in the Chief Justice who has the power of appointment and removal and of making rules for the conditions of service.<sup>12</sup>

**'Memorials or petitions'.**

An application for review<sup>7</sup> or an appeal<sup>13</sup> would be covered by this expression

**Cla. (d)-(e).**—These sub clauses also use the expression 'serving under the Government'. Hence, the staff of a High Court are clearly excluded from the scope of these sub clauses.<sup>9</sup>

**Claim for re-imbursement of costs of defence.**

When a civil servant is acquitted in a legal proceeding coming under sub-cl. (d), the Department should not, without consulting the Public Service Commission, reject the claim for reimbursement of costs on the ground that it is not admissible under the Rules.<sup>14 21</sup>

**'To advise'**—Being an advisory or consultative body, the Commission is entitled to withhold any information from the Government.<sup>1</sup>

**Proviso to Art. 320 (3).**

1 This Proviso enables the President and Governor to make regulations to take out particular classes from the obligation to consult the Public Service Commission under Art. 320 (3). Such regulations may—

(i) Either provide that with respect to the specified *matter*, such consultation will not be necessary; or,

(ii) Provide that such consultation shall not be necessary in particular classes or cases;<sup>2</sup> or,

(iii) Provide that such consultation shall not be necessary in particular *circumstances*

2 But the power can be exercised only by making 'regulations' in conformity with the above conditions and not by executive orders in relation to particular cases. Thus Rule 7 of the Railway Services (Safeguarding of National Security) Rules, 1954 provides that consultation with the Public Service Commission is not necessary for termination of service under those Rules.<sup>3,7</sup> Similarly, there is no need for consultation where, under the Regulations made by the Governor under this Proviso, the Commission is not required to be consulted when disciplinary action is taken by any authority other than the *Government*,<sup>8</sup> or when a Government servant is suspended pending inquiry,<sup>9</sup> or where orders are passed on the advice of the Tribunal for Disciplinary Proceedings.<sup>11</sup>

12. Cf. *Pradyat v. Chief Justice* A 1956 SC 285

13. *Pantulu v. Govt. of Andhra*, A 1953 AP 240 (251)

14-25. Cf. *Samsul v. Union of India* A 1957 Assam 113

1. *Kesava v. State of Mysore*, A 1956 Mys 21 (26)

2. Cf. *Kenchiah v. State Recruitment Committee* A 1966 Mys 36

3-7. *Ananthanarayanan v S Ry* A 1956 Mad 220.

8. *Bhanuprasad v State* A 1966 Sau 14 (19) *Mahadev v Chatterjee* A 1954 Pat. 285.

9. *Thimma Reddy v State of Andhra* A. 1958 AP 35 (37)

10. *Pantulu v. Govt. of Andhra*, A 1958 AP 240 (251)

3. Though Art. 320 (3) (c) is directory and though the proviso empowers the Government to make Regulations for excluding such consultation, it does not mean that Government has no constitutional obligation to consult the Commission<sup>11</sup> or that it is at the pleasure of the Government in any particular case to consult or not to consult the Commission. It only means that if in any case Government fails to consult, the decision of Government to terminate the services of the employee shall not be invalidated by a court of law. Once the Government makes Regulations under the Proviso, it cannot make *ad hoc* exemptions outside those Regulations.

This does not, however, prevent the Government from making a retrospective Regulation giving validity to an appointment already made, provided the Regulation is made before the appointment takes effect.<sup>12</sup>

4. Conversely, even where consultation with the Commission is dispensed with by the Regulations, an order of the Government is not rendered illegal merely because the Commission has been consulted, provided the Government applies its mind to the matter.<sup>13</sup>

5. By reason of Art. 313, Regulations made under the corresponding provision of the Government of India Act, 1935 [s. 266 (3)] shall continue to be in force until new Regulations are made under the Proviso to Art. 320 (3).<sup>14</sup>

#### CL. (4).

This clause makes it clear that the Commission has no right to be consulted in the matter of reservation of posts for backward classes nor can it itself make any such reservation.<sup>15</sup>

#### CL. (5): 'Shall be laid before Parliament'.

1. The requirement as to laying before Parliament is directory notwithstanding the word 'shall', for, no consequence for non-compliance with the requirement is laid down in the Article. Hence, the Rules made under the Proviso to cl. (3) are not rendered invalid if they are not laid before Parliament as required by cl. (5).<sup>16, 16</sup> Though the Rules are subject to any modifications as the Legislature may make, it is not a condition precedent to their validity that they should be formally approved by the Legislature.<sup>16</sup>

2. By reason of Art. 372 (1), Regulations made under Art. 266 (3) of the Government of India Act, 1935, continue to be in force until replaced by Regulations made under the Proviso to Art. 320 (3).<sup>16</sup> It is not necessary to lay these Regulations before Parliament under Art. 320 (5) even though they are adapted after the commencement of the Constitution.<sup>17</sup>

#### 321. An Act made by Parliament or, as the case may be, the Legis-

Power to extend functions of Public Service Commissions.

lature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union

or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

**Art. 321: Power to confer additional functions on a Public Service Commission.**

1. A Public Service Commission cannot take up any function other

11. *Durga Singh v. State of Punjab*, A. 1957 Punj 97.

12. *Sivaramakrishnan v. Arumugha*, A. 1958 Mad. 17.

13. *Prahlad v. Tilaketti*, A. 1956 Pat. 233.

14. *Kesava v. State of Mysore*, A. 1966 Mys. 20 (25).

15. *Munna Lal v. Scott*, A. 1955 Cal. 451.

16. *Dalmer Singh v. State of Peshawar*, A. 1955 Peshaw 97.

17. *Vishwanath v. S. T. A.*, A. 1955 Nag. 163.

than those specified in Art. 320, even at the request of the Government, unless such functions are conferred in the manner prescribed by Art 321.<sup>18</sup>

2. The conditions for the conferment of additional functions under the present Article are—(a) an Act of the competent Legislature; (b) such functions must relate to the services of the Union, or the State, or a local authority, or a statutory corporation, or a public institution. It cannot be done by any private arrangement between the Government and the Commission.<sup>19</sup>

#### Instances of Acts made under Art. 321:

Mysore Public Service Commission (Conduct of Business and Additional Functions) Act, 1959.<sup>19</sup>

**322.** The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

Expenses of Public Service Commission

Reports of Public Service Commissions

**323. (1)** It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor.....<sup>20, 21</sup> of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor.....<sup>22-24</sup> of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor.....<sup>25-27</sup> shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

## PART XV

### ELECTIONS

**324. (1)** The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution,..... shall be vested in a

Superintendence, direction and control, of election to be vested in an Election Commission

18. *Mira Chatterjee v. Public Service Commn* A 1958 Cal 345 (349)

19. *Chandra Sekhara v State of Mysore*. A 1963 Mys 292

20-25. References to the 'Rainramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956

26. The words 'including States' have been omitted by the Constitution (Nineteenth Amendment) Act, 1966 and by s 80A, inserted by the Representation of the People (Amendment) Act, 1966 the jurisdiction to try an election petition has been vested in the High Court instead of the Election Tribunal.

**Commission (referred to in this Constitution as the Election Commission).**

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the function conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President or the Governor.....<sup>2</sup> of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

#### **Scope of jurisdiction of Election Commission.**

The words 'superintendence, direction and control' empower the Election Commission to act in contingencies not provided for by law, and to pass necessary orders for the conduct of the election, e.g., whether a repoll should be held or not at a particular polling station<sup>3</sup>

#### **Jurisdiction of High Court over Election Commission.**

It is to be noted that prior to 6-10-63, since the jurisdiction of a High Court was confined to tribunals situated 'within the territory in relation to which it exercises its jurisdiction', no High Court in India, other than the

2 The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956.

3. *Moti Lal v. Mangla*, A. 1958 All. 794 (799).

High Court of Punjab, had local jurisdiction over the Election Commission located in Delhi.<sup>4</sup>

This inconvenience has been removed by the Constitution (Fifteenth Amendment) Act, 1963, by providing that the jurisdiction under Art. 226 shall be exercisable by any High Court within which 'the cause of action, wholly or in part, arises for the exercise of such a power' [Art. 226 (1A); see p. 403, *ante*]. Hence, after the amendment, though the decision of the Election Commission is issued from Delhi, if the order of the Commission is sought to be carried out in another State, the party aggrieved shall be at liberty to apply under Art. 226 to the High Court of that State.

**325. There shall be one general electoral roll for every territorial constituency for election to either House of**

No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

**Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.**

**326. The elections to the House of the People and to the Legislative Assembly of every State shall be on the**

Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

**basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.**

**Scope of Art. 326.**

1. This article does not confer any justiciable right to elect. If any person is deprived of the right to vote by reason of the omission of his name from the electoral roll, his remedy would be to follow the procedure prescribed by the electoral law made under Art. 327, for rectifying such omission.<sup>5</sup>

2. For the same reason, when the nomination of a candidate has been rejected by the Returning Officer, an elector cannot apply under Art. 226 against the decision of the Returning Officer on the ground that his right to elect has thereby been denied. Such decision cannot be challenged by anybody except as provided in Art. 329 (b).<sup>6</sup>

**327. Subject to the provisions of this Constitution, Parliament**

Power of Parliament to make provision with respect to elections to Legislatures.

**may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls,<sup>7</sup> the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.**

**Power of Parliament.**

"All matters", in the present Article include all matters arising out of

4. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

5. *Paleh v. Patnaik*, A. 1954 Orissa 87.



or connected with any stage of the entire election process,<sup>6</sup> including determination of constitution.<sup>7</sup>

**328.** Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of a State including the preparation of electoral rolls, and all other matters necessary for securing the due constitution of such House or Houses.

Power to Legislature of a State to make provision with respect to elections to such Legislature.

**329.** Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

Bar to interference by courts in electoral matters.

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

**Scope of Art. 329: Bar to interference by Courts in electoral matters.**

Cl. (b) is to be read as complementary to cl. (a). While cl. (a) ousts the jurisdiction of the Courts with regard to such law as may be made under Arts. 227-8 (e.g. the Representation of the People Act), relating to the delimitation of constituencies or the allotment of seats of such constituencies, which includes orders made by the Delimitation Commission itself under the Delimitation Commission Act.<sup>8</sup> Cl. (b) ousts the jurisdiction of the Courts with regard to the matters arising between the commencement of the polling and the final election.<sup>9</sup>

**Arts. 71 (1) and 329 (b).**

There is an important difference between these two provisions. While Art. 71 (1) had to be in an affirmative form because it confers special jurisdiction on the Supreme Court which that Court could not have exercised but for that Article, cl. (b) of Art. 329 was primarily intended to inexclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged.

**Cl. (b): Bar to jurisdiction of Courts in election matters.**

1. This clause excludes the jurisdiction of the Courts to entertain any matter relating to 'election' which can be questioned only by an election petition under the law prescribed by the appropriate Legislature (cf. Chs. II-III of the Representation of the People Act, 1951). Hence, a suit for setting aside an election would not lie.<sup>10-11</sup>

6. *Dr. Khare v. Election Commn.*, A. 1957 S.C. 694.

7. *Meghraj v. Delimitation Commn.*, A. 1967 S.C. 669 (671).

8. *Pannunoomi v. Returning Officer*, (1962) S.C.R. 218.

9-11. *Shri Vishva v. Ahmad*, A. 1965 S.C. 233; (1955) 1 S.C.R. 389.

Under s. 80A, introduced by the Amendment Act of 1966, an election petition is now heard by the High Court, instead of by an election tribunal.

'Election' in this context means the *entire* process culminating in a candidate being declared elected, and is not confined to the final result.<sup>4</sup>

By reason of this clause, the following matters cannot, therefore, be challenged by a suit; the only remedy would be an election petition:

(i) Acceptance or rejection of a nomination paper by a Returning Officer.<sup>11</sup>

(ii) Any matter which arises while the elections are in progress,<sup>12</sup> e.g., at every stage from the time of the issue of the notification appointing a date for nomination<sup>13</sup> till the results are declared.<sup>14</sup>

2. But the word 'election' does not include the *decision* of an Election Tribunal as to the *validity* of the election.<sup>15</sup> The 'election' referred to in Art. 329 (b) ends before the setting up of an Election Tribunal.<sup>16</sup> The proceedings before the Election Tribunal are not, accordingly, excluded from the jurisdiction of the High Court<sup>1</sup> or Supreme Court.<sup>14</sup>

3. After the 19th Amendment of the Constitution, an election petition would be heard by the High Court as a statutory tribunal.

### Power to interfere with decisions of Election Tribunals.

1. Though Art. 329 takes away the jurisdiction of courts to interfere with any order of any Election authority relating to the election proceedings, it does not preclude the High Court or the Supreme Court to interfere with the decisions of Election Tribunals in exercise of the powers of control conferred by the Constitution upon the High Court and the Supreme Court over all 'tribunals', by Arts. 134, 226,<sup>18</sup> or 227.<sup>19</sup>

2. As to the grounds upon which the High Court or the Supreme Court may interfere with the decisions of an Election Tribunal, see pp. 295, 422, 440, *ante*.

## PART XVI

### SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

#### 330. (1) Seats shall be reserved in the House of the People for—

- |  |  |
|--|--|
| Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. | (a) the Scheduled Castes;<br>(b) the Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam and Nagaland; and<br>(c) the Scheduled Tribes in the autonomous districts of Assam. |
|--|--|

(2) The number of seats reserved in any State or Union territory<sup>2</sup> for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number

12. *Tirath Singh v. Bachitar*, A. 1954 Pepsu 118.

13. *Shankar v. State of Bihar*, A. 1953 Pat. 47.

14. *Shankar v. Returning Officer*, A. 1952 Bom. 277.

15. *Rajkrishna v. Binod*, (1954) S.C.R. 913: (1952-4) 2 C.C. 618.

16. *Nagappa v. Basappa*, A. 1954 Mys. 102.

17. *Durgachankar v. Raghuraj*, (1955) 1 S.C.R. 267 (1952-4) 2 C.C. 619.

18. *Rajkrishna v. Binod*, (1954) S.C.R. 913.

1. Added by the Constitution (Twenty Third Amendment) Act, 1969, w.e.f. 23.1.70.

2. Inserted by the Constitution (Seventh Amendment) Act, 1956.

of seats allotted to that State or Union territory<sup>3</sup> in the House of the People as the population of the Scheduled Castes in the State or Union territory<sup>4</sup> or of the Scheduled Tribes in the State or Union territory<sup>4</sup> or part of the State or Union territory<sup>4</sup>, as the case may be, in respect of which seats are so reserved bears, to the total population of the State or Union territory.<sup>5</sup>

### Effect of reservation.

1. The effect of reservation of seats for the Scheduled Castes (or Scheduled Tribes, as the case may be) is to guarantee a minimum number of seats to the members of the Scheduled Castes. It does not deprive a member of a Scheduled Caste of his right to contest a *general seat* which every adult citizen (not otherwise disqualified) possesses, and he can contest for a general seat on the strength of the very nomination for a reserved seat.<sup>6</sup>

2. If, in a two member constituency, one seat is reserved for the Scheduled Castes, and, besides the member returned to this reserved seat another member of the Scheduled Castes secures the highest votes at the general election, there is nothing to prevent the second member of the Scheduled Castes from being elected to the second seat.<sup>7</sup>

**331.** Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

Representation of the Anglo-Indian community in the House of the People.

**332. (1)** Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam and Nagaland,<sup>1</sup> in the Legislative Assembly of every State.....<sup>2</sup>

Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside the district except in the case of the constituency comprising the cantonment and municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any

3. *Giri v. Dora*, A 1959 S.C. 1318; *Digambarao v. Desai*, (1958) 60 Bom.L.R. 1988.

4. The words 'specified in Part A . . . First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1955.

autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and municipality of Shillong.

**333. Notwithstanding anything in article 170, the Governor.....'**

Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate one member of the community to that Assembly

as he considers appropriate.

**334. Notwithstanding anything in the foregoing provisions of this**

Reservation of seats and special representation to cease after thirty years.

Part, the provisions of this Constitution relating to—

- (a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and
- (b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination,

shall cease to have effect on the expiration of a period of thirty years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

**335. The claims of the members of the Scheduled Castes and the**

Claims of Scheduled Castes and Scheduled Tribes to services and posts.

Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

**'Consistently with the maintenance of efficiency of administration.'**

There is some overlapping between the present Article and Art 16 (4) inasmuch as the reservation for 'backward classes' in Art 16 (4) obviously includes reservation for members of the Scheduled Castes and Tribes.<sup>5,10</sup> The fact that the present Article is outside the Part on Fundamental Rights and is in the nature of a Directive does not matter much since Art 16 (4) is also an enabling provision.<sup>10</sup>

The overlapping between the two provisions has, however, been eliminated by the Supreme Court by holding that Art 35 operates as a limitation to the provision contained in Art 16 (4) though Art 16 (4) does not specifically refer to Art 335 or raise any question of 'maintenance of

5. The word 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956.
6. Substituted by the Constitution (Twenty Third Amendment) Act, 1969
7. The word 'twenty' was subs. by the Constitution (Eighth Amendment) Act, 1959, for "ten years", and, again, by the word 'thirty', by the Constitution (Twenty-third Amendment) Act, 1969, w.e.f. 23-1-70.
8. *Davudnani v. Union of India*, A. 1964 SC 179 (188).
9. *General Manager v. Rangachari*, A. 1962 SC 36 (46).
10. *Cf. Balaji v. State of Mysore*, A. 1963 S.C. 649 (664).

efficiency of the administration'.<sup>9</sup> A reservation for the backward classes will, thus, be struck down as violative of Arts. 14 and 16 (1), if it is unreasonably excessive.<sup>10</sup>

**336. (1)** During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

Special provision for Anglo-Indian community in certain services,

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent. than the numbers so reserved during immediately preceding period of two years:

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.<sup>11</sup>

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

**337.** During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State.....<sup>12</sup> for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

Special provision with respect to educational grants for the benefit of Anglo-Indian community

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years:

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease.<sup>13</sup>

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

**338. (1)** There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

Special Officer for Scheduled Castes, Scheduled Tribes, etc.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

11. Since Arts. 436-337 have not been amended by the Constitution (Eighth Amendment) Act, 1959, the reservations in favour of the Anglo-Indians have ceased to operate at the end of January 25, 1960.

12. The words 'specified in Part A of the Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

**339. (1)** The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the State.....<sup>13</sup>.

Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provision as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

**340. (1)** The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

Appointment of a Commission to investigate the conditions of backward classes.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

**341. (1)** The President may with respect to any State or Union territory,<sup>14</sup> and where it is a State.....<sup>15</sup> after consultation with the Governor.....<sup>15</sup> thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.<sup>13</sup>

Scheduled Castes.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe, or part of or group within any caste race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

13. Added by the Constitution (Seventh Amendment) Act, 1956.

14. The words 'specified in Part A..... Schedule' were omitted by *ibid*.

15. The words 'or Rajpramukh' was omitted by *ibid*.

### Scheduled Castes.

1. The list of Scheduled Castes is now contained in the Constitution (Scheduled Castes) Order, 1950,<sup>16</sup> as amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act (LXIII of 1956), s. 41 of the States Reorganisation Act, 1956 and the Punjab Reorganisation Act, 1966.<sup>17</sup>

2. A person who belongs to a caste or tribe included in the Order made under Art. 341 or 342 (as the case may be) does not cease to be so merely by performing ceremonies appertaining to the higher castes,<sup>18</sup> or by becoming a member of the Arya Samaj.<sup>19</sup>

3. But in order to belong to a Scheduled Caste under this Order, a person must *profess* to be either a Hindu or a Sikh.<sup>20</sup>

4. Where, therefore, a person has made a public declaration that he has adopted the Buddhist religion, he cannot thereafter claim to be a Scheduled Caste on the ground that his conversion to Buddhism was not efficacious.<sup>20</sup>

If, however, there is no conversion to a religion other than the Hindu religion but a mere acceptance of certain ideological tenets, the person does not lose his status as a member of a Scheduled Caste.<sup>21</sup>

5. Under cl. (2), the original Scheduled Castes and Tribes Order cannot be varied by a subsequent Order or Notification unless that is issued under a law made by Parliament. Where, therefore, the Modification Order issued under s. 41 of the States Reorganisation Act, 1956 is *ultra vires*, it fails to vary the status conferred by the original Scheduled Castes Order, 1950.<sup>22</sup>

### 'Groups within castes'.

This Article specifically empowers the President to declare a group within a caste (instead of the caste as a whole) as a Scheduled Caste. Art. 15 (1) has to be read along with present Article. If, therefore, the President specifies only the Hindus amongst the Bawaria caste in Punjab as a Scheduled Caste to the exclusion of the Sikhs amongst the same Bawaria caste, so that the Sikh Bawarias are denied the privileges enjoyed by members of a Scheduled Caste, the President's Order cannot be challenged as contravening Art. 15 (1), for having excluded members of the Bawaria caste who profess the Sikh religion.<sup>23</sup>

The object of Art. 341 (1) is to provide additional protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer. It is obvious that in specifying castes, races or tribes, the President has been authorised to limit the notification to parts or groups within the castes etc., and that must mean that after examination the educational and social backwardness of a caste etc., the President may well come to the conclusion that not the whole caste, race<sup>24</sup> or tribe but parts or groups within them should be specified. Similarly, the President may specify castes etc. or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied

16. Validity upheld in *Michael v. Venkataswaram*, A. 1952 Mad. 474.

17. *Naunihal Singh v. Kishorilal*, A. 1961 M.P. 84.

18. *Dippala v. Giri*, A. 1058 A.P. 724 (735).

19. *Shyamsunder v. Shankar*, A. 1960 Mys. 27.

20. *Punjab Rao v. Meshram*, (1966) II S.C.A. 85.

21. *Chaturbhuj v. Moteswar*, (1954) S.C.R. 816 (841).

22. *Naunihal Singh v. Kishorilal*, A. 1961 M.P. 84.

23. *Gurumukh v. Union of India*, A. 1952 Punj. 143.

that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification.<sup>24</sup>

### Exhaustiveness of the President's Order.

I. The object of Cl. (1) is to avoid all disputes as to whether a caste is a Scheduled Caste or not, for the purposes of the Constitution.<sup>25</sup> As Cl. (1) provides, it is the President's notification issued under the present Article which is to determine who is to be deemed to be a member of a Scheduled Caste for the purposes of the Constitution.<sup>26</sup> The Scheduled Castes Order, 1950 has been promulgated by the President under this power. In order, therefore, to determine whether a particular caste is a 'Scheduled Caste' within the meaning of Art. 341, one has to look to the terms of this Order.<sup>27</sup>

II. It is not open to anybody to seek any modification of the Order by producing any evidence to show that though caste A alone is mentioned in the Order, caste B was also a part of Caste A, and as such was deemed to be a Scheduled Caste.<sup>28</sup> Wherever one caste has another name, it has been mentioned in brackets after it in the Order. Therefore, "generally speaking it would not be open to any person to legal evidence to establish that caste B is part of caste A notified in the Order."<sup>29</sup> It is, therefore, useless to refer to Gazetteers or glossaries, for establishing that a caste is a 'Scheduled Caste', for the purposes of the Constitution,<sup>30</sup> though not mentioned as much in the President's Order.<sup>31</sup>

III. Where, of course, the Order itself mentioned a caste as a caste "known as Bhovi in the Mysore State as it was before 1956", evidence was admitted<sup>32</sup> to find out what was meant by the term 'Bhovi' before 1956, and it was held that it referred to the caste 'Voddar' in the State of Mysore before 1956; the name was changed by a resolution at a Conference of the Voddar caste.

IV. Where the item in the Order was 'Sunri excluding Saha', it has been held that it did not exclude from the protection of the Order those members of the Sunri caste who bore the surname 'Saha', unless it was shown that those who bore the surname 'Saha' formed a sub-caste known as 'Saha'.<sup>33</sup>

**342. (1) The President may with respect to any State or Union territory,<sup>1</sup> and where it is a State...<sup>2</sup> after consultation with the Governor...<sup>3</sup> thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be<sup>4</sup>**

**(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.**

24. *Bhaiyalal v. Harikishan* A. 1965 S.C. 1557 (4560).

25. *Basavalingappa v. Mumichinappa*, A. 1965 S.C. 1269 (1965) 1 S.C.R. 316.

1. *Parasram v. Shivchand*, A. 1969 S.C. 59 (559).

*Abhay Pada v. Sudhir*, A. 1967 S.C. 115 [see, however, the facts in A. 1966 Cal. 141].

3. Inserted by the Constitution (Seventh Amendment) Act, 1956.

4. The words 'specified in Part A . . . Schedule' were omitted by *ibid.*

5. The word 'Rajpramukh' was omitted by *ibid.*

6. Inserted by the Constitution (Seventh Amendment) Act, 1965.



**Scheduled Tribes.**

The list of Scheduled Tribes is now contained in the Constitution (Scheduled Tribes) Order, 1950, as amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act (XLIII of 1956).

**PART XVII****OFFICIAL LANGUAGE****CHAPTER I—LANGUAGE OF THE UNION**

**343. (1)** The official language of the Union shall be Hindi in Devanagari script.

Official language of the Union      The form of numerals to be used for official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

(a) the English language, or

(b) the Devanagari form of numerals,

for such purposes as may be specified in the law.

**344. (1)** The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the progressive use of the Hindi language for the official purposes of the Union;

(b) restrictions on the use of the English language for all or any of the official purposes of the Union;

(c) the language to be used for all or any of the purposes mentioned in article 343;

(d) the form of numerals to be used for any one or more specified purposes of the Union;

(c) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

## CHAPTER II REGIONAL LANGUAGES

345. Subject to the provisions of article 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State:

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

### Scope of Art. 345.

1. The Article merely empowers the Legislature of a State to adopt Hindi or any State language as the official language of that State. But it does not lay down that after such adoption, English will cease to be an official language or proceedings done in English will be invalid.<sup>1</sup>

2. In order to for the use of English for official purposes, the State Legislature must enact an express legislation for that purpose as envisaged by the Provision. The M. B. Official Language Act, 1950, is not such a law.<sup>2</sup> Hence, even after the passing of this Act, English continued to be the language of the subordinate Courts under s. 137 (3) of the C. P. Code.<sup>3</sup>

346. The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union:

Provided that if two or more States agree that the Hindi language should be the official

1-2. *Dayabhai v. Natarlal*, A. 1957 MP. 1.

language for communication between such States, that language may be used for such communication.

347. Or a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as may specify.

Special provision relating to language spoken by a section of the population of a State

### CHAPTER III LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC

348. (1) Notwithstanding anything in the foregoing provisions of this part, until Parliament by law otherwise provides —

- (a) all proceedings in the Supreme Court and in every High Court,  
 (b) the authoritative texts—  
 (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,  
 (ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor..... of a State, and  
 (iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1) the Governor..... of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor..... of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a transaction of the same in the English language published under the authority of the Governor..... of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

#### CL. (3): Authoritative text.

1. The effects of this clause are quite clear. It makes an exception to the provision in cl. (1) (b), in favour of a State Legislature. The two provisions, read together, indicate that a State Legislature may prescribe

3 The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

the use of any language other than English for Bills and Acts passed by itself, or subordinate legislation made thereunder, but then, it is an English translation of the Bill or Act, duly published under cl. (3), which shall be deemed to be the 'authoritative text' of the same.<sup>5</sup> It follows, therefore, that in case of conflict between the State language and the English translation, the latter shall prevail.<sup>6</sup> Of course, if there is any ambiguity in the English text, the Hindi version may be referred to as extended aid.<sup>7</sup>

2. The question is, what happens if no English translation is made and published in respect of any Act or rule. The Madhya Bharat High Court<sup>8</sup> has held that the publication under Art. 348 (3) is not a condition precedent to the validity of the Act or rule, hence, the Act or rule made in the State language will have full effect. The only consequence of the absence of an English translation will be that there will be no authoritative text.

3. In order to be an 'authoritative text', the English translation must be published 'under the authority of the Government.'<sup>9</sup>

4. Since in case of conflict between the English and Hindi versions, the former will prevail, all appointments will be valid only from the date given in the English version of the notification, and not from the earlier date given in the Hindi version and a corrigendum published later cannot validate the appointment from the earlier date given in the English version.<sup>11</sup>

### 349. During the period of fifteen years from the commencement

Special procedure for  
enactment of certain  
laws relating to language.

of this Constitution, no Bill or amendment making provision for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

## CHAPTER IV - SPECIAL DIRECTIONS

### 350. Every person shall be entitled to submit a representation for

Language to be used  
in representations for  
redress of grievances.

the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

### 350A. It shall be the endeavour of every State and of every local

Facilities for instruction  
in mother-tongue at  
primary stage.

authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President

4. *Jaswant Sugar Mills v. Industrial Tribunal*, A. 1962 All. 240 (F.B.).

5. *Bhikam Chand v. State*, A. 1966 Raj. 132 (149).

6. *Saghir Ahmad v. State of U. P.*, A. 1954 All. 257 (278).

7. *Gobindram v. Assessing Authority*, A. 1958 M.P. 16 (19).

8. *Raichand v. Sanchalak*, A. 1957 M.B. 26 (29), *Han v. S. T. O.*, A. 1959 All. 208.

9. *Ashgar Ali v. State of U. P.*, A. 1959 All. 782.

10. *Jaswant Sugar Mills v. Industrial Tribunal*, A. 1962 All. 240 (F.B.).

11. *Agra Municipality v. Gulzari*, A. 1965 All. 170.

12. Inserted by the Constitution (Seventh Amendment) Act, 1956.

*may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.*

### **'Linguistic minority'.**

This expression refers to a linguistic group which is in a numerical minority in the State as a whole as distinguished from any particular area or region therein.<sup>13</sup>

**"350B.** (1) *There shall be a Special Officer for linguistic minorities to be appointed by the President.*

*Special officer for linguistic minorities.*

(2) *It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all reports to be laid before each House of Parliament, and sent to the Governments of the States concerned*

**Objects of Art. 350A-B.**— Articles 350A-B have been inserted by the Constitution (Seventh Amendment) Act, 1956, with the object of safeguarding the interests of the linguistic minorities which have particularly come into existence as a result of the reorganisation of the States.

**351.** It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages

*Directive for development of the Hindi language.*

## PART XVIII

### EMERGENCY PROVISIONS

**352.** (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

*Proclamation of Emergency.*

(2) A Proclamation issued under clause (1)—

(a) may be revoked by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament;

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months

13. Ref. on the Kerala Education Bill, A. 1958 S.C. 956.

referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger.

**Clause (1).**—It is not necessary for the President to recite in the Proclamation the fact of his satisfaction about the emergency.<sup>1</sup>

**353.** While a Proclamation of Emergency is in operation, then—  
Effect of Proclamation of Emergency. (a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

**354.** (1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

**355.** It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.  
Duty of the Union to protect States against external aggression and internal disturbance.

**356.** (1) If, the President, on receipt of a report from the Governor.....<sup>2</sup> of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—  
Provisions in case of failure of constitutional machinery in States.

1. *Lakshmpal v. Union of India*, 1 1967 S.C. 243 (244)

2. References to the 'Rajpramukh' have been omitted by the Constitution (Seventh Amendment)\* Act, 1956.

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor....., or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3):

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both House of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People, during the said period, the Proclamation shall cease to

operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

### CL (1): President's satisfaction.

The President's satisfaction is not subject to any objective limitations. It cannot be contended, in a Court, that the power under Art. 356(1) cannot be issued at a time when the State is already under the President's rule by a previous Proclamation under Art. 356.<sup>2</sup> If a fresh election has been held during the continuance of the previous Proclamation and a Ministry cannot be formed as a result of that election, it is open to President to make a fresh Proclamation after revoking the previous one.<sup>3</sup>

Of course, Parliament may refuse its approval when the Proclamation is placed its approval.<sup>4</sup>

### CL (3): Expiration of the Proclamation.

1. This clause lays down the various modes in which a Proclamation under Art. 356 may come to an end. It is obvious that the powers exercisable under cls. (a)-(c) of cl (1) shall have validity only if they are exercised before the expiration of the Proclamation in any of these modes.

2. A question arose whether an Order made by the President in exercise of the power conferred upon him under Art. 356 (1)(b), read with Art. 357 (1) (a), is valid if it is published in the Official Gazette only after the date of expiration of the Proclamation by revocation. The Supreme Court held that the publication in the Gazette on a subsequent date was immaterial inasmuch as the Order expressly provided that it was to come into force 'at once', i.e. from the date when it was made by the President.<sup>4</sup>

**357. (1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent --**

Exercise of legislative powers under Proclamation issued under article 356.

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a) to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

3. *Aboo v Union of India*, A. 1965 Ker. 229 (231-2).

4. *Ram Parshad v. State of Punjab*, A. 1966 S.C. 1607 (1610).



(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under article 356, have been competent to make shall, to the extent to the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

**Cl. (2): 'Things done'.**

These words must receive a liberal interpretation. An Order made by the President under Art. 357 (1)(a) shall not, therefore, lapse on the expiry of one year after the termination of the Proclamation, if, on a reading of the Order as a whole, it appears that it was intended to operate as a permanent measure, e.g., for the better management of the affairs of a Bank.\*

**358. While a Proclamation of Emergency is in operation, nothing** in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so cease to have effect.

Suspension of provisions of article 19 during emergencies.

**Arts. 358 and 359.**

The point of distinction between the two Articles have thus been explained by the Supreme Court<sup>5</sup>—

(i) As soon as a Proclamation of Emergency has been issued under Art. 352 and so long as it lasts, Art. 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Art. 19 during the pendency of the Proclamation of Emergency removes the fetters created on the legislative and executive powers by Art. 19 and if the legislature makes laws or the executive commits acts which are inconsistent with the rights guaranteed by Art. 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Art. 19 because as soon as the emergency is lifted, Art. 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Art. 19 is complete during the period in question and legislative and executive action which contravenes Art. 19 cannot be questioned even after the emergency is over.

(ii) Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to

5. *Mahajan Singh v. State of Punjab*, A. 1964 S.C. 381.

6. *District Collector v. Ibrahim & Co.*, A. 1970 S.C. 1275 (1978).

issue an order declaring that the right to move any court for the enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which Proclamation is in force or for any shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Art. 359 (1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement.

(iii) The suspension of Art. 19 under Art. 358 applies to the whole of the country, and so, covers all States. On the other hand, the Order issued under Art. 359 (1) may extend to the whole of India or may be confined to any part of the territory of India.

(iv) The suspension of Art. 19 for which Art. 358 provides continues so long as the Proclamation of Emergency is in operation whereas the suspension of the right to move any court which the Presidential Order under Art. 359 (1) brings about can last either for the period of the proclamation or for a shorter period if so specified by the Order.

### Questions still open.

1. Art. 358 suspends the restrictions on the powers of the State to make any law in contravention of the provisions of Art. 19 only during the pendency of the Proclamation. It does not lay down that the validity of any law, which has been made prior to the Proclamation, cannot be challenged on the ground of violating the provisions of Art. 19.<sup>7</sup>

2. It does not preclude the Court from annulling an executive act or subordinate legislation as *ultra vires*, on the ground of being outside the scope of a statute, as interpreted by the Supreme Court.<sup>8</sup> In other words, the executive order immune from attack under Art. 358 is only that order which the State was competent to make but for the provisions contained in Art. 19, to make Executive action which was *ultra vires* invalid is not immune from attack because of Art. 358.<sup>9</sup>

**359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.**

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

**Arts. 358 and 359.** See under Art. 358 *ante*.

### 'Proceedings for the enforcement of the fundamental rights'.

1. The proceedings which are barred by a Presidential Order under Art. 359 (1) are such proceedings as may be taken by citizens for the

7. *Shyam Behari v. Union of India*, A. 1963 A.S.M. 94 (47).

8. *Thangamani v. Govt. of Madras*, A. 1965 Mad. 225 (279).

9. *Channan v. State of Punjab*, A. 1965 Punj. 74 (77).

enforcement of such of the rights conferred by Part III as may be mentioned in the Order. If a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the Order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed, as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights that it is a proceeding which falls under Art. 359 (1) and would, therefore, be hit by the Presidential Order issued under the said article. The sweep of Art. 359 (1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights,<sup>10</sup> including the right to apply for *habeas corpus* under s. 491 of the Cr. P. C.<sup>11</sup>

2. But there is no bar to challenging an order of detention on the ground of contravention of a fundamental right other than those specified in the Presidential Order,<sup>12</sup> or on a ground other than the contravention of a fundamental right.<sup>12</sup>

**360. (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.**

Provisions as to financial emergency.

(2) The provisions of clause (2) of article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

- (i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;
- (ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to

10. *Makhan Singh v. State of Punjab*, A. 1964 S.C. 381.

11. *Cf. Mphar v. Chief Commr.*, A. 1964 S.C. 173 (177).

12. *Ananda v. Chief Secy.*, A. 1966 S.C. 657 (660).

issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

## PART XIX

## MISCELLANEOUS

**361. (1)** The President, or the Governor.....' of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Protection of President and Governors.

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor..... of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor..... of a State shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor.....' of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor..... of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor.....' as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

**Art. 361: Personal Immunity of President or Governor for official acts.**

This Article gives personal immunity from legal action to the heads of the States for their official acts, including proceedings for contempt of Court.<sup>2</sup>

**Cl. (1): 'Shall not be answerable to any court'.**

This clause means that no Court can compel the President or Governor to exercise any power or to perform any duty nor can a Court

1. The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956. As a result the ex-Rajpramukhs have lost their immunity from criminal proceedings under the present clause. *Keskar v. Nizam*, (1960) S.C. (Cr. A. 10), 551.
2. *Vijay v. Ajitprasad*, A. 1966 All 305 (308)

compel him to forbear from exercising his power or performing his duties. He is not amenable to the writs or directions issued by any Court.<sup>3</sup>

### 'Acts done or purporting to be done'.

The protection offered by the Article extends not only to the official acts and omissions but also to acts and omissions which can be said to be incidental to the exercise of the powers or performance of the duties of the Governor.<sup>4</sup>

The words 'purporting to be done' are of a very wide implication and even though the act done is outside or in contravention of the Constitution it comes within the protection of Art. 36 if the act is *professed to be done* in pursuance of the Constitution.<sup>5</sup> If the act was *ostensibly* done in the exercise of the power given under the Constitution and it is not established that the act was done *dishonestly or in bad faith*, i.e. out of any improper motive the immunity attaches to the exercise of the power.<sup>6</sup> Thus, Art. 361 stands as an absolute bar to relief where the Governor made an *erroneous* decision or a *wrong* choice, in the matter of making nominations in exercise of the power conferred by Art. 171 (3).<sup>7</sup>

### 2nd Proviso.

1 Because the executive head is not personally amenable to the process of the Court, it cannot be said that his acts purporting to be done in pursuance of the Constitution are beyond the scrutiny of the Court.<sup>8</sup> In cases in which action lies against the Government the action of the President or the Governor, as the case may be, may be scrutinised by the Court in order to give relief to the individual against the Government.

2 The Proviso makes it clear that the personal immunity of the head of the State does not bar any suit being brought or any writ being issued against the Government, where the suit or proceeding would have been otherwise maintainable against the Government.<sup>9</sup> To such a suit or proceeding, the Governor is not a necessary party.<sup>10</sup>

3 The Proviso makes it clear that there is no bar to the judicial writs as are mentioned in Arts. 32 (2) and 226 being issued against the Government provided other conditions for their application are present. Though a mandamus would not issue against the President or Governor, there is no bar to such writ being issued against the Government concerned or against an officer thereof. Art. 226 specifically mentions 'Government'.

### CL. (4): Acts done in personal capacity.

While cl. (1) deals with acts done by the Governor ~~etc.~~ in their official capacity, cl. (4) deals with acts done by them in their *personal* capacity. While in respect of acts done or purported to be done in official capacity an *absolute* bar is created, in respect of personal acts only a partial bar in the shape of notice for a period of two months prior to the institution of civil proceedings is imposed similar in nature to that to be found in s. 80 of the Code of Civil Procedure.<sup>11</sup>

3. *Bimanchandra v. Dr H. C. Mukherjee*, (1952) 56 C.W.N. 651 (654), *Satwant v. State of Punjab*, A. 1960 S.C. 266, *Dhananjay v. Mohan*, A. 1960 S.C. 745, *Prabhakar v. Shankar*, A. 1969 S.C. 686 (688).

4. *Kulkarni v. Shevde*, A. 1952 Nag. 330, *Lalman v. Rajpramukh*, A. 1953 M.B. 54.

5. *State of Bombay v. Nanavati*, (1960) 62 Bom.L.R. 383 (386); *State of W.B. v. S. N. Bose*, A. 1964 Cal. 184 (189).

6. *C. J. Cooverjee v. Excise Commr.*, A. 1954 S.C. 220, *Guruswamy v. State of Mysore*, A. 1954 S.C. 592, *State of Bombay v. Arishman*, A. 1960 S.C. 1223, *Parlap Singh v. State of Punjab*, A. 1964 S.C. 83.

**362.** In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in....., article 291 with respect to the personal rights, privileges and dignities of Ruler of an Indian State.

**Art. 362: Guarantee of rights and privileges of Rulers of Indian States.**

1. This Article gives constitutional recognition to those personal rights, privileges and dignities, of the Rulers of Indian States [Art. 366 (22), *post*] which have been assured by covenant or agreement between the Government of India and such Rulers prior to the Constitution, e.g., as to the use of red plate in cars, suits and prosecutions.

2. S. 86 of the Code of Civil Procedure provided that a Ruling Chief could not be sued without the consent of the Central Government. In view of Art. 362 this privilege is available even after the commencement of the Constitution. This has not been safeguarded by s. 87F, inserted by the C. P. C. Amendment Act, 1951. Similarly s. 197A has been inserted in Cr. P. C. to ensure that no prosecution shall be against an ex-Ruler except with the previous sanction of the Central Government. The privilege under s. 197A, Cr. P. C. is however confined to prosecution for an 'offence' and does not extend to an application under s. 488 Cr. P. C.

3. The Ruler of a State under the Constitution is not an 'mere citizen' of India but for certain privileges etc. which shall not be possessed by any other citizen. To this extent Art. 362 forms an exception to Arts. like 15 and 18.

### 'Due regard shall be had'.

These words are in the nature of a directive because the agreement or covenant by which the personal rights or privileges are guaranteed is not enforceable in a Court of law by reason of Art. 363<sup>1</sup>. Hence, if despite the recommendation in Art. 362 Parliament or the Legislature of a State makes laws inconsistent with the personal rights or privileges, the legislative authority cannot be questioned by the ex-Ruler in any Court, either as plaintiff or as defendant<sup>2</sup>.

### 'Agreement as is referred to in Art. 291'.

These words refer to the agreement mentioned in the opening words of Art. 291 that is any covenant or agreement entered into before the commencement of the Constitution by which personal rights or privileges were guaranteed to the Rulers.<sup>3</sup>

7 The Constitution (Twenty-Fourth Amendment) Bill, 1970 to omit Arts. 291, 362 and 366 (22), to do away with the Privy Purse and other privileges of the ex-Rulers, after having been passed in the House of the People, has been defeated in the Council of States on 5.9.70. Government is determined to pursue it [see under Art. 366 (22), *post*].

8 The words 'clause (1)' or 'have been omitted by the Constitution (Seventh Amendment) Act, 1956.

9 10 *Jaswant Singh v. State of Bombay*, A 1955 Bom 108.

11 *Sushantsekhar v. State of Orissa*, A 1961 SC 196 (199) (1961) 1 SCR. 779 (786).

12 *Cf. Das J. in Vishnu v. State of M. P.* (1952) SCR 1020.

13 *Bhim v. Ramnau* (1955) 57 Bom LR 60 (61).

14 The scope of Art. 362 is not confined to agreements relating to Privy Purse as was supposed by *Pravir v. State of M. P.*, (1952) 7 DLR. 17 (Nag).

**'Personal rights, privileges and dignities.'**

1. What is saved by Art. 362, however, is the 'personal' rights and privileges of the ex-Rulers and not their constitutional or political rights, such as the power to grant suspension or remission of death sentence.<sup>15</sup> Nor does it grant any immunity from taxation.<sup>11, 16</sup>

2. The guarantee given by the Article is of limited extent: It only guarantees that the Ruler's private properties will not be claimed as State properties.<sup>17</sup> The guarantee has no greater scope than this and does not, accordingly, prevent the State from dealing with the property on the assumption that it is private property,<sup>17</sup> and to acquire<sup>17</sup> or regulate such property along with other private properties, under a tenancy legislation of the like,<sup>18</sup> or to impose a tax on such property<sup>11</sup> or to appoint a Court of Words in respect of such property, under Entry 34 of list I.<sup>19</sup>

3. It follows that Art. 362 does not bar the acquisition of the properties which were recognised as the 'private property' of the Ruler under a covenant between the Ruler and Government of India, on payment of compensation, under Art. 31 (2) of the Constitution;<sup>20</sup> or the fixation of fair and equitable rents payable by the tenants of such lands,<sup>21</sup> or the protection of tenants from eviction from such lands;<sup>17</sup> or the imposition of such reasonable restrictions as may be legitimately imposed upon other landlords in the interests of the tenants.<sup>17</sup>

4. The privileges can continue only subject to the conditions, if any, attached to it. Thus, a grant of land which was made in favour of a prince to be enjoyed so long as he remained a cadet, lapsed on his becoming the Ruler and cannot, therefore, be claimed by the ex-Ruler against the State.<sup>21a</sup>

**363. (1) Notwithstanding anything in this Constitution but subject**

Bar to interference by courts in disputes arising out of certain treaties, agreements, etc. **to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provisions of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Government was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement; sanad or other similar instrument.**

**(2) In this article -**

- (a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and
- (b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Govern-

15. *Vareed v. State of T. C.*, (1956) S.C.A. 448 (494).

16. *Commr. of I. T. v. Osman*, A. 1966 S.C. 1260 (1263).

17. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (941).

18. *Jagannath v. Harihar*, (1958) S.C.R. 1067.

19. *Lalith Kumar v. State of M. P.*, A. 1961 M.P. 197.

20. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (267).

21. *Srikaram v. Ramanathan*, A. 1958 Orissa 24.

21a. *Vadia v. State of Saurashtra*, A. 1967 S.C. 346 (347).

**ment of the Dominion of India as the Ruler of any Indian State.**

**Scope of Art. 363 (1).**

1. No Court shall have jurisdiction to entertain a dispute arising out of treaties etc., entered into between Rulers of Indian States and the Government of India. The jurisdiction of the Supreme Court is also barred by Proviso (i) to Art. 131: if it is a State which has lost its integrity by reason of merger or otherwise, the jurisdiction is barred by Art. 363 (1). The cause of action relating to such dispute is political<sup>22</sup> in nature, and the remedy provided by the Constitution is—a reference by the President to the Supreme Court under Art. 143.<sup>23</sup>

2. While Art. 363(1) postulates the continued operation of the treaties, agreements etc., entered into or executed before the commencement of the Constitution and giving rise to disputes, it does not require, as a condition of its application, that such disputes, should arise *after* the commencement of the Constitution. The time factor is related to the *instruments* and not the disputes. In order that the bar under Art. 363 (1) is to apply, such instrument should have been executed before the Constitution came into force and has to be in operation after the Constitution, but the dispute which is the subject-matter of the litigation may arise before or after.<sup>23</sup>

3. While the Proviso to Art. 131 bars the original jurisdiction of the Supreme Court in disputes arising out of such treaties and agreements, Art. 363 bars the jurisdiction of all Courts and in respect of all proceedings.<sup>23</sup>

4. The Ruler himself cannot take resort to a Court of law to enforce an agreement, directly or indirectly, e.g., by a petition under Art. 226 to challenge the validity of a law made by the Legislature on the ground that it has violated his rights guaranteed by the Agreement.<sup>24, 25</sup>

5. Even where a private person has certain privileges<sup>1</sup> or even contractual rights<sup>2</sup> or benefits<sup>3</sup> or immunity from taxation<sup>24</sup> following from a Covenant entered into by an ex-Ruler, he cannot enforce the Covenant in a Court of law, whether he was a party to such Covenant or not. Apart from Art. 363, the Covenant is an 'Act of State' and is not enforceable against the new Sovereign who acquires the territory of the ex-Ruler, unless the new Sovereign chooses to recognise them,<sup>2</sup> by a specific and unequivocal act.<sup>4</sup>

6. But the bar under Art. 363 (1) is attracted only if the dispute 'arises out of the Covenant'. Thus,—

(i) Where an individual had a right under a law which is not affected by or is independent of<sup>5</sup> the Covenant, the individual is not barred from enforcing his legal rights in the courts.<sup>6</sup> In such suit, the individual does not seek to enforce any right arising from the Covenant.<sup>7</sup>

(ii) On the same principle, though no justifiable rights could be founded on a Merger Agreement or any other similar Covenant, if the

22. *Usmanali v Sagar Mal*, A. 1965 S.C. 1798 (1802).

23. *State of Seraikella v. Union of India*, (1951) S.C.R. 474; (1950-1) C.C. 271.

24. *Sudhansu v State of Orissa*, A. 1961 S.C. 196 (199).

25. *Commr. of I. T. v Osman*, A. 1966 S.C. 1260.

1. *Umegh Singh v. State of Bombay*, A. 1955 S.C. 540.

2. *Dalmia Cement Co. v. I. T. Commr.*, A. 1958 S.C. 816.

3. *Raghubar v. State of U. P.*, A. 1959 S.C. 909.

4. *Amar Singhji v. State of Rajasthan*, A. 1955 S.C. 504 (523); (1955) 2 S.C.R. 303.

5. *Jagannath v. Harihar*, A. 1958 S.C. 239; (1958) S.C.R. 1067.

6. *Bholanath v. State of Saurashtra*, A. 1954 S.C. 680.



new Sovereign, i.e., the Union or a State Government, affirms or recognises the rights arising out of the Agreement, the right may be enforceable against the new Sovereign in a court of law, by virtue of such recognition.

### Disputes arising out of a Covenant etc.

Where a term in an Agreement or Covenant with the ex-Ruler of an Indian State is relied upon either to found a right or to defeat a liability, there is a dispute arising out of such Agreement or Covenant, *e.g.*—

(i) A suit for a declaration that a law passed by Parliament or a State Legislature is void owing to contravention of the terms of an Instrument of Accession<sup>7</sup> or a Letter of Guarantee<sup>8</sup> or a Covenant as between the Government of India and the Ruler of an Indian State, is a suit which is barred by Art. 363.

(ii) Where the liability arising under an Act of an Indian State which is continuing as an existing law is sought to be got rid of by recourse to the terms of the Supplementary Covenant executed by the Ruler concerned, it is a dispute arising out of the Covenant and, hence, Art. 363 will apply.<sup>10</sup>

**364. (1) Notwithstanding anything in this Constitution, the President from by public notification direct that as Special provisions as to major ports and aerodromes, from such date as may be specified in the notification—**

- <sup>1</sup> (a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or
- <sup>1</sup> (b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

### (2) In this article—

- <sup>1</sup> (a) “major port” means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port;
- <sup>1</sup> (1) “aerodrome” means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

**365. Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.**

7. *State of M. B. v. Behramji*, A. 1958 M.P. 71.

8. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 413 (429).

9. *State of Serakhella v. Union of India*, (1961) S.C.R. 474 (490); *Cf. Virendra v. State of U. P.*, (1955) S.C.R. 415 (430); *Umegh Singh v. State of Bombay*, A. 1955 S.C. 540.

10. *Lachmon v. State of Punjab*, A. 1963 S.C. 222 (231).

**305.** In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

Definitions.

- (1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;
- (2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;
- (3) "article" means an article of this Constitution;
- (4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly;
- (5) "clause" means a clause of the article in which the expression occurs;
- (6) "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:—
  - (a) that it is not chargeable in respect of agricultural income;
  - (b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised, to be made from dividends payable by the companies to individuals;
  - (c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;
- (7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question;
- (8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly;
- (9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass;
- (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;

**CL. (10): "Law".**

1. 'Law' in this clause primarily means statute law, including subordinate legislation, i.e., any rule, regulation or order made under statutory authority.<sup>11-22</sup> Though 'notifications' are mentioned in this clause, where notifications are issued under statutory power<sup>1,9</sup> (as distinguished from executive notification), they themselves have the force of a law.<sup>10</sup> A notification, issued under an existing statute, after the commencement of the Constitution is not 'existing law' if it seeks to change the law.<sup>11</sup>

2. The word 'passed' in this definition can only mean as "having received the sanction or imprimatur of the Legislature or legislative authority". Customary law is thus excluded from the present definition<sup>12,13</sup> though it is a 'law in force' within the meaning of Art. 372, *Expl. I*. Similarly, though Hindu Law has been applied in the administration of justice by directions of competent legislature, it does not follow that Hindu law was 'passed or made' by a Legislature. It cannot, therefore, be said to be an "existing law" within this definition;<sup>12,21</sup> though it is included in the definition of 'law in force' in Explanation 1 of Art. 372, *post* where the definition uses the word 'includes' instead of the word 'means' which is used in the present definition of 'existing law'.

**"Order".**

1. The definition, read as a whole, shows that it is only orders having the force of law, and not mere executive orders, that are included within this definition.<sup>14</sup>

2. But since the Rulers of Indian States possessed supreme legislative executive and judicial powers, without any constitutional limitation, any order, however issued, by an Indian Ruler, had the force of law and would constitute an 'existing law'.<sup>15</sup>

**"Rule".**

Rule means—

"a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment"<sup>16</sup>

Service Rules made under s. 241 (2) of the Government of India Act, 1935,<sup>17</sup> come under the present definition.

**"Regulation".**

Regulation means—

"a Regulation made by the Central Government under the Government of India Acts".<sup>18</sup>

A Regulation made under s. 266 (3) of the Government of India Act, 1935 would continue after the commencement of the Constitution by virtue of this clause.<sup>19</sup>

11-25. *Edwards Mills v State of Ajmer*, A. 1955 S.C. 25. (1955) 1 S.C.R. 735

1-9. *State v. Gopal Singh*, A. 1956 M.B. 138 (F.B.); *State v. Gokulchand*, A. 1957 M.P. 145.

10. *State of Bombay v. Balsara*, A. 1951 S.C. 318

11. *Kalyani Stores v. State of Orissa*, A. 1966 S.C. 1686 (1691)

12. *Moti Bai v. Kand Kari*, A. 1954 Hyd. 161 (163).

13. *Birumbhar v. State of Orissa*, A. 1957 Orissa 247 (252).

14. *Motilal v. Uttar Pradesh*, A. 1951 All. 257 (323).

15. *Madhuran v. State of M. B.*, A. 1961 S.C. 298 (302).

16. General Clauses Act (X of 1907) Sec. 3 (51).

17. *Kamtacharan v. Post Master-General*, A. 1955 Pat. 381 (384).

18. General Clauses Act (X of 1897), S. 3 (50).

19. *Jagdish v. State of U. P.*, A. 1957 All. 436.

**"Passed or made".**

What is material for the definition is the time of enactment of the law. If the Act was *passed* before the commencement of the Constitution, it would be 'existing law' within the meaning of the present definition even though it was brought into operation *after* the commencement of the Constitution.<sup>20</sup>

**"Having power to make such law".**

These words indicate that the definition of Art. 366 (10) does not obviate the question of *competence*<sup>21</sup> of the Legislature which made the law. Thus, it has been held<sup>22</sup> that since the Essential Supplies Act, 1946, passed by the Indian Legislature, could not, at that time extend to the Indian States, and was not extended to Rajasthan prior to the commencement of the Constitution, the Act cannot be said to be an 'existing law' in Rajasthan.

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935;

(12) "goods" includes all materials, commodities, and articles;

**Goods.**

The definition of goods in the Sale of Goods Act, 1930, is ordinarily followed in interpreting the present clause—

(13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount;

(14) "High Court" means any court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution;

(15) "Indian State" means any territory which the Government of the Dominion of India recognised as such a State;

(16) "Part" means a Part of this Constitution;

(17) "pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund;

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 3<sup>2</sup> 2;

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State;

20. *Katti v. State of Madras*, (1951) 1 M.L.J. 117 (130), *State of Bombay v. Heman*, A. 1952 Bom. 6.

21. *Khandwaj v. State of U. P.*, A. 1955 All. 12.

22. *Rampidas v. State of Rajasthan*, A. 1954 Raj. 97 (98).

23. *Kutkarni v. The State*, A. 1957 M.P. 45; see also *Melnyappan v. Commr., A.* 1969 Mad. 284 (191).

(20) "railway" does not include-

- (a) a tramway wholly within a municipal area, or
- (b) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway;

(21) Omitted <sup>1a</sup>

"(22) 'Ruler' in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by President as the successor of such Ruler;

'Ruler'.

The effect of this definition is that a Ruler who entered into the Merger Agreement or the like ceased to be a Ruler for all purposes<sup>1</sup> other than those of the Constitution, such as the privy purse under Art. 291

(23) "Schedule" means a Schedule to this Constitution;

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) "securities" includes stock;

(27) "sub-clause" means a sub-clause of the clause in which the expression occurs;

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

21 *Aluminium Corp. v. Coal Board* A 1957 Cal 320.

25 The Constitution (Twenty Fourth Amendment) Bill, 1970, to omit Arts 291, 362 and 366 (22), to do away with the Privy Purse and other privileges of the ex Rulers, after having been passed in the House of the People, has been defeated in the Council of States on 5.9.70.

Government is determined to pursue it. Statesman, 6-9-70, p. 1], and, as an alternative route to reach the same goal, a Presidential Order of derecognition has been issued on 6-9-70, in respect of each of the existing Rulers recognised by previous Presidential Orders issued under the same provision, i.e., Art 366 (22). The assumption behind this derecognition Order is that if there be no Ruler within the meaning of Art 366 (22) with effect from the date of this new Order, there will be none to claim the Privy Purse and other privileges under Arts 291, 362. The new Order [Statesman, 8-9-70, p. 1] is as follows:

"In exercise of the powers vested in him under Article 366 (22) of the Constitution, the President hereby directs that with effect from the date of this order . . . (name of the ruler with full title) do cease to be recognized as a ruler of . . . (name of the State) by order and in the name of the President L. P. Singh, Secretary to Government of India."

The above Order has, on the other hand, been challenged by some of the Princes in an application under Art 32, which is now pending before the Supreme Court.

1. Cl (21) has been omitted by the Constitution (Seventh Amendment) Act, 1956.

**'Impost'.**

'Impost' means a compulsory levy and would include contributions payable by employers under the Employees' State Insurance Act, 1948,<sup>1a</sup> a toll levied under the statutory authority,<sup>1b</sup> a tariff imposed on the export of a commodity;<sup>2</sup> imposition of a condition in a licence of payment to the State of 20% of the sale price,<sup>3</sup> the royalty on minerals payable under the Bihar Minor Mineral Concession Rules<sup>4</sup>

(29) "tax on income" includes a tax in the nature of an excess profits tax;

(30) "Union territory" means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule<sup>5</sup>

**367. (1)** Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Interpretation article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State..... shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor....., as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by a Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.

**CL (1): General Clauses Act.** in states, as in the case of the General Clauses Act, 1897, the words "Union Territory" in Art. 372(1) of the Constitution would include a "Union Territory" as defined in the General Clauses Act, 1897, and the words "foreign State" in Art. 372(3) of the Constitution would apply to the interpretation of Art. 370.<sup>6</sup>

**CL (3): Effect of the Constitution (Declaration as to Foreign States) Order, 1950.**

The effect of this Order, issued under Art. 367(3) is that wherever the words 'foreign State' appear in the Constitution, they must be taken as not including a country within the Commonwealth, such as Pakistan.<sup>7</sup> But it cannot be invoked for any provision, e.g., Art. 7, which does not use the expression 'foreign State' or item 9 of list I.<sup>8</sup>

1a. *Pratt v. State of M. P.* A. 1961 S.C. 775

1b. *Anand v. Employees Corpn.* A. 1957 All. 1 (111)

2. *Wadhvani v. State of Rajasthan* A. 1958 S.C. 138 (135)

3. *Gulam Hazi v. State of Rajasthan*, A. 1963 S.C. 379

4. *State of Kerala v. Joseph* A. 1958 S.C. 296

5. *Ladu Mal v. State of Bihar* A. 1965 Pat. 191

6. Substituted by the Constitution (Seventh Amendment) Act, 1956.

7. The words 'specified in Part A Schedule' were omitted, by *ibid.*

8. The words 'or Rajpramukh' were omitted by *ibid.*

9. *Ram Kishore v. Union of India* A. 1966 S.C. 641 (648)

10. *Samfat v. State of J. & K.* A. 1970 S.C. 1118 (1121)

11. *Ch. Noor Md. v. State of A.* 1956 M.B. 211 (213) *Nazirabai v. State*, A. 1957 M.B. 1 (3); *State v. Abdul Rahid*, A. 1961 Pat. 112.

12. *Jagannath v. Union of India*, (1960) 2 S.C.R. 784; A. 1960 S.C. 625.

## PART XX

### AMENDMENT OF THE CONSTITUTION

**368.** An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Procedure for amendment of the Constitution.

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241; or
- (b) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States..... by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

#### Different modes for alteration of the provisions of the Constitution.

The Indian Constitution lays down three different modes of alteration of its various provisions:

I. A very large number of provisions are open to alteration by the Union Parliament, by a simple majority, viz., the matters referred to in Arts. 2-4, 169 and 240:

(a) Creation of new States or reconstitution of existing States<sup>2</sup> (b) Creation or abolition of Upper Chambers in the State<sup>3</sup> (c) Constitution of Centrally administered areas.<sup>4</sup> (d) Administration of Scheduled Areas and Scheduled Tribes.<sup>5</sup>

These matters will not be treated as "amendments of the Constitution".

If, however, a matter is not covered by any of these articles, e.g., cession of territory to a foreign power, that can be effected only by enacting an Amendment Act under Art. 368.<sup>6a</sup>

II. In the case of a few matters relating to the federal structure of the Constitution, a special mode is prescribed, viz., that the Bill for amendment must be passed by a two-thirds majority of the members of each House present and voting (such majority being more than 50% of the total membership of each House) then, and ratified by the Legislatures of half of the States. [Proviso to Art. 368]. These matters are—

(a) The manner of election of the President.<sup>6</sup> (b) Extent of the

1. The words 'specified in..... Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956.

2. Art. 4 (2).

3. Art. 169 (3).

4. Art. 240 (2).

5. Paragraph 7 of the 5th Schedule and Paragraph 21 of the 6th Schedule.

6a. Ref. on Agreement relating to Berubari Union, A. 1960 S.C. 845.

6. Arts. 54-55.

executive power of the Union and the States.<sup>7</sup> (c) the Supreme Court and the High Courts.<sup>8</sup> (d) Distribution of legislative powers between the Union and the States.<sup>9</sup> (e) Representation of States in Parliament.<sup>9</sup> (f) Provisions of Art. 368 itself

III. The remaining provisions of the Constitution shall be liable to be amended by Parliament by a majority of two thirds of the members of each House present and voting provided such majority exceeds 50% of the total membership of that House [Art. 368]. No ratification by the State Legislatures will be required for these amendments

### Form of Amendment.

Art. 368 does not prescribe the form in which amendments may be made. An amendment may therefore add a provision to the Constitution without altering its existing text.<sup>11</sup>

### Principles relating to amendment of the Constitution.

(a) Subject to the special procedure laid down in Art. 368, our Constitution vests *constituent* power upon the ordinary Legislature of the Union, i.e., the Parliament and there is no separate body for amending the Constitution, as exists in some other Constitution.<sup>12</sup>

(b) Subject to the provisions of Art. 368, Constitution Amendment Bills are to be passed in the same way as ordinary Bills.<sup>13</sup>

(c) Provided the procedure as laid down in Art. 368 is complied with, Parliament may, by a Constitution Amendment Act amend Art. 368 itself.<sup>14</sup>

(d) The Courts are competent to examine the validity of a Constitution Amendment Bill, but the scope of enquiry seems to be limited to see whether the provisions of Art. 368 have been complied with or violated.<sup>15</sup>

### Amendment of Art. 226.

Since Art. 226 is a provision included in Part VI Chapter V of the Constitution, the special procedure in the Proviso to Art. 368 must be complied with if Art. 226 is to be amended<sup>16</sup> but the Proviso would not be attracted if the object of the amendment is not directly restrict the scope of Art. 226, and the impact upon Art. 226 is only incidental e.g., where owing to the curtailment of a fundamental right the field of Art. 226 is narrowed down<sup>17</sup> taking out certain cases from its purview

### Amendment of Fundamental Rights.

A. Until the case of *Golak Nath*,<sup>18</sup> the Supreme Court had been holding that no part of our Constitution is unamendable and that parliament may, by passing a Constitution Amendment Act in compliance with the requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.<sup>19</sup>

7 Arts. 73, 162.

8 Art. 241, Ch. IV of Part V Ch. V of Part VI

9 Ch. I of Part XI 7th Sch.

10 *Purshottam v. Prem Shankar* A. 1966 All C. 1337

11 *Sankari Prasad v. Union of India* (1950-51) CC 281 (1952) SCR 89

12 It is patently anomalous that Art. 32 being included in Part III of the Constitution, an Amendment of Art. 32 would not come under the Proviso to Art. 368

13 *Sarjan Singh v. State of Rajasthan* A. 1965 SC 845 (854)

14 *Golak Nath v. State of Punjab* A. 1967 SC 1613 (paras 39, 146, 163, 195—*Subba Rao C.J.*, *Sikri Shah Shelat Vaidhyanam & Hidayatullah JJ.*,—*Wanchoo, Bachawat, Rameswami JJ.*, dissenting)

15 *Sankari Prasad v. Union of India* A. 1951 SC 459 (Kania C.J., Shastri, Mukherjee, Das & Avyar JJ., unanimous) *Sarjan Singh v. State of Rajasthan*, A. 1965 SC 845 (Gaiendranadkar C.J., Wanchoo & Raghubar Dayal JJ.—*Hidayatullah & Mudholkar JJ.*, dissenting)



B. But, in *Golak Nath's* cases,<sup>16</sup> a majority of six Judges of a special Bench of eleven has overruled the previous decisions<sup>17</sup> and taken the view that though there is no express exception from the ambit of Art. 368, the Fundamental Rights included in Part III of the Constitution cannot, by very nature, be subject to the process of amendment provided for in Art. 368 and that if any of such Rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.<sup>18</sup>

#### The power to cede territory.

Since Art. 368 includes the power to amend Art. I, it is evident that the power to cede territory which India possesses as a Sovereign State, may be exercised by amending Art. I.<sup>19</sup> Though an ordinary treaty may be implemented by ordinary legislation in exercise of the power conferred by List I, Entry 14, read with Art. 253, a treaty involving cession of a part of the territory of India can be implemented only by amending the Constitution.<sup>17</sup>

### PART XXI

#### TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS

**369.** Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power

Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List

to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely: -

(a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or *kapaṛ*), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;

(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters but not including fees taken in any court; but any law made by Parliament, which Parliament would not but for the provisions of this article have competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

**370.** Notwithstanding anything in this Constitution,—

Temporary provisions with respect to the State of Jammu and Kashmir.

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to—

16. For a critical study of the decision in *Golak Nath's Case*, see C5, Vol. V, pp. 494-501.

17. *Re. Berubari Union*, A. 1960 S.C. 845 (856, 861).

1. The word 'and special' were added by the Constitution (Thirteenth Amendment) Act, 1962.

- (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
- (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation, dated in the fifth day of March, 1948;

- (c) the provisions of article 1 and of this article shall apply in relation to that State;
- (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify;

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify.

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

#### CL (1) (d): 'Modifications'.

1. The power to 'modify' includes the power to enlarge or add to an existing provision,<sup>2</sup> or to abrogate it, if necessary.<sup>3</sup> It is co-extensive with the power to amend and is not confined to minor alterations only.<sup>4</sup>

2. See the Constitution (Application to Jammu and Kashmir) Order 1951 made by the President, in exercise of the powers conferred by clause (1) of article 370 of the Constitution with the concurrence of the Government of the State of Jammu and Kashmir [See C 4 Vol V], as amended by the Amendment Orders.

3. *Sant Singh v. State of J. & K.* A. 1959 J & K 35 (40).

4. *Purand v. President of India*, A. 1961 SC 1519 (1521).

5. *Sampat v. State of J. & K.*, A. 1970 SC. 1118 (1125).

2. Art. 370 is a special provision for amending the Constitution in its application to the State of J & K. Art. 368 does not curtail the power of the President under Art. 370<sup>6</sup>.

3. Art. 246 has been applied only with modifications to the State of J. & K. As a result, the State Legislature of J. & K. has a residuary power of legislation over matters which may not be enumerated in the State List or the Concurrent List; the only limitation is that it must not be within the exclusive jurisdiction of Parliament<sup>7</sup>.

**Declaration under Art. 370 (3).**—In exercise of the power conferred by Art. 370 (3), the President has substituted the Explanation to Art. 370 (1) as follows:—

*"Explanation—For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadr-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office."*

**\*371. (1)** *Notwithstanding anything in this Constitution, the President*

*may, by order made with respect to the State of Andhra Pradesh<sup>8,9</sup> provide for the Constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees*

*(2) Notwithstanding anything in this Constitution, the President may by order made with respect to the State of Maharashtra or Gujarat,<sup>10</sup> provide for any special responsibility of the Governor for—*

*(a) the establishment of separate development boards for Vidarbha, Marathwada, the rest of Maharashtra, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly,*

*(b) the equitable allocation of funds for development expenditure over the said areas, subject to the requirements of the State as a whole; and*

*(c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole*

**Amendment.**—The Constitution (Seventh Amendment) Act, 1956 has substituted the present Article for the original Article which ran as follows:

6. *Hindusthan Construction Co. v. Assessing Authority*, A 1970 J & K 85 (86)
7. Substituted by the Constitution (Seventh Amendment) Act, 1956
8. The Regional Committee for Andhra Pradesh was constituted, with effect from 1-2-58 by an Order of the President the Andhra Pradesh Regional Committee Order, 1958
9. The words 'or Punjab' have been omitted by s. 26 of the Punjab Reorganisation Act, 1966 as a result of which Punjab shall no longer have a regional committee after 1-11-66 when Haryana is constituted a separate State.
10. Substituted by the Bombay Reorganisation Act, 1960.

"371. Notwithstanding anything in this Constitution during a period of ten years from commencement thereof or during such longer or shorter period as Parliament may by law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President

Provided that the President may by order direct that the provisions of this article shall not apply to any State specified in the order

**Object of Amendment.** The object of the new Article is to enable the President to constitute regional committees of the State Legislative Assemblies of Andhra Pradesh (and Punjab) and secure their proper functioning by directing suitable modifications to be made in the rules of business of Government and in the rules of procedure of the Assembly

### Cl. (1): Regional Committee.

1. The Regional Committee under the present clause is a part of the State Legislature concerned, and its proceedings are the proceedings of the Legislature itself<sup>11</sup>

2. In the result, Art. 212 would be attracted to the proceedings in such Committee<sup>12</sup>

3. Where the President<sup>13</sup> has empowered the Regional Committee to make recommendations to the State Government in respect of scheduled matters, such recommendation would be of the force of law<sup>14</sup>

**371A.** (1) Notwithstanding anything in this Constitution—  
Special provision with reference to Parliament in respect of —  
respect to the State of Nagaland, in relation to the traditional practices of the Nagas,

(i) Nagaland customary law and procedure,

(ii) administration of civil and criminal justice including decisions recorded by Nagaland customary law

(iii) ownership and transfer of land and its revenue,

shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution decides,

(b) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland and so far as in his opinion internal disturbances concerning the Nagas in Naga Areas immediately before the formation of that State have arisen or in any part thereof and in the disturbance of its practices or customs thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken

Provided that if any question arises whether any matter is or is not a matter as respects which the Governor is under any special duty required to act in the exercise of his individual judgment for decision of the Governor in his discretion shall be final and the decision of the Governor shall not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment

Provided further that if the President in receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the

11. *Ramachandra v A P Regional Committee*, A 1965 AP 206 (310)

12. *Nageswara v Medical College*, A 1962 AP 212 (217), *Nageswaram v Secy. to Govt.*, A. 1965 AP 362

13. Inserted by the Constitution (Thirteenth Amendment) Act, 1962 (w.e.f. 1-12-1963).

Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

(c) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;

(d) as from such date as the Governor of Nagaland may by public notification in this behalf specify there shall be established a regional council for the Tuensang district consisting of thirty-five members and the Governor shall in his discretion make rules providing for—

(i) the composition of the regional council and the manner in which the members of the regional council shall be chosen:

Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman *ex officio* of the regional council and the Vice-Chairman of the regional council shall be elected by the members thereof from amongst themselves,

(ii) the qualifications for being chosen as, and for being, members of the regional council;

(iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council,

(iv) the procedure and conduct of business of the regional council;

(v) the appointment of officers and staff of the regional council and their conditions of service, and

(vi) any other matter in respect of which it is necessary to make rules for the constitution and proper functioning of the regional council

(2) Notwithstanding anything in this Constitution, for a period of ten years from the date of the formation of the State of Nagaland or for such further period as the Governor may, on the recommendation of the regional council, by public notification, specify in the behalf,—

(a) the administration of the Tuensang district shall be carried on by the Governor,

(b) where any money is provided by the Government of India to the Government of Nagaland to meet the requirements of the State of Nagaland as a whole, the Governor shall in his discretion arrange for an equitable allocation of that money between the Tuensang district and the rest of the State;

(c) no Act of the Legislature of Nagaland shall apply to the Tuensang district unless the Governor, on the recommendation of the regional council, by public notification so directs and the Governor in giving such direction with respect to any such Act may direct that the Act shall in its application to the Tuensang district or any part thereof have effect subject to such exceptions or modifications as the Governor may specify on the recommendation of the regional council;

Provided that any direction given under this sub-clause may be given so as to have retrospective effect;

(d) the Governor may make regulations for the peace, progress and good government of the Tuensang district and any regulations so made may

repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district;

(e) (i) one of the members representing the Tuensang district in the Legislative Assembly of Nagaland shall be appointed Minister for Tuensang affairs by the Governor on the advice of the Chief Minister and the Chief Minister in tendering his advice shall act on the recommendation of the majority of the members as aforesaid;<sup>14</sup>

(ii) the Minister for Tuensang affairs shall deal with, and have direct access to the Governor on, all matters relating to the Tuensang district but he shall keep the Chief Minister informed about the same;

(f) notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion;

(g) in articles 54, 55 and clause (4) of article 80, reference to the elected members of the Legislative Assembly of a State or to each such member shall include references to the members or member of the Legislative Assembly of Nagaland elected by the regional council established under this article;

(h) in article 170—

• (i) clause (1) shall, in relation to the Legislative Assembly of Nagaland have effect as if for the word 'sixty' the words 'forty-six' had been substituted;

(ii) in the said clause, the reference to direct election from territorial constituencies in the State shall include election by the members of the regional council established under this article,

(iii) in clauses (2) and (3), references to territorial constituencies shall mean references to territorial constituencies in the Kohima and Mokokchung districts

(3) If any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may by order do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty.

Provided that no such order shall be made after the expiration of three years from the date of the formation of the State of Nagaland

Explanation—In this article, the Kohima, Mokokchung and Tuensang districts shall have the same meanings as in the State of Nagaland Act, 1962.

#### • Object of Amendment.

In July 1960, an agreement was reached by the Government of India with the leaders of the Naga Peoples Convention under which it was decided that Naga Hills Tuensang Area (Nagaland), which was then a part 'B' Tribal Area within the State of Assam, would be formed into a separate State in the Union of India.

14. Paragraph 2 of the Constitution (Removal of Difficulties) Order No. X provides (w.e.f. 1-12-1963) that article 371A of the Constitution of India shall have effect as if the following proviso were added to paragraph (i) of sub-clause (e) of clause (2) thereof, namely:—

"Provided that the Governor may, on the advice of the Chief Minister, appoint any person as Minister for Tuensang affairs to act as such until time as persons are chosen in accordance with law to fill the seats allocated to the Tuensang district in the Legislative Assembly of Nagaland."

The Agreement *inter alia* provided that—

(a) the Governor of the State of Nagaland would have special responsibility for law and order for so long as the law and order situation continued to remain disturbed on account of hostile activities;

(b) the Governor would have general responsibility with regard to the funds made available to the new State by the Government of India;

(c) the administration of the Tuensang District of Nagaland would be carried on by the Governor for a period of ten years during which it is expected that the people of that area would be in a position to shoulder fuller responsibilities of administration. A Regional Council is to be formed for the said Tuensang District comprising elected representatives from the tribes therein. This Regional Council will supervise and guide the working of the Village, Range and Area Councils in that district and further no law passed by the Nagaland Legislature will extend to that district unless so recommended by the Regional Council;

(d) Acts of Parliament shall not apply to Nagaland unless so decided by the Nagaland Legislature with regard to:—

- (i) religious or social practices of the Nagas;
- (ii) Naga Customary Law and procedure;
- (iii) administration of civil and criminal justice involving decisions according to Naga Customary Law;
- (iv) ownership and transfer of land and its resources

As these matters are peculiar to the proposed new State of Nagaland, provision with respect thereto has to be made in the Constitution itself. A separate Act,<sup>15</sup> for the formation of the new State relating to article 3 has also been simultaneously passed.

**371B.** *Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Assam, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and such number of other members of that Assembly as may be specified in the order and for the modifications to be made in the rule of procedure of that Assembly for the constitution and proper functioning of such committee.*

**Amendment.**—Art 371B was inserted by the Constitution (Twenty Second Amendment) Act, 1969, w.e.f. 25-9-69 in order to facilitate the creation of the sub State 'Meghalaya'. The legislative Committee referred in the present Article will constitute the legislative body for the purposes of the Assam Reorganisation (Meghalaya) Act, 1969.

**372. (1)** *Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.*

**(2)** *For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Consti-*

15. The State of Nagaland Act, 1962.

tution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendments, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of [three years]<sup>16</sup> from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

*Explanation I*—The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

*Explanation II*—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

*Explanation III*—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

*Explanation IV*—An Ordinance promulgated by the Governor of a Proviso under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

### Object of Art. 372.

The object of clause (1) of this Article is to secure the continuance of the existing law (not obstructing the action of the Government of India Act, 1935 by Art. 395)<sup>17</sup> until they are repealed or amended by a competent authority under the new Constitution.<sup>18</sup>

**Cl. (1): “Subject to the other provisions of the Constitution”.**

1. Thus, though an existing law continues to be in force under the present Article it cannot contravene any provision of the Constitution, e.g., Ar. 226 or 227,<sup>19</sup> or 278.<sup>20</sup>

16. Substituted by the Constitution (First Amendment) Act, 1951 s. 12 for “two years”.

17. *State of U. P. v Jagmander A* 1951 SC 683

18. *S. I. Corpn. v Board of Revenue A* 1961 SC 207 (215) (1964) SC.R 380

19-25. *Motilal v. State. A* 1962 AH 963 (1964)



By reason of this clause, if there is any irreconcilable conflict between a pre-Constitution law and a provision of the Constitution, the latter shall prevail to that extent.<sup>16</sup> Such inconsistency must, however, be spelled out from the express provisions of the Constitution and not from any supposed political philosophy underlying the Constitution.<sup>18</sup> In other words, an Article of the Constitution by its express terms may come into conflict with a pre-Constitution law wholly or in part; the said Article or Articles may also, by necessary implication, come into direct conflict with the pre-existing law. It may also be that the combined operation of a series of Articles may bring about a situation making the existence of the pre-existing law incongruous in that situation. But the inconsistency, if any, has to be determined with reference to the express provisions of the Constitution and not anything else.<sup>18</sup>

2. Art. 372 does not enlarge the scope of Art. 277.<sup>18</sup>

3. It has been held that the provisions of Arts. 72, 161 and 238 of the Constitution are inconsistent with the prerogative power of the ex-Rulers of Indian States to grant suspension or remission of death sentences and the latter power must, therefore, be deemed to have been superseded by the Constitution.<sup>1-18</sup>

4. On the other hand,—

(a) The principle of priority of Crown debts (*i.e.*, debts due to the State) is not inconsistent with anything in the republican Constitution, because it is essential to the proper functioning of every State that debts due to the public funds should have a priority over debts due to private individuals.<sup>17</sup>

(b) The competence of the Legislature to enact the law has to be determined with reference to the time when the law was made and not with reference to the provisions of the Constitution.<sup>18</sup>

Thus, if a law, when made, was invalid under the provisions of the Government of India Act, 1935, no question of its continuance after the Constitution or of contravention of its provisions arises.<sup>18</sup>

But if the pre-Constitution law was made by a competent authority, it will not cease to continue after the Constitution merely because that authority has lost its legislative competence over the subject-matter, provided only the law does not contravene any provision of the Constitution other than those dealing with the distribution of legislative power.<sup>14</sup>

For the same reason, where a pre-existing law was valid at the time of its enactment and was continued to be in force after commencement of the Constitution, it does not become void, by reason of its inconsistency with a Central<sup>19</sup> Act made after the Constitution, under Art. 254. That State law continues until repealed by competent authority, by reason of Art. 372.<sup>20</sup>

### Repeal may be retrospective.

The competent Legislature under the new Constitution may repeal the existing laws with retrospective effect, and even with effect from dates earlier than when the Constitution came in force.<sup>20</sup>

1-16. *Vered v. State of T. O.*, A. 1965 S.C. 142; (1955) 2 S.C.R. 1190.

17. *B. S. Corporation v. Union of India*, A. 1956 Cal. 26 (31); *Bank of India v. Bowman*, A. 1955 Bom. 305; *Hindusthan Commercial Bank Ltd. v. Union of India*, A. 1965 All. 474 (477).

18. *State of Orissa v. Satyabadi*, A. 1961 Orissa 196 (200).

19. *Potankar v. Sastry*, A. 1961 S.C. 272.

20. *Union of India v. Madangopal*, (1964) S.C.R. 541.

**Repeal may be express or implied.**

As in the case of repeal of other laws, the repeal of any of the 'law in force' may be also implied by an interpretation of some provision of the Constitution or some subsequent Act of the Legislature.

Thus, it has been held<sup>10</sup> that the prerogative power of the ex-Rulers of Indian States has been taken away either by Arts. 72, 161 and 238 of the Constitution which are inconsistent with any prerogative or by Act I of 1951 which extended the provisions of the Criminal Procedure Code (which contains ss. 401, 402 and 402A) to all Part B States.

**"All the law in force".**

1. This expression includes not only the enactments of the Indian Legislature but also the common law of the land which was being administered by the Courts in India. This includes not only the *personal laws*, viz., the Hindu and Mahomedan laws, but also the rules of English Common law, e.g., the law of torts<sup>21</sup> as well as customary laws, the rules of interpretation of statutes.<sup>22</sup>

2. It is to be noted that the definition of 'law in force' in Explanation I of the present Article differs from the definition of "existing law" in Art. 366 (10) in this that while the word "means" is used in Art. 366 (10), the word "includes" is used in the present Explanation. Case law or judicial decisions are thus included in the expression 'law in force' in Art. 372<sup>23</sup>. Privy Council decisions are, accordingly, binding on the High Courts and subordinate Courts, until overruled by the Supreme Court.<sup>24</sup>

3. Both in Arts. 366 (10) and 372 'law' also includes subordinate legislation.<sup>25</sup> Thus, by virtue of the Article (or Art. 225) rules made by the High Courts under the Government of India Act shall continue in force, subject to the Constitution until repealed or altered by a competent Legislature.<sup>1</sup> Similarly, rules, regulations and orders made by the Government, which were legislative in nature would come within the purview of this Explanation.<sup>2</sup> Thus, an Order made by the Governor-General under s. 94 (3) of the Government of India Act, 1935 investing the Chief Commissioner with the authority to administer a Chief Commissioner's Province is in nature of a legislative provision and is accordingly, a 'law in force' within the meaning of Art. 372.<sup>3</sup>

4. Mere executive or administrative orders, however, would not come within the purview of either Art. 366 (10) or 372, such as Army Instructions No. 212. Similarly, while statutory notifications would be law in force, executive notifications would not.

5. The Letters Patent relating to the three Presidency High Courts, issued by the Crown would also come within this expression.<sup>4</sup> So also the laws made by the ex-Rulers of Indian States.<sup>5</sup>

21. *Director of Rationing v. Centre of Calcutta*, (1951) 1 S.C.R. 158 (172)

22. *Cf. United Province v. Aboua*, A. 1941 F.C. 16 (37)

23. *Cf. Province of Bengal v. Hingikumar*, A. 1946 Cal. 217 (224); *S. Gopalan v. State of Madras*, A. 1958 Mad. 538 (54)

24. *Radharani v. Sishikumar*, A. 1953 Cal. 524. *Kishan Chand v. Ram Babu*, A. 1965 All. 65 (68)

25. *Edward Mills v. State of Aimer*, (1955) 1 S.C.R. 735 (746)

1. *Seshadri v. Proor of Madras*, A. 1954 Mad. 513 (517)

2. *In re Ranganavakulu*, A. 1956 Andhra 161 (F.B.)

3. *Gurbachan v. State of Pepsu*, A. 1956 Pepsu 26 (28)

4. *State v. Gokulchand*, A. 1957 MP. 145

5. *John v. State*, A. 1956 T.C. 117 (118)

6. *Nirmalchand v. Parmeswari*, A. 1958 MP. 332 (335)

7. *Atindra v. Gillot*, A. 1955 Cal. 543

8. *Desai v. State of Bombay*, A. 1960 S.C. 1312. *Javayant v. Chandrakant*, (1970) 1 S.C.C. 702.

6. Every order of a legislative nature,<sup>9</sup> made by the absolute Ruler of an Indian State, had the force of law constitutes an 'existing law' under Art. 372 (1). The rights conferred by such an order cannot therefore, be extinguished otherwise than by legislation.<sup>9</sup>

But there is no bar to an executive act<sup>10,11</sup> or a grant or a contract made by such Ruler being modified by an executive act of the appropriate successor Government,<sup>10</sup> e.g., where the Ruler purported to act under certain administrative Rules framed by himself and not in the exercise of sovereign power<sup>11</sup>

### Cl. (2): 'May make such adaptation'.

By this clause, the President is authorised to adapt existing laws, but the operation of the existing laws is *not conditioned* by the making of adaptations or modifications by the President. Hence, it cannot be contended that an Ordinance made by a Ruler of an Indian State lapsed by reason of the absence of adaptation by the President.<sup>14</sup>

### 'Shall not be questioned in any court of law'.

1. These words preclude an attack on the Adaptation Order on the ground that it does *more than* merely bring the existing law into conformity with the Constitution and is, in consequence, *ultra vires* the power conferred by Art. 372 (2).<sup>15</sup>

2. But they do not protect the Adaptation Order from being challenged on the ground that it contravenes *some other* provision of the Constitution.<sup>15</sup>

### Expl. 1: 'Shall include'.

These words show that the definition in Expl. 1 is not exhaustive<sup>16</sup> Hence, it includes—

(a) An order issued by the Governor General under the Government of India Act, 1935, provided it was a *legislative* as distinguished from an administrative order.<sup>16</sup>

(b) The doctrine of priority of debts due to the State which was a part of the law prior to the commencement of the Constitution and which is not inconsistent with the republican form of Government under the Constitution.<sup>17</sup>

(c) Rules made the High Court in exercise of the powers conferred by the Letters Patent prior to the commencement of the Constitution.<sup>18</sup>

(d) Orders under the Indian Independence Act, 1947, such as the Indian Independence (Legal Proceedings) Order, 1947.<sup>19</sup>

### 'Competent Legislature'.

This means that when the law was passed the Legislature which enacted it had legislative power with respect to the subject matter of the

9. *Madharan v. State of M. B.* A 1961 S.C. 298.

10. *Narsing Pratab v. State of Orissa* A 1964 S.C. 1793 (1799); *State of M. P. v. Rampal*, A 1968 S.C. 820.

11. *Bengal Nagpur Cotton Mills v. Board of Revenue* A 1964 S.C. 888.

12. *State of M. P. v. Raghuendra*, A. 1966 S.C. 704 (707).

13. *Bengal Nagpur Cotton Mills v. Board of Revenue*, (1964) 4 S.C.R. 190 (196). A. 1964 S.C. 888.

14. *Desai v. State of Bombay*, A 1960 S.C. 1312.

15. *Sundaramier v. State of A. P.*, 1958 S.C. 488 (488); (1959) S.C.R. 1422.

16. *Edward Mills v. State of Aimer*, (1955) 1 S.C.R. 735.

17. *B. S. Corporation v. Union of India*, A. 1965 S.C. 1061.

18. *In re Rangnavakulu*, A 1956 Andhra 161 (164) F.B.

19. *N. C. Bose v. Deb*, A. 1956 Cal. 222.

legislation. It does not matter if that Legislature has ceased to have that power under the Constitution, by reason of a redistribution of legislative powers by the Constitution.<sup>20</sup>

### Validity of subordinate legislation issued after the Constitution.

So long as an existing law continues to remain in operation by virtue of Art. 372, the power conferred by such law to make subordinate legislation also continues to remain valid, so that an order or notification may be issued under such law even after the commencement of the Constitution even though the Legislature which enacted the law has lost the power to make a new law relating to the subject.<sup>21</sup>

### 'And not previously repealed'.

The Article has no application to laws which had expired or been repealed prior to 26-1-50.<sup>22</sup>

### 'Notwithstanding.....in particular areas'.

1. The object of Expl. I is to make it clear that an unrepealed enactment of a competent Legislature which was in existence at the commencement of the Constitution will be a law in force within the meaning of Art. 372 (1), even though it has not been brought into force in any part of India or any particular area of India or of the State.<sup>23</sup> If this Explanation had not been inserted, 'law in force' would have included only such laws which were actually in operation at the commencement of the Constitution.<sup>24</sup>

2. It has been held by the Rajasthan High Court<sup>25</sup> that by reason of these words, it was possible for the Rajasthan Government to extend the Police Act, 1861 to Rajasthan even after the commencement of the Constitution, though 'Police' is a State subject under the Constitution while the Police Act is a Central enactment.

**Expl. III.**—This Expl. merely provides that temporary statutes shall have their lives automatically extended by virtue of the provisions of Art. 372 (1). It did not take away the power of Parliament to extend the period of an existing temporary statute if Parliament finds it necessary to do so.<sup>1</sup>

**'372A.** (1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956 into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications to the law, whether by way of repeal or amendment, as may be necessary or expedient and provided that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications contained in and as such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

20. *S. I. Corpn v Bd of Revenue* A 1961 SC 207.

21. *Inder Singh v State of Rajasthan* (1957) SCR 605 (620).

22. *State of U. P. v Jagannada* A 1954 SC 683.

23. *Jotindra v Lala Prasad* A 1956 Pat 496.

24. *Kutti v. State of Madras*, A 1954 Mad 621.

25. *Ran Bahadur v Hemwant* A 1957 Rai 27.

1. *Akhmanvay State of West Bengal* (1951) 55 CWN 693 (696).

2. Inserted by the Constitution (Seventh Amendment) Act, 1956.

### Scope of Art. 372A.

1. This is an additional power to adapt a law, besides the power conferred by Art. 372 (2),<sup>3</sup> which ceased to exist after 1953. By reason of adaptation under the present power, the definition of 'State' in s. 3 (58) of the General Clauses Act, as adapted in 1956, includes 'Union Territories'.<sup>4</sup>

2. For the same reason, the jurisdiction of the members of the Police Force belonging to a Union Territory may be extended to other States, under Entry 80 of List I of Schedule VII.<sup>5</sup>

**373.** *Power of President to make order in respect of persons under preventive detention in certain cases*<sup>6</sup>

**374-378.** *Not reprinted, being transitional provisions having little importance now*

<sup>4</sup>[**378A.** *Notwithstanding anything contained in Art 172, the Legislative Assembly of the State of Andhra Pradesh as constituted under the provisions of sections 28 and 29 of the States Reorganisation Act, 1956, shall, unless sooner dissolved, continue for a period of five years from the date referred to in the said section 29 and no longer and the expiration of the said period shall operate as a dissolution of that Legislative Assembly*]

**379-391.** *Rep. by the Constitution (Seventh Amendment) Act, 1956*

**392. (1)** The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provision of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by article 324, by clause (3) of article 367 and by article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

### Scope of the power to adapt.

The scope of the power conferred upon the President by cl. (1) was very wide and he was competent to make an adaptation, by modifying, adding to, or omitting from, the existing provisions.<sup>7</sup>

3. *Advance Ins. Co v. Gurudasmal*, A. 1970 S.C. 1126

4. This article has ceased to have effect. Hence, not reproduced.

5. Inserted by the Constitution (Seventh Amendment) Act, 1956.

6. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (516).

## PART XXII

## SHORT TITLE, COMMENCEMENT AND REPEALS.

Short title.

393. This Constitution may be called the Constitution of India.

394. This article and articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force  
Commencement.

at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

395. The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments  
Repeals.

amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

## Effect of repeal.

Notwithstanding the repeal of the Government of India Act, 1935 or the Indian Independence Act, 1947, the laws made under the Act of 1935<sup>1</sup> or the Orders made under the Indian Independence Act, 1947, shall continue to be in force by virtue of Art. 372 (1) until

1. *Edward Mills v. State of Bihar*, (1955) 1 S.C.R. 735  
S.C.L.—105 (contd.)



# FIRST SCHEDULE<sup>1</sup>

## [Articles 1 and 4]

### 1. THE STATES

Name	Territories.
1. <i>Andhra Pradesh</i>	<sup>2</sup> The territories specified in sub-section (1) of section 3 of the Andhra State Act, 1953..... sub-section (1) of section 3 of the States Reorganisation Act, 1956, and the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, but excluding the territories specified in the Second Schedule to the last mentioned Act]
2. <i>Assam</i>	The territories which immediately before the commencement of this Constitution were comprised in the province of Assam, the Khasi States and the Jaintia Tribes Areas and the territories referred to in Part I of the First Schedule to the Assam Territories (Merger) Act, 1960 <sup>3</sup> but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951, and the territories specified in sub-section (1) of s. 3 of the State of Nagaland Act, 1962 <sup>4</sup>
3. <i>Bihar</i>	... The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, and the territories specified in clause (a) of sub-section (1) of section 3 of the Bihar and Uttar Pradesh (Alteration

1. Substituted by the Constitution (Seventh Amendment) Act, 1956

2. Substituted by the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, for the former entry, w.e.f. 1.4.56. vide C.S. Vol. 8, p. 1618.

3. Added by the Acquired Territories (Merger) Act, 1960 [vide C.S., Vol. 8, p. 1676].

4. Added by the State of Nagaland Act, 1962



**Name**

**Territories.**

of Boundaries) Act, 1968],<sup>4a</sup> [but excluding the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956]<sup>5</sup> <sup>4a</sup> [and the territories specified in clause (b) of sub-section (1) of section 3 of the first mentioned Act].

<sup>4</sup>4. Gujarat ... The territories referred to in sub-section (1), of section 3 of the Bombay Reorganisation Act, 1960<sup>6</sup>.

5 Kerala .. The territories specified in sub-section (1) of section 5 of the State Reorganisation Act, 1956

6. Madhya Pradesh The territories specified in sub section (1) of section 9 of the States Reorganisation Act, 1956 [and the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1956]<sup>7</sup>

<sup>107</sup>7. Tamil Nadu The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in section 4 of the States Reorganisation Act, 1956,<sup>8</sup> [and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959<sup>9</sup> but excluding the territories specified in sub section (1) of section 3 and sub-section (1) of section 4 of the Andhra State Act, 1953, and <sup>9</sup>[the territories specified in clause (b) of sub-section (1) of section 5, section 6 and clause (d) of sub-section (1) of

<sup>4a</sup>4a. Added by s. 4 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968

5. Added by the Bihar & West Bengal (Transfer of Territories) Act, 1956 [vide C<sub>2</sub>, Vol. 8, p. 1565].

6. Substituted by the Bombay Reorganisation Act (11 of 1960), w.e.f. 1-5-60.

7. Added by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1956.

8. Substituted by the Constitution (Seventh Amendment) Act, 1956.

9. Added by the Andhra Pradesh & Madras (Alteration of Boundaries) Act, 1959, w.e.f. 1-4-60 (vide C<sub>2</sub>, Vol. 8, p. 1802).

*Names*

*Territories.*

*section 7 of the States Reorganisation Act, 1956, and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.<sup>10</sup>*

- <sup>11</sup>[8. *Maharashtra* ... *The territories specified in sub-section (1) of section 8 of the States Reorganisation Act, 1956, but excluding the territories referred to in sub sec. (1) of section 3 of the Bombay Reorganisation Act 1960]* <sup>11</sup>
9. *Mysore* ... *The territories specified in sub-section (1) of section 7 of the States Reorganisation Act, 1956* <sup>12</sup>
10. *Orissa* .. *The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province* <sup>13</sup>
- 11 *Punjab* ... *The territories specified in section 11 of the States Reorganisation Act, 1956<sup>14</sup> [and the territories referred to in Part II of the First Schedule to the Acquired Territories (Merger) Act 1960] <sup>14</sup>[but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960] and the territories specified in section (1) of section 3, section 4 and sub-section (1) of section 5 of the Punjab Reorganisation Act, 1966]* <sup>15</sup>
- 12 *Rajasthan* ... *The territories specified in section 10 of the States Reorganisation Act, 1956<sup>16</sup> [but excluding the territories specified in the First Schedule to the Rajasthan and Madhya*

<sup>10</sup> The name of 'Madras' has been changed to 'Tamil Nadu, by the Madras State (Alteration of Name) Act, 1968, w. e. f. 14-1-69.

<sup>11</sup> Inserted by the Bombay Reorganisation Act, 1960, w. e. f. 1-5-60 [vide C<sub>5</sub>, Vol. 8 p. 1680.

<sup>12</sup> Substituted by the Constitution (Seventh Amendment), Act, 1956.

<sup>13</sup> Inserted by the Acquired Territories (Merger) Act, 1960 [vide C<sub>5</sub>, Vol. 8, P 1675].

<sup>14</sup> Added by the Constitution (Ninth Amendment) Act, 1960

<sup>15</sup> Added by s. 7 of the Punjab Reorganisation Act, 1966.

*Name**Territories.*

*Pradesh (Transfer of Territories) Act, 1959*.<sup>1a</sup>

13. *Uttar Pradesh* ... The territories which immediately before the commencement of this Constitution were either comprised in the Provinces or were being administered as if they formed part of that Province<sup>1aa</sup> and the territories specified in clause (b) of sub-section (1) of section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in clause (a) of sub-section (1) of section 3 of that Act].
14. *West Bengal* The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of section 2 of the Chandernagore (Merger), Act, 1954<sup>17</sup> [and also the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956],<sup>18</sup> [and the territories referred to in Part II of the First Schedule of the Acquired Territories (Merger) Act, 1960].<sup>19</sup>
15. *Jammu and Kashmir* The territories which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.
- <sup>1a</sup>16. *Nagaland* .. The territories specified in sub-sec (1) of s. 8 of the State of Nagaland Act, 1962.
17. *Haryana* The territories specified in sub-section (1) of section 3 of the Punjab Reorganisation Act, 1966.<sup>20</sup>

1a. Added by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.

1aa. Added by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968

17. vide O., Vol. 8, P. 1510.

18. Added by the Bihar and West Bengal (Transfer of Territories) Act, 1956 [vide O., vol. 6, P. 145]

19. Added by the Acquired Territories (Merger) Act, 1960 [vide O., Vol. 8, P. 1678].

20a. Inserted by the State of Nagaland Act, 1962.

20. Added by s. 5 of the Punjab Reorganisation Act, 1966.

## II. THE UNION TERRITORIES.

<i>Name</i>	<i>Extent</i>
1. <i>Delhi</i>	<i>The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi</i>
2. <i>Himachal Pradesh</i>	<i>The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioner's Provinces under the names of Himachal Pradesh and Bilaspur [and the territories specified in sub-section (1) of section 5 of the Punjab Reorganisation Act, 1966]<sup>a</sup></i>
3. <i>Manipur</i>	<i>The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur</i>
4. <i>Tripura</i>	<i>The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura</i>
5. <i>The Andaman and Nicobar Islands</i>	<i>The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands</i>
6. <i>The Laccadive, Minicoy and Amindivi Islands</i>	<i>The territory specified in section 6 of the States Reorganisation Act, 1956</i>
7. <i>Dadra and Nagar Haveli</i>	<i>The territory which immediately before the eleventh day of August, 1961, was comprised in the Dadra and Nagar Haveli<sup>b</sup></i>
8. <i>Goa, Daman and Diu</i>	<i>The territories which immediately before the twentieth day of December, 1961, were comprised in Goa, Daman and Diu<sup>c</sup></i>

<sup>a</sup> Added by s. 7 of the Punjab Reorganisation Act, 1966 (18 of 1966) s. 7 (w.e.f. 1-11-1966)  
<sup>b</sup> Inserted by the Constitution (Tenth Amendment) Act, 1961, with effect from 11.8.61.  
<sup>c</sup> Inserted by the Constitution (Twelfth Amendment) Act, 1961, with effect from 30-12-61.

9. *Pondicherry*      *The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam*<sup>11</sup>
- <sup>12</sup>10. *Chandigarh*      *The territories specified in section 4 of the Punjab Reorganisation Act, 1966*<sup>12</sup>

## SECOND SCHEDULE

Articles 59(3), 65(3), 75(6), 79, 125, 148(3),  
158(3), 164(5), 186 and 221)

### PART A

PROVISIONS AS TO THE PRESIDENT AND THE GOVERNORS OF STATES.<sup>13-15</sup>

1. There shall be paid to the President and to the Governors of the States . . the following emoluments per mensem, that is to say :—

The President	10,000 rupees
The Governor of a State	5,500 rupees

2. There shall also be paid to the President and to the Governors of the States \* \* 'such allowances as were payable respectively to the Governor-General of the dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of the *States* through-out their respective terms of office shall be entitled to the same privileges to which the Governor-General and Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of or is acting as, President, or any

11. Inserted by the Constitution (Fourteenth Amendment) Act, 1963, with effect from 28-12-63.

12. Inserted by the Punjab Reorganisation Act, 1966, w.e.f. 1-11-66.

13. Inserted by the Constitution (Tenth Amendment) Act, 1961.

14. Inserted by the Constitution (Twelfth Amendment) Act, 1962.

15. Inserted by the Constitution (Fourteenth Amendment) Act, 1963.

1. Omitted by the Constitution (Seventh Amendment) Act, 1956.

person is discharging the functions of the Governor, he shall be entitled to the same emoluments allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

## PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY \* \* \* AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF LEGISLATIVE COUNCIL OF A STATE.

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were payable to the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly \* and to the Chairman and the Deputy Chairman of the Legislative Council of a State such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

## PART D

PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS. \* \* \*

2. Part B omitted by *ibid*
3. Omitted by *ibid*.
4. Omitted by *ibid*.

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice	...	...	5,000 rupees
Any other Judge	...	...	4,000 rupees

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity\*

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Justice) of the Supreme Court under the said clause,

during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the the case may be, entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he has drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The right in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. (1) *There shall be paid to the Judges of High Courts, in respect of time spent on actual service, salary at the following rates per mensem, that is to say,—*

<i>The Chief Justice</i>	<i>3,500 rupees</i>
<i>Any other Judge</i>	<i>4,000 rupees</i>

*Provided that if a Judge of a High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced —*

- (a) *by the amount of that pension, and*
- (b) *if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and*
- (c) *if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity,*

(2) Every person who immediately before the commencement of this Constitution.—

- (a) *was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the Corresponding State under clause (1) of article 376, or*
- (b) *was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause,*

*shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.*

(3) *Any person who, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, was holding office as the Chief Justice of the High Court of a State specified in Part B of the First Schedule and has on such commencement become the Chief Justice of the High Court*

6. Substituted by the Constitution (Seventh Amendment) Act, 1956.

7. Substituted for paras. (3) and (4), by the Constitution (Seventh Amendment), Act, 1956.



of a State specified in the said Schedule as amended by the said Act shall, if he was immediately before such commencement drawing any amount as allowance in addition to his salary,<sup>8</sup> be entitled to receive in respect of time spent on actual service as such Chief Justice, the same amount as allowance in addition to the salary specified in sub-paragraph (1) of this paragraph.

11. In this Part, unless the context otherwise requires,—

- (a) the expression “Chief Justice” includes an acting Chief Justice, and a “Judge” including an *ad hoc* Judge ;
- (b) “actual service” includes—
  - (i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of President undertake to discharge ;
  - (ii) vacations, excluding any time during which the Judge is absent on leave ; and
  - (iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

**Amendment**—The amendments, indicated by italics, have been made by the Constitution ( Seventh Amendment ) Act, 1956.

(i) The Proviso to Para. 1 has been added by the Constitution ( Seventh Amendment ) Act, 1956, with the following object—

“Sometimes it becomes necessary to appoint a retired district judge as a judge of a High Court. In the absence of a legal provision for withholding the pension due to such a judge, it has been the practice to obtain from him an undertaking that he would not claim the pension for the period for which he serves as a High Court judge. Since this is obviously unsatisfactory, it is proposed to add a proviso to paragraph 10 (i) of the Second Schedule on the same lines as the proviso to paragraph 9 (i) thereof regulating the salary of a judge of the Supreme Court in similar circumstances.”

(ii) The original cls (3) and (4) have been substituted by the now cl. (3). The original clauses, relating to travelling allowances and leave of absence, are no longer necessary as provision for these matters has now been made by the High Court Judges ( Conditions of Service ) Act, 1954.

## PART E

### PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the controller and Auditor-General of India under article 377 shall in addition to the salary specified in sub-paragraph (1) be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be

<sup>8</sup> For the pension of a pre-Constitution Judge, see *B. Malvi v. Union of India*, A 1970 All. 368 (F. B.)

9. Statement of Objects and Reasons.

governed or shall continue to be governed as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this constitution and all references in those provisions to the Governor-General shall be construed as references to the President.

### THIRD SCHEDULE

[Articles 75(4), 99, 124(6), 148(2), 188 and 219]

#### Forms of Oaths or Affirmations

##### I

Form of Oath of Office for a Minister for the Union :—

"I, A.B., do <sup>swear in the name of God</sup> <sup>solemnly affirm</sup> that I will bear true faith and allegiance to the Constitution of India as by law established, *that I will uphold the sovereignty and integrity of India,*<sup>1</sup> that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and law, without fear or favour, affection or illwill."

##### II

Form of oath of secrecy for a Minister for the Union :—

"I, A.B., do <sup>swear in the name of God</sup> <sup>solemnly affirm</sup> that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

##### III

##### A

*Form of oath or affirmation to be made by a candidate for election to Parliament.*

"I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do <sup>swear in the name of God</sup> <sup>solemnly affirm</sup> that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

##### B

*Form of oath of affirmation to be made by a member of Parliament :—*

"I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do <sup>swear in the name of God</sup> <sup>solemnly affirm</sup> that I will bear true faith and allegiance to the Constitution of India as by law established, that I

1. Added by the Constitution (Sixteenth Amendment) Act, 1968.

2. Substituted by *ibid.*

*will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter".*

## IV

**Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India :—**

"I, A.B., having been appointed Chief-Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, *that I will uphold the sovereignty and integrity of India,*<sup>3</sup> that I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

## V

**Form of oath of office for a Minister for a State :**

"I, A.B. do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, *that I will uphold the sovereignty and integrity of India,*<sup>3</sup> that I will faithfully and conscientiously discharge my duties as a Minister for the State of ..... and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

## VI

**Form of oath of secrecy for a Minister for a State :—**

"I, A.B., do swear in the name of God solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a minister for the State of.....except as may be required for the due discharge of my duties as such Minister."

## VII

## A

**Form<sup>4</sup> of oath or affirmation to be made by a candidate for election to the Legislature of a State :—**

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

3. Added by the Constitution (Sixteenth Amendment) Act, 1963.

4. Substituted by the Constitution (Sixteenth Amendment) Act, 1963.

5. If the essential requirement of art. 173, read with their form are complied, a mere misprint in the form or inaccuracy in translation thereof not render the election invalid (*Sharma v. Shanoodia*, A 1970 SC 765 (767)).

## B

*Form<sup>a</sup> of oath or affirmation to be made by a member of the Legislature of State :—*

*"I, A. B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."*

## VIII

*Form of oath or affirmation to be made by the Judges of a High Court :—*

*"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of) do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India,<sup>a</sup> that I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws."*

FOURTH SCHEDULE<sup>1</sup>

[Articles 4 (1) and 80 (2)]

## Allocation of seats in the Council of States

To each State or Union territory specified in the first column of the following table, there shall be allotted the number of seats specified in the second column thereof opposite to that State or that Union territory<sup>1</sup>, as the case may be.

TABLE<sup>1</sup>

1. Andhra Pradesh	...	...	...	16
2. Assam	...	...	...	7
3. Bihar	...	..	...	22
4. Gujarat	...	...	...	11 <sup>a</sup>
5. Haryana <sup>2</sup>	...	...	...	5
<sup>3</sup> 6. Kerala	...	...	...	9
7. Madhya Pradesh	...	...	...	16
8. Madras	...	...	...	18 <sup>4</sup>
9. Maharashtra	...	...	...	19 <sup>5</sup>
10. Mysore	...	...	...	12 <sup>6</sup>
11. Orissa	...	..	...	10

<sup>6</sup> Added by the Constitution (Sixteenth Amendment) Act, 1963.

<sup>1</sup> Substituted by the Constitution (Seventh Amendment) Act, 1956.

<sup>2</sup> Substituted by the Bombay Reorganisation Act, 1960.

<sup>3</sup> Ins. by the Punjab Reorganisation Act, 1966 (81 of 1966), Sec. 9 (w.e.f. 1-11-66).

<sup>4</sup> Substituted by the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.

<sup>5</sup> Entries 5 to 21, renumbered as entries 6 to 22, by Section 9, *ibid* (w.e.f. 1-11-66).

12. Punjab	...	...	...	7 <sup>7</sup>
13. Rajasthan	...	...	...	10
14. Uttar Pradesh	...	...	...	34
15. West Bengal	...	...	...	16
16. Jammu and Kashmir	...	...	...	4
17. Nagaland	...	...	...	1 <sup>6</sup>
18. Delhi	...	...	...	6
19. Himachal Pradesh	...	...	...	3
20. Manipur	...	...	...	1
21. Tripura	...	...	...	1
22. Pondicherry	...	...	...	1 <sup>6</sup>
TOTAL ...				228 <sup>a</sup>

## FIFTH SCHEDULE

[Article 244 (1)]

Provisions as to the Administration and Control of Scheduled Areas,  
and Scheduled Tribes

### PART A

#### GILIRLA

#### Administration of Scheduled Areas and Tribes (other than in Assam).

While the Sixth Schedule deals with the administration of the Tribal Areas in Assam ( see Table A & B appended to paragraph 20 of that Schedule, *post* ), the Fifth Schedule deals with the administration of *other* Scheduled Areas and Tribes ( as enumerated under paragraph 6 of the Fifth Schedule ). Thus, the Fifth Schedule is applicable to the Godavari Agency in Madras.<sup>1</sup>

Roughly speaking the Fifth Schedule corresponds to the 'Excluded Areas and Partially Excluded Areas',<sup>2</sup> as referred to in secs. 91-12 of the Government of India Act, 1935 and the Government of India ( Excluded and Partially Excluded Areas ) Order, 1936 ( minus the Areas of Assam, which are included in the Sixth Schedule ) The reasons why special provisions have been made for these Areas and Tribes are that they are culturally backward, and that their social and other customs are different from the rest of India.<sup>3</sup>

The Scheduled Areas are determined by the President by an Order and such Order may be amended by the President from time to time except that he cannot alter an Order made under sub-paragraph 1 of para. 6 except as laid down in cls. (a), (b) and (c) of the second sub-paragraph.

<sup>6</sup> Inserted by the State of Nagaland, 1962.

<sup>7</sup> Inserted by the Constitution (Fourteenth Amendment) Act, 1962.

<sup>8</sup> Substituted by the Punjab Reorganisation Act, 1966).

<sup>1</sup> *Venkata v State of A. P.*, A. 1967 S.O. 71 (77).

<sup>2</sup> See Constituent Assembly Debates, Vol. VII, Appx. C and D, pp. 101-9, 157.

Any amendment of the Schedule must be made by Parliament.<sup>1</sup>

For the enumeration of Scheduled Tribes, we have to refer to the Order of the President made under Art. 312, such as the Constitution (Scheduled Tribes) Order, 1950.

The system of administration provided for the Scheduled Areas and Tribes may be summarised as follows :

The executive power of the Union shall extend to giving directives to the States regarding the administration of the Scheduled Areas.<sup>2</sup> Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor.<sup>3</sup>

The Governor is authorised to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor is also authorized to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land, and regulate the business of money-lending. All such regulations made by the Governor or Ruler must have the assent of the President.<sup>4</sup>

In short, under Sch. V, the Governor is the sole legislature for the Scheduled Areas and Tribes to which this Schedule applies. He makes Regulations after consulting the Tribes Advisory Council and submits them to the President for the latter's assent.<sup>4</sup>

1. In this Schedule, unless the context otherwise requires, the expression "State"<sup>5</sup>.....does not include the State of Assam.

Executive power of a State in Scheduled Areas.

2. Subject to the provisions of this Schedule, the Executive Power of a State extends to the Scheduled Areas therein.

Report by the Governor to the President regarding the administration of Scheduled Areas.

3. The Governor<sup>6</sup>...of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

## PART B

### ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. (1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty

1. *Edwards v. State of Assam*, (1960) 1 SCA 895 (414) ; A 1966 SC 1220.

2. Para. 2.

3. Para. 4.

4. Part. 5

5. The words 'means ..but' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

6. The words 'or Rajpramukh' omitted by the Constitution (Seventh Amendment) Act, 1956.

members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State :

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor ..<sup>6</sup>

(3) The Governor...<sup>6</sup> may make rules prescribing or regulating, as the case may be,—

- (a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof ;
- (b) the conduct of its meetings and its procedure in general ; and
- (c) all other incidental matters.

5. (1) Notwithstanding anything in this Constitution, the Governor...<sup>6</sup> may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor...<sup>6</sup> may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area ;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such area ;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor ...<sup>6</sup> may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

CL. (1) : Law applicable.

Acts of Parliament or of the appropriate Legislature apply to the Scheduled Areas of their own force, but the Governor has the power to exclude their operation by a notification. In the absence of such a notification, therefore, the Acts of the Legislature shall extend to such areas.<sup>7</sup>

The words 'subject to exceptions and modifications' confer a power to amend.<sup>8</sup>

<sup>7</sup> *Jaiendra v. Lal Prasad*, A 1959 Pat. 400.

<sup>8</sup> *Edgington v. State of Assam*, (1955) 1 BCL 295 (414).

The power of making a notification under the present Clause is a *legislative* power, and, in making a notification, the Governor is competent to change the whole aspect of an Act or Section referred to in the notification <sup>11</sup>

**Cl. (2) : Scope of Governor's power to make Regulations.**

While Cl (1) gives the Governor the power of merely *applying* or modifying the application of Acts made by Parliament or the State Legislature, Cl. (2) confers powers of *independent* legislation of great width. He is given plenary power of legislation concerning these Areas by framing regulations 'for the peace and good government' of such Area. He is the sole judge to decide whether the Regulation is required for the peace and good government of the Area in question. There is no doubt that the Governor has under the present Clause the power of retrospective legislation just as the State Legislature possesses <sup>12</sup>. Again, the extent of the present power of the Governor is *not* restricted to any particular Entries or Entries of the Legislative Lists in the 7th Schedule. The plenary nature and extent of this power is illustrated by Cl (3) which says that in making any such Regulation, the Governor may override (repeal or amend) any Act of Parliament or of the State Legislature so far as its application to that Area is concerned. So the power of the Governor to make Regulations, extends to all the three Lists of the 7th Schedule <sup>13-15</sup>

The power 'to apply laws' under the Clause is a plenary legislative power and the Regulations made in exercise of this power are not to be instances of delegated or conditional legislation <sup>14</sup>

The only limitations to the exercise of this plenary power are contained in Paras 4 and 5 viz., that they must be (i) made on previous consultation of the Tribes Advisory Council where there is such a Council, and (ii) submitted to and assented to by the President <sup>15</sup>

(5) No regulation shall be made under this paragraph unless the Governor ....<sup>6</sup> making the regulation has in the case where there is a Tribes Advisory Council for the State consulted such Council.

PART C

SCHEDULED AREAS

6. (1) In this Constitution the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

- (a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area ;
- (b) alter, but only by way of rectification of boundaries, any Scheduled Area ;
- (c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area ;

and any such order may contain such incidental and consequential provisions<sup>9</sup> as appear to the President to be necessary and proper, but save as aforesaid,

11. *Ohhaturam v Commr of I T.* (1947) F L J 92.

12. *Venkata v State of A P.* A. 1967 S C 71 (74)

13. *Jatindra v Province of Bihar*, (1949) F L J 228 (238)

14. *Ram Karpal v State of Bihar*, A. 1970 S C 951 (958).



the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

## PART D

### AMENDMENT OF THE SCHEDULE

7. (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

Amendment of the  
Schedule.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of of Article 368.

## SIXTH SCHEDULE

[Articles 244 (2) and 275 (1)]

### Provisions as to the Administration of Tribal Areas in Assam

#### Administration of Tribal Areas in Assam.

There are two Parts in the Table appended to this Schedule. The Areas in Part A shall be an 'autonomous district' by virtue of the Constitution,<sup>1</sup> and the provisions in Paras. 1-17 relate to the Administration of these Autonomous districts, —the word 'autonomous' indicating a right of self-government.<sup>2</sup>

The Areas included in Part B, on the other hand, shall, in the first instance, be governed by the Governor of Assam acting in his discretion, as the agent of the President.<sup>3</sup> But by notification issued [under Cl. (1) of Para 18] by the Governor, with the previous approval of the President, the provisions of Paras. 1-17 relating to autonomous districts may be applied in whole or in part to any Area included in Part B.<sup>4</sup>

The Areas included in Part A are not outside the *executive authority* of the Government of Assam but provision is made for the creation of District Councils and Regional Councils. Again, barring such functions as law-making in certain specified fields, such as management of any forest other than a reserved forest, inheritance of property, marriage and social customs<sup>5</sup> and certain judicial functions<sup>6</sup> which are to be exercised by the District or Regional Councils. The authority of Parliament as well as that of the Assam Legislature extends over these Areas, under the general provisions of Art. 245 (1) unless the Governor, by notification, directs to the contrary.<sup>7</sup> All such

1. Para. 1 (1).

2. *Edgington v State of Assam*, (1966) 1 SCA 695 (416).

3. Para. 18 (2)-(3).

4. Para. 18 (1).

5. Para. 3: 12 (a). As regards the matters enumerated in Para. 3, Acts of Parliament or of the Assam Legislature shall not apply to these Areas, unless the District Council, by notification, so directs.

6. Para. 4.

7. Para. 18 (b).

laws made by these Councils, are to have no effect, unless assented to by the Governor.<sup>8</sup> The jurisdiction of the Supreme Court and the High Court over such Regional Tribunals is not barred, but the High Court's power to entertain suits and cases as are mentioned in paragraph 4 (2), is subjected to regulation by Order of the Governor.<sup>9</sup>

1. (1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedules shall be an autonomous district.

Autonomous districts  
and autonomous re-  
gions.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

- (a) include any area in Part A of the said table,
- (b) exclude any area from Part A of the said table,
- (c) create a new autonomous district,
- (d) increase the area of any autonomous district,
- (e) diminish the area of any autonomous district,
- (f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,
- (ff) alter the name of any autonomous district,<sup>10</sup>
- (g) define the boundaries of any autonomous district :

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the Report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

#### Para. 1(1).

This sub-paragraph means that the Tribal Areas in the State of Assam are as specified in Part A of the Table appended to Part 20 of Sch. VI, and that each of these Areas shall be an autonomous district, subject to this that if the Governor makes any change in exercise of his powers under Para. 1 (3), those changes will have to be read into the relevant item of Part A of the Table.<sup>11</sup>

#### Para. 1 (3)

This sub-paragraph means that the Governor has the power to issue a notification for the purpose of bringing about any of the results enumerated in Cls (a) to (g). The Provision says down that before the Governor exercises his power under any of the four (a) to (f) of para 1(3), he has to appoint a Commission under para. 14 (1) and consider its report.<sup>11</sup>

By this sub-paragraph, the Constitution has delegated to the Governor a part of the power conferred on Parliament itself by para. 21. Hence, once the Governor issues a notification in exercise of this power, it takes effect without any legislation by Parliament providing for the creation of an autonomous district.<sup>11</sup>

The exercise of the powers conferred by Cl(3) by the Governor is not dependent upon the sanction of legislation by Parliament under paragraph

8. Para. 18 (8).

9. Para. 4 (8).

10. Inserted by Assam Reorganisation (Meghalaya) Act, 1969.

11. *Edgington vs State of Assam*, (1966) 1 SOA 385 (403-3) : A 1966 S.C. 1220.

21; <sup>11</sup> but, because of para. 20 (1), such legislation may be required to implement an order made under.

### Creation of new district.

Cls. (a) and (e) of Para. 1(3) empower the Governor to create a new autonomous district by dividing an existing district. If the procedure prescribed by the Provision is followed for such creation, no Parliamentary confirmation is required and the validity of the Governor's notification in this behalf cannot be challenged.<sup>11</sup>

Constitution of District Councils and Regional Councils.

2. (1) There shall be a District Council for each autonomous district consisting of not more than twenty-four members, of whom not less than three-fourths shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of "the District Council of (*name of district*)" and "the Regional Council of (*name of region*)", shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

- (a) the composition of the District Councils and Regional Councils and the allocation of seats therein ;
- (b) the delimitation of territorial constituencies for the purpose of elections to those Councils ;
- (c) the qualifications for voting at such elections and the preparation of electoral rolls therefor ;
- (d) the qualifications for being elected at such elections as members of such Councils ;
- (e) the term of office of members of such Councils ;
- (f) any other matter relating to or connected with elections or nominations to such Councils ;
- (g) the procedure and the conduct of business including the<sup>12</sup> power to act notwithstanding any vacancy in the District and Regional Councils ;
- (h) the appointment of officers and staff of the District or the Regional Councils.

<sup>11</sup>(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after the general elections to the Council, unless the District Council is sooner

dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor

*Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate*

*Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term for which the member whom he replaces.<sup>12</sup>*

(7) The District or the Regional Council may after its first constitution make rules with the approval of the Governor<sup>12</sup> with regard to the matters specified in sub-paragraph (b) of this paragraph and may also make rules with like approval<sup>12</sup> regarding—

- (a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and
- (b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be :

**Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in each such Council.**

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### District Council.

The District Council is not a representative body as a legislative body. Further, as the limited powers and functions were vested in the Governor by part 19 of the District Councils were constituted. The Governor framed Rules and orders (in 1947) created the Assam Autonomous District Constitution of District Councils. The Rules provide *inter alia* for an Executive Committee with a Chief Executive Member as the head and two other members to exercise the executive functions of the District Council. The Rules also specify the matters which are excepted from the purview of the Executive Committee though in an emergency the Executive Committee of some of the autonomous districts is authorised to take such action with respect to excepted matters as might be necessary, but every such case has to be laid before the District Council at its next session. In pursuance of these Rules, the District Council for the District came into being from June, 1952.

The extent of autonomy of a District Council may be summarised as follows—

“The laws made by Parliament or the Legislature of the State do not run automatically in these areas. The laws are either made by the District Councils or are applied by them. The administration of justice is achieved by the District and Regional Councils through their own agencies except that in serious offences the Governor has to decide whether to invest the Councils and the courts set up by the Councils with jurisdiction to try them. The Councils enjoy the powers of taxation and establishing of institutions mentioned in paragraph 6. They have their own funds. Some actions of the District or Regional Councils are capable of being annulled by the Governor who may even dissolve the Councils. There is complete

12. The second proviso has been omitted by the Assam Reorganisation (Meghalaya) Act, 1969.

autonomy as far as the powers and jurisdiction of the Councils go. A check is supplied by the Governor and the Legislature of the State comes into picture only when the Governor takes action against the Councils to revoke their acts or resolutions or dissolves them and takes over the administration himself."<sup>14</sup>

The District Council is not, however, a part of the governmental machinery of the State of Assam. Hence, persons appointed by the District Council are not employees under the State.<sup>15</sup>

#### Sub-para. (4) : Administrative powers of the District Council.

The District Council is both an administrative and legislative body. Under this sub-paragraph, the District Council shall have all such executive powers as are necessary for the purposes of the administration of the district. Though para. 3 empowers the District Council to exercise legislative powers, it does not mean that until such laws were passed, the Council could not exercise any administrative powers. Thus, under para. 3 (1) (g), the Council has the power to make laws relating to the appointment or removal of Chiefs or Headmen. But until such laws were made, there was nothing to prevent the Council to appoint or remove a Chief in exercise of its executive power.<sup>16</sup>

Hence, even prior to the enactment of the Union Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959, the District Council had jurisdiction to appoint a Myntri (headman) and to remove him, even though he had been elected prior to the commencement of that Act.<sup>17</sup>

#### Sub-para. (6) : Rules made by the Governor.

Under this power, the Governor made the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951. These Rules provide, *inter alia*, for an Executive Committee with the chief Executive Member as the head and two other Members to exercise the executive functions of the District Council. The District Council for the United Khasi-Jaintia Hills District was constituted with effect from June, 1952.<sup>18</sup>

### 3. (1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have

Powers of the District Councils and Regional Councils to make laws.

power to make laws with respect to—

- (a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town :

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of Assam in accordance with the law for the time being in force authorising such acquisition ;

- (b) the management of any forest not being a reserved forest ;
- (c) the use of any canal or water-course for the purpose of agriculture ;

14. *Edgington v. State of Assam*, (1936) I B.O.A. 593 (417).

15. *Abdul v. Gajo Hills District*, A. 1961 Assam 69 (70).

16. *Gajee v. Jormanik*, A. 1961 S. O. 278 (379).

17. *Prallishan v. Dist. Council*, A. 1959 A. & N. 189.

- (d) the regulation of the practice of *jhum* or other forms of shifting cultivation ;
- (e) the establishment of village or town committees or councils and their powers ;
- (f) any other matter relating to village or town administration, including village or town police and public health and sanitation ;
- (g) the appointment or succession of Chiefs or Headmen ;
- (h) the inheritance of property ;
- (i) marriage and divorce<sup>18</sup> ;
- (j) social customs.

(2) In this paragraph a "reserved forest" means any area which is a reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

#### Scope of para. 3(1).

Para. 3 (1) is something like a legislative list and enumerates the subjects on which the District Council is competent to make laws ; but it does not follow from this that the District Council cannot exercise its administrative powers conferred by para 2(4) unless there is first a law to that effect. Under para. 2(4), the District Council is competent to exercise any of the executive powers as are necessary for the purposes of administration of the District Council, for example, the appointment or removal of a Chief or Headman even though no law has been passed under para 3(g). Of course, when Regulations are made under para 19(1b), or laws passed under para. 3(1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the regulations so made or the laws so passed.<sup>19</sup> The United Khasi Jaintia Hills Autonomous District (Appointment & Succession of Chief and Headmen) Act, 1959 is such a law passed under para 3(1)g, which came into force in October, 1959.<sup>20</sup>

The District Council has no power to legislate on transfer of land.<sup>20</sup>

4. (1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas other than suits and cases to which the provisions of subparagraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village Councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional

18. Changes made by the Assam Reorganisation (Meghalaya) Act, 1969.

19. *Cajee v. Siem*, A. 1961 B. C. 276 (282).

20. *Sitlipon v. Dist. Council*, A. 1968 A. & N. 48 (47).

Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

- (a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph ;
- (b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph ;
- (c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph ;
- (d) the enforcement of decisions and orders of such Councils and courts ;
- (e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

<sup>21</sup>(5) On and from such date as the President may, after consulting the Government of Assam or, as the case may be, the Government of Meghalaya, by notification appoint in this behalf, this paragraph shall have effect in relation to such autonomous district or region as may be specified in the notification, as if—

(i) in sub paragraph (1), for the words "between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub paragraph (1) of paragraph 5 of this Schedule apply", the words "not being suits and cases of the nature referred to in sub-paragraph (1) of paragraph 5 of this Schedule, which the Governor may specify in this behalf", had been substituted ,

(ii) sub-paragraph (2) and (3) had been omitted ,

(iii) in sub-paragraph (4)—

(a) for the words "A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating," the words "The Governor may make rules regulating" had been substituted , and

(b) for clause (c), the following clause had been substituted, namely :—

(c) the transfer of appeals and other proceedings pending before the Regional or District Council or any court constituted by such Council immediately before the date appointed by the President under sub-paragraph (5) ; and

(d) in clause (e), for the words, brackets and figures "sub-paragraphs (1) and (2)," the words, brackets and figure "sub-paragraph (1)" had been substituted.<sup>22</sup>

21. Sub para. (5) was inserted by the Assam Reorganisation (Meghalaya) Act, 1950.

5. (1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

<sup>22</sup>(4) On and from the date appointed by the President under sub-paragraph (5) of paragraph 4 in relation to any autonomous district or autonomous region, nothing contained in this paragraph shall, in its application to that district or region, be deemed to authorise the Governor to confer on the District Council or Regional Council or on courts constituted by the District Council any of the powers referred to in sub-paragraph (1) of this paragraph.<sup>22</sup>

#### Criminal Procedure in the Autonomous regions.

In 1953, the District Council, with the previous approval of the Governor of Assam, under sub para 11, framed the Garo Hills Autonomous District (Administration of Justice) Rules, 1953. These Rules provide for the constitution of Village Courts and also lay down the powers of the District Council. Subordinate District Council and the Village Courts. R 24 also provides that till the Governor confers the power to try suits or cases referred to in r 23 on the Subordinate District Council Courts, the existing Courts which include the Court of a Deputy Commissioner, will continue to try such cases.<sup>23</sup>

6. *Powers of the District Council to establish primary schools, etc —*(1) The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport<sup>24</sup> and water ways in the district and may, with the previous approval of the Governor, make regulations for the regulation and control thereof<sup>24</sup> and, in particular, may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

(2) The Governor may, with the consent of any District Council entrust either conditionally or unconditionally to that Council or its officers functions in relation to agriculture, animal husbandry, community projects, co-operative societies, social welfare, village planning or any other matter to which the

<sup>22</sup> Sub-paragraph (4) was inserted by the Assam Reorganisation (Meghalaya) Act, 1969.

<sup>23</sup> *Jogendra v. State*, A. 1962 Assam 62 (64)



*executive power of the State of Assam or Meghalaya, as the case may be, extends.<sup>24</sup>*

7. (1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

(2) *The Governor may make<sup>24</sup> rules for the management of the District Fund or, as the case may be, the Regional Fund, and the rules so made may prescribe the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.*

(3) *The accounts of the District Council or, as the case may be, the Regional Council shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.*

(4) *The Comptroller and Auditor-General shall cause the accounts of the District and Regional Councils to be audited in such manner as he may think fit, and the reports of the Comptroller and Auditor General relating to such accounts shall be submitted to the Governor who shall cause them to be laid before the Council<sup>24</sup>*

8. (1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

- (a) taxes on professions, trades, callings and employments ;
- (b) taxes on animals, vehicles and boats ;
- (c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries ; and
- (d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraph (2) and (3) of this paragraph and every such regulation shall be submitted forthwith to the Governor, and until assented to by him, shall have no effect.<sup>24</sup>

<sup>24</sup>. Changes made by the Assam Reorganisation (Meghalaya) Act, 1969.

**Power to levy taxes.**

The power to levy taxes and land revenues in the areas coming under the Sixth Schedule is exclusively vested in the Regional and District Councils. Hence, after the commencement of the Constitution, the Lyngdoh has no power to levy any tax or fee.<sup>25</sup>

9. (1) Such share of the royalties accruing each year from licences or leaves for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

Licences or leases for the purpose of prospecting for, or extraction of, minerals.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

Power of District Council to make regulations for the control of money-lending and trading by non tribals.

10. (1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of moneylending ;
- (b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender ;
- (c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council ;
- (d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council :

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council :

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor, and, until assented to by him, shall have no effect.

11. All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

Publication of laws, rules and regulations made under the Schedule.

<sup>25</sup>. *Nongdoh v. Durbar of the Lyngdoh*, A. 1958 Assam 88.

Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.

## 12. (1) Notwithstanding anything in the Constitution—

- (a) no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit ;
  - (b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State of which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.
- (2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

### Application of Union and State Laws.

No Act of the Legislature of the State in respect of which the District or Regional Councils have power to make law shall apply unless the District Council by public notification directs and the District Council can in so applying the law make any exceptions or modification it thinks fit. In respect of any other law made by Parliament or the Legislature of the State the Governor shall determine whether it shall not apply to the autonomous districts or regions and, if so, the Governor may make such exceptions or modifications as he may notify with or without retrospective effect.<sup>1</sup>

### "12A. Notwithstanding anything contained in paragraph 12,—

(a) if any provision of a law made by a District or Regional Council in Meghalaya with respect to any of the matters specified in clause (b) or clause (c) of sub-paragraph (1) of paragraph 3 of this Schedule is repugnant to any provision of a law made by the Legislature of the State of Assam with respect to any project declared by the Legislature of that State to be of State importance, then, the law made by the District Council or, as the case may be, the Regional Council, whether made before or after the law made by the Legislature of the State of Assam, shall to the extent of the repugnancy, be void and the law made by the Legislature of the State of Assam shall prevail;

(b) if any provision of a law made by a District or Regional Council in Meghalaya with respect to any of the matters specified in clause (b) or clause (c) or clause (f) of sub-paragraph (1) of paragraph 3 of this Schedule is repugnant to any provision of a law made by the Legislature of Meghalaya with respect to that matter, then, the law made by the District Council or, as the case may be, the Regional Council, whether made before or after the law made by the Legislature of Meghalaya shall, to the extent of repugnancy, be void and the law made by the Legislature of Meghalaya shall prevail.

(2) If it appears to two or more District Councils or Regional Councils in Meghalaya to be desirable that any of the matters with respect to which

1. *Edgington v. State of Assam*, (1968) 1 SOA 995 (418).

they have power to make laws under paragraph 3 of this Schedule should be regulated by the Legislature of Meghalaya by law, and if resolutions to that effect are passed by the said District Councils or Regional Councils, it shall be lawful for the Legislature of Meghalaya to pass an Act regulating that matter accordingly, and any Act so passed shall apply to the autonomous districts or regions concerned, and to any other autonomous district or region the District or Regional Council whereof adopts it afterwards by resolution passed in this behalf.

(3) Any Act passed by the Legislature of Meghalaya under sub-paragraph (2) of this paragraph may be amended or repealed by an Act of the Legislature of Meghalaya passed in like manner, but shall not, as respects any autonomous district or region to which it applies, be amended or repealed by any law made by the District or Regional Council thereof.

(4) The Governor may, with respect to any Act of the Legislature of the State of Assam, and the President may, with respect to any Act of Parliament, by public notification direct, that it shall not apply to Meghalaya, or shall apply thereto, or to any part thereof subject to such exceptions or modifications as he may specify in the notification, and any such direction may be so given as to have retrospective effect.

(5) The provisions of clause (b) of sub-paragraph (1) of paragraph 12 shall not apply to Meghalaya".

### 13. The estimated receipts and expenditure pertaining to an autonomous

district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State

under article 202.\*

under article 202.\*

14. (1) The Governor may at any time appoint a Commission<sup>2</sup> to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.

- (a) the provision of educational and medical facilities and communications in such districts and regions;
- (b) the need for any new or special legislation in respect of such districts and regions ; and
- (c) the administration of the laws, rules and regulations made by the District and Regional Councils ;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam."

2. The words 'under Article 202, at the end of para. 13 shall be omitted, in the application of the Paragraph to Meghalaya.

3. Cf *Edwington v. State of Assam*, (1966) 1 BCR 395 (407-8).

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.

15. (1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India or is likely to be prejudicial to public order,<sup>4</sup> he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

Annulment or suspension of acts and resolutions of District and Regional Councils.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made ;

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

16. (1) The Governor may on the recommendation of a Commission appointed under paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

Dissolution of a District or a Regional Council.

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months :

Provided that when an order under clause (i) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election :

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

(2) If at any time the Governor is satisfied that a situation has arisen in which the administration of an autonomous district or region cannot be carried on in accordance with the provisions of this Schedule, he may, by public notification, assume to himself all or any of the functions or powers vested in or exercisable by the District Council or, as the case may be, the Regional Council and declare that such functions or powers shall be exercisable by such person or authority as he may specify in this behalf, for a period not exceeding six months :

4. Italicized words inserted by the Assam Reorganisation (Meghalaya) Act, 1962.

5. Sub-para (2) and (3) were added by *ibid.*

*Provided that the Governor may by a further order or orders extend the operation of the initial order by a period not exceeding six months on each occasion.*

(3) Every order made under sub paragraph (2) of this paragraph with the reasons therefor shall be laid before the Legislature of the State and shall cease to operate at the expiration of thirty days from the date on which the State Legislature first sits after the issue of the order, unless, before the expiry of that period it has been approved by the State Legislature<sup>6</sup>

17. For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

Exclusion of areas from autonomous districts in forming constituencies in such districts

18. (1) The Governor may—

Application of the provisions of this Schedule to areas specified in part B of the table appended to paragraph 20.

(a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph

20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and

(b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of Article 240<sup>6</sup> shall apply thereto as if such area or part thereof were a Union territory specified in that article<sup>6</sup>

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

Para 18 (1) (b)

This paragraph provides that the Governor may exclude any area from Table B to Para. 50 But this can be done only by a public notification and with the previous approval of the President, unlike the power under Para 1(3), which the Government exercises on ministerial advice<sup>7</sup>

19. (1) As soon as possible after the commencement of this Constitution<sup>8</sup> the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the areas within such district instead of the foregoing provisions of this Schedule, namely :—

Transitional provisions.

<sup>6</sup> Substituted by the Constitution (Seventh Amendment) Act, 1956.

<sup>7</sup> *Edwards v. State of Assam*, (1966) 1 SOA 395 (400).

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

Cl. (1) : 'Until a District Council is constituted'.

The Governor's power to make regulations comes to an end as soon as a District Council is constituted for an autonomous district.<sup>8</sup> Thereafter, the Governor can neither make a new regulation nor issue a notification in exercise of the power conferred by an earlier regulation.<sup>9</sup>

Cl. (1) (b) : 'Existing law.'

The Khasi States (Administration of Justice) Order, 1950, made by the Governor of Assam on 25-1-50, is an 'existing law' applicable to the Khasi States which is a 'tribal area' under para 20 of Sch. VI of the Constitution. Hence, so long as that Order is not repealed by the Governor under the present clause, the administration of criminal justice in the Khasi States is to be governed by that Order.<sup>9</sup>

20. (1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong but, including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem :

Provided that for the purposes of clauses (a) and (f) of sub-paragraph (1) paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clause (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (a) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the district.

<sup>10</sup>(2a) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.<sup>11</sup>

8. *Ka Byrnan v. State of Assam*, A 1954 A. & N. 29 (22)

9. *Farcheng v. The State*, A 1954 Assam 8.

10. Inserted by the Lushai Hills District (Change of Name) Act, 1954.

11. Sub-para (2B) omitted and (2) amended, by the Statute of England Act, 1954.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District and the Mizo District)<sup>10</sup> or administrative area<sup>11</sup> shall be construed as a reference to that district or area at the commencement of this Constitution :

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

## TABLE

## PART A

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.
3. The Mizo District<sup>12</sup>.
4. \* \* \*<sup>13</sup>
5. The North Cachar Hills.
6. The Mikir Hills.

## PART B

1. North East Frontier Tract including Balipara Frontier, Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. [The Naga Hills Tuensang Area]<sup>14</sup>

'Area comprised within the Municipality of Shillong'.

In view of these words in clause 2 of para 20 the Siem of Mytiem shall have no jurisdiction to decide civil disputes between tribals living in a territory which forms part of the Khasi and Jaintia Hills District but which is comprised within the Shillong Municipality.<sup>15</sup>

<sup>17</sup>20A. Interpretation—(1) In this Schedule—

(a) "Governor" means the Governor of Assam acting with and through the Minister for Meghalaya, except in so far as he is acting under this Schedule required to exercise his functions in his discretion to exercise his powers under sub paragraph (4) of paragraph 12A.

(b) "Meghalaya" means the autonomous State named under article 244A.

(2) Subject to any express provisions in this part, the provisions of this Schedule shall in their application to Meghalaya have effect—

(i) as if references to the Government of Assam, State of Assam, State and Legislature of the State were respectively references to the Government of Meghalaya, the autonomous State of Meghalaya and the Legislature of Meghalaya.

<sup>12</sup> The words 'other than the Naga Hills Tuensang Area' which were inserted by the Naga Hills Tuensang Area Act 1967 have been omitted by section 3 of the State of Nagaland Act 1962

<sup>13</sup> The name of the Lushai Hills District was changed by the Lushai Hills District (Change of Name) Act, 1954

<sup>14</sup> Item 4 was omitted by the Naga Hills Tuensang Area Act 1967

<sup>15</sup> Item 2 was omitted by the State of Nagaland Act 1962

<sup>16</sup> *H. Oving v. K. Vossdon* A 1955 Assam 199

<sup>17</sup> Instituted by the Assam Reorganisation (Meghalaya) Act, 1969.



(ii) as if in paragraph 13, the words and figures "under article 202" had been omitted.

21. (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## SEVENTH SCHEDULE

[Article 246]

### General rules for interpretation of the Entries.

1. The various Entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation.<sup>1,2</sup> The power to legislate is given by Art. 246, and other Articles of the Constitution.<sup>3</sup> Thus, the power to make a law authorising 'deprivation of property' is conferred by Art. 31. It cannot be contended that because there is no Entry in the Lists relating to 'deprivation of property' as such, it is not within the competence of the Legislatures of this country to enact such a law. Such a law could be made, for instance, under Entry 1 of List I, 1 of List II or List III.<sup>4</sup>

2. The Entries in the Lists are mere legislative heads and are of an enabling character. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures.<sup>4-6</sup> They neither impose any implied restrictions on the legislative power conferred by the Articles nor prescribe any duty to exercise that legislative power in any particular manner.<sup>4</sup>

3. The language of these Entries should be given the widest scope<sup>6-7</sup> of which their meaning is fairly capable because they set up a machinery of Government.<sup>8-9</sup> Each general word should, accordingly, be held, to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it,<sup>8-12</sup> e.g., the validation of executive orders<sup>10</sup> or a defective

1.2. *Calcutta Gas Co. v. State of W. B.*, A 1962 S.C. 1044 (1049).

3. *Shankdasani v. Central Bank of India*, (1952) S.C.R. 891.

4. *State of Bihar v. Ramnath*, A. 1952 S.C. 262.

5. *Calcutta Gas Co. v. State of W. B.*, A 1952 S.C. 1044 (1049).

6. *Dumuchand v. Bhawalika Bros.*, (1965) 1 S.C.R. 1071.

7. *Bri Ram v. State of Bombay*, A 1959 S.C. 459 (463); *Banarsi v. W.T.O.*, A. 1966 S.C. 1287 (1289).

8.9. *Hans Muller v. Sepdi.*, (1955) 1 S.C.R. 1385 (1389).

10. *Narainchandra v. Mafatlal*, A. 1955 S.C. 58 (51).

11. *T. Commr. v. Benoy*, A. 1957 S.C. 706 (779).

12. *Chaturbhai v. Union of India*, A. 1960 S.C. 124 (426); *State of Rajasthan v. Chawla*, A. 1960 S.C. 544 (548); *Ramkrishna v. State of Bihar*, A. 1962 S.C. 1603 (1613).

law<sup>13</sup> relating to the subject referred to in the Entry or the licensing and control of bonded warehouse for the purpose of making effective the realisation of an excise duty ;<sup>14</sup> or the prevention of evasion in exercise of a taxing power ;<sup>15</sup> or to grant refund of a tax which it has imposed<sup>16 16</sup>

4. In interpreting an Entry in the preceding manner, it would not be reasonable to import any limitation by comparing or contrasting that Entry with any other Entry in the same List.<sup>17</sup>

5. There is no prohibition against a Legislature enacting a single statute in exercise of powers conferred by several Entries in the List which is within its competence.<sup>18</sup>

But—

(a) The Court is not free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of correcting any supposed errors.<sup>19</sup>

(b) The doctrine of ancillary power would not enable the Legislature to provide that an amount which is not due is to be paid under the relevant legislative entry should still be paid over to the Government.<sup>20</sup>

(c) The rule of widest construction would not enable the Legislature to make a law relating to a matter which has no rational connection with the subject-matter of an Entry.<sup>21</sup> eg., total income-taxation which was not rationally capable of being considered as the income of a citizen.<sup>22</sup>

6. The power conferred by an Entry in the List can be exercised both prospectively and retrospectively in the absence of any constitutional provision barring retrospective operation.<sup>23 24</sup>

7. It is competent for a Legislature to exercise its legislative power relating to a subject as to a date a previous Act passed by it, which has been invalidated by the courts, to permit or alter<sup>25</sup>, or a law made by an incompetent Legislature<sup>26</sup> and cur with retrospective operation, subject to the reasonableness of such retrospective legislation, for the purposes of constitutional provisions such as Art. 19 or 31.<sup>27 28</sup>

### Presumption of constitutionality.

When the *vires* of an enactment is challenged and there is any difficulty in ascertaining the limits of its power, the difficulty must be resolved, so far as possible, in favour of the legislative body,<sup>29</sup> putting the most liberal construc-

13. *Jadoo v Municipal Committee*, A 96 90 146

14. *Baldeo v I I Commr*, A 111 SC (186 74)

15. *State of Orissa v Orient Iron Works*, A 191 SC 148

16. *Burmah Construction Co v I T O*, A 1961 SC 1820 (13-21)

17. *Banarasi v. W T O*, A 1935 SC 157 (15-16)

18. *Haji Krishna v Union of India*, A 1964 SC 116 (6-7)

19. *In re C P. & Berar Motor Spirit Taxation Act* (1989) FCR 13 (37)

20. *Abdul Quader v S T O*, A 1964 SC 922

21. *Naumit Lal v I T A A Commr*, A 1965 SC 1878

22. *Ramkrishna v State of Bihar*, A 1968 SC 1667 (1670)

23. *Tata Iron & Steel Co. v State of Bihar* (1958) SCR 1815 *J K Jute Mills v State of U. P.*, A 1961 SC 1534 (*Chhoti Jute Mills v Union of India*, A 1962 SC 103)

24. *Sunderamammur v. State of A P.* (1956) SCR 14-2

25. *Diamond Sugar Mills v State of U. P.*, A 1961 SC 652 (66-)

tion upon the relevant legislative entry so that it may have the widest amplitude.<sup>1</sup>

But, at the same time, the Court should guard against extending the meaning of the words beyond their reasonable connotation in an anxiety to preserve the power of the Legislature.<sup>2</sup>

### Conflict between Entries in different Lists.

1. The entries in the different Lists should be read together without giving a narrow meaning to any of them.<sup>3</sup> The powers of the Union and the State Legislatures are both expressed in precise and definite terms. There can be no reason in such a case of giving a broader interpretation to one power than to the other.

Even where an Entry is framed in wide language, it cannot be so interpreted as to make it cancel or override another entry or make another entry meaningless. In case of an apparent conflict between different Entries, it is the duty of the Court to reconcile them.<sup>4</sup>

2. In case of apparent overlapping between two Entries the doctrine of 'pith and substance' has to be appointed to find out the true nature of a legislation and the Entry within which it would fall.<sup>5</sup>

2. Where one Entry is made 'subject to' another Entry, all that it means is that out of the scope of the former Entry, a field of legislation covered by the latter Entry has been reserved to be specially dealt with by the appropriate Legislature.<sup>6</sup>

3. When one item is general and another specific, the latter will exclude the former.<sup>7</sup>

### Relation between different Entries in the same List.

1. Two items of the same Entry are not necessarily exclusive of each other and it is possible for the same matter to come under more than one Entries.<sup>8</sup> As between different Entries in the same List, the general scheme followed is that each particular Entry should relate to a separate subject or group of cognate subjects. But the different Entries are supplementary to each other and are not limited by each other in any way.<sup>9</sup> The point kept in view in drawing up the lists was not scientific precision or prevention of overlapping<sup>10</sup> but to include all possible legislative power within their ambit.<sup>9</sup>

2. Every attempt should be made to harmonize the different entries and to discard a construction which will render any of the entries nugatory or ineffective.<sup>9-11</sup>

1. *Narainchandra v. Commr. of I. T.*, (1955) 1 S.O.B. 829.

2. *State of Bombay v. Balsara*, (1961) S.O.B. 682; *Waverly Jute Mills v. Raymon & Co.*, A. 1955 S.O. 90 (95).

3. *Ramkrishna v. Secy. Municipal Committee*, A. 1950 S.O. 11 (18).

4. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.O. 1044 (1050).

5. *Second G. T. O. v. Hasoreth*, A. 1970 S.O. 999 (1002).

6. *Govinda v. State of U. P.*, A. 1953 All. 88.

7. *Sardar Singh v. Muslim Evacuees's Property*, A. 1953 Popen 12.

8. *I. T. Commr. v. Benoy*, A. 1957 S.O. 706; *Ramkrishna Dalmis v. Tendolhar*, A. 1958 S.O. 533.

*State of Bombay v. Narottamdas*, (1950-51) O.G. 292 (296-7, 298, 302-3); (1951) S.O.B. 51.

10. *United Provinces v. Aliya*, (1940) F.O.B. 110.

11. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.O. 1044 (1050).<sup>6</sup>

### Source of the taxing power.

The entries in the Legislative Lists are divided into two groups—one relating to the power to tax and the other relation to the power of general legislation relating to specified subjects. Taxation is considered as a *distinct matter* for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative Entry as an ancillary power.<sup>12</sup> Thus, the power to legislate on inter-State trade and commerce under Entry 42 of List I does not include a power to impose tax on sales<sup>13</sup> in the course of such trade and commerce.<sup>14</sup>

### General Principles for interpretation of the Entries relating to the taxing power.

1. In order to determine whether a tax was within the legislative competence of the Legislature which imposed it, is necessary to determine the nature of the tax, *e.g.*, whether it is a tax on income, on property, business or the like, so that the Entry under which the legislative power has been assumed could be ascertained.

(a) The primary guide for this purpose is what is known as the '*charging section*.' The identification of the subject-matter of a tax is only to be found in the charging section,<sup>15</sup> *i.e.*, the section which creates the liability to pay the tax, as distinguished from the *mode* of assessment or the *machinery* by which it is assessed.

(b) Generally speaking, all tax on is imposed on *persons*, but the nature and amount of liability is determined either by *individual units*, as in the case of a poll-tax, or in respect of the tax-payers' interest in *property* or in respect of *transactions* or activities of the tax-payers.<sup>16</sup>

But the '*incidence*' or the ultimate burden of a tax does not determine its nature or alter the legislative power relating to it.<sup>17</sup>

(c) It is the substance of the levy and not the form that determines the nature of the tax. The name given by the Legislature is not conclusive for this purpose.

(d) The intrinsic character of a tax is not to be determined by the mode of measurement or the standard of calculation prescribed for assessing the amount of the tax.

Thus, in repelling the contention that a tax on 'buildings and lands' was a tax on income' because the tax was leviable upon 'owners' and that the value of the building was taken as the basis for assessing the tax, the Federal Court observed:<sup>18</sup>

"It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profit or income. The annual value, as has been pointed out, is at best only *notional* or *hypothetical income* and not the actual income. It is only a *standard* used in the income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income."<sup>19</sup>

12. *Sundararamier v. State of A.P.*, A. 1958 S.C. 468 (494).

13. *Ralla Ram v. Prov. of East Punjab*, A. 1949 F.C. 81.

14. *Byramji v. Prov. of Bombay*, I.L.R. (1940) Bom 58. *Muthuraj v. State of Madras*, (1954) 1 M.L.J. 110.

15. *Amin v. I.T.O.*, A. 1954 Mad. 1120.

Similarly, the fact that the tax is to be measured in proportion to the fares and freights realised does not alter the nature of a tax upon 'goods and passengers' carried on motor vehicles.<sup>16</sup>

2. So far as the Entries relating to the taxing power are concerned,—"it is wrong to think that two independent imposts arising from two different acts of circumstances were not permitted" by the Constitution.<sup>17</sup> Thus, the same article may be subject to a Central excise duty and a State octroi duty;<sup>18</sup> or a State tax as well as a Municipal tax.<sup>19</sup>

### The ambit of a taxing power.

1. If the power to impose a tax is established, the power to collect the same is necessarily implied. The Legislature having the power to impose a tax has also the power to prescribe the *means* by which the tax shall be collected<sup>20</sup> and to designate *officers* by whom it shall be enforced; the obligation and indemnity of those officers,<sup>21</sup> the means to ensure proper realisation of the tax, e.g., demanding security from the class of persons liable to pay the tax.<sup>22</sup>

It follows from the above that the method and machinery for the collection of a tax is no criterion for judging the *vires* of the tax law.<sup>23</sup>

3. The following powers follow from the power to impose a tax, as ancillary powers—

(i) To provide for refund of a tax illegally or improperly collected and to impose restrictions upon the right to claim such refund.<sup>24</sup>

(ii) To provide for the prevention of evasion of the tax imposed.<sup>25</sup>

### The Doctrine of 'Pith and substance'.

1. This doctrine means that if an enactment *substantially* falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it it cannot be held to be invalid, merely because it *incidentally* encroaches on matters assigned to another Legislature.<sup>26</sup> In other words, when a law is impugned as *ultra vires*, what has to be ascertained is the true character of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.<sup>27</sup>

2. In order to examine the true character of the enactment, one must have regard to the enactment as a whole, to its objects and to the scope and effect of the provisions. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legis-

16. *Atma Ram v. State of Bihar*, A. 1952 Pat. 869 (364).

17. *Keshori v. The King*, (1949) F O R 650.

18. *Ramabrushna v. Municipal Committee*, (1950) S O R 15 (25).

19. *Nand Lal v. Commr. of Sales Tax*, (1961) S.O. [Peta. 76/58].

20. *Orient Paper Mills v. State of Orissa*, A. 1951 S.O. 1438.

21. *Khyabari Tea Co. v. State of Assam*, A 1964 S. O.

22. *Burnak Construction Co. v. State of Orissa*, A. 1962 S.O. 1810.

23. *Balaji v. I. T. O.*, A. 1961 S.O. 125; *Baldev Singh v. Commr. of I. T.*, A. 1961 S.O. 786.

24. *Mannohn v. State of Bihar*, A. 1961 S.O. 199; *Krishna v. State of Madras*, A. 1947 S.O. 297.

lation those parts would severally fall and by that process determine what portions thereof are *intra vires* and what are not.<sup>2,4</sup>

3. The question of invasion into the territory of another Legislature is to be determined not by degree but by substance. 'Nevertheless, the *extent* of invasion is not altogether irrelevant for the determination of the question. Though the validity of an Act is not to be determined by discriminating between degrees of invasion, the extent of invasion into another sphere may itself determine what is the 'pith and substance' of the impugned Act'. But once the 'pith and substance' of the legislation is determined and is found to be within the powers of the Legislature, the extent of invasion into the other sphere cannot invalidate the law.<sup>1</sup>

4. The doctrine of 'pith and substance' is to be applied not only in cases of apparent conflict between the powers of two Legislatures but in any case where the question arises whether a legislation is covered by a particular legislative power in exercise of which it is purported to be made.

In all such cases, the name given by the Legislature to the impugned enactment is not conclusive on the question of its own competence to make it. It is the 'pith and substance' of the legislation which decides the matter,<sup>2</sup> and the pith and substance is to be determined with reference to the provisions of the statute itself.<sup>3</sup>

#### Distinction between a 'Tax' and a 'Fee'.

1. The distinction between a tax and a fee is of particular importance under our Constitution in connection with the question of *vires* inasmuch as the power to levy different kinds of impositions has been distributed by the various Entries in the Legislative Lists, so that the validity of the imposition made by a particular Legislature has to be determined with reference to those Entries. Now, taxes are specifically divided between Lists I and II and the residuary power to levy a tax other than those enumerated in any of the Lists is given to Parliament, by Entry 47 of List I. Fees are, however, not mentioned specifically. There is a general entry towards the end of each List which empowers the Legislature to levy a fee in respect of any matter over which it has legislative power according to the relevant List. The result is that the power of a Legislature to levy a fee or a tax is to be determined by applying different tests.

2. A levy is not a fee if it is *considerably higher* than the expenses incurred for rendering the services.<sup>5</sup>

Thus, in the following cases a levy purported to be a fee, was held to be a 'tax' and, accordingly, *ultra vires* a State Legislature—

- (i) A levy imposed on religious institutions<sup>6</sup> on the following grounds ;
- (a) It was levied according to the capacity of the payer and not according to the quantum of benefit received.
- (b) On the other hand, there was a total absence of any co-relation between the expenses incurred by Government and the amount raised by the contribution.

<sup>2,3</sup> *Prafulla v. Bank of Commerce*, A 1945 P.C. 60.

<sup>1</sup> *Chaturbhai v. Union of India*, A. 1960 S.O. 424.

<sup>2</sup> *Amar Singh v. State of Rajasthan*, (1955) 2 S.O.R. 803

<sup>3</sup> *Municipal Council v. Nambur*, (1969) 1 SOWR 871

<sup>4</sup> *Commr. H.B.E. v. Lakshmindra*, A 1954 S.O. 282.

(ii) A levy imposed on religious institutions solely for the purpose of creating a surplus in the fund.<sup>5</sup>

(iii) Where the fee levied for the use of a bus stand provided by a municipality is so enhanced that the income yielded by it considerably exceeds the expenses incurred for the maintenance of the bus stand and incidental matters and the surplus income is spent for other purposes.<sup>6</sup>

#### List I—Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces ; any other armed forces of the Union.

3. Delimitation of cantonment areas, local self-government in such areas, the constitutions and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

#### 'Cantonments'.

The specific enumeration of subjects in the Entry shows that the Union Parliament shall have exclusive jurisdiction over cantonment areas, only in respect of the specified subjects,<sup>6</sup> such as—

(i) delimitation, (ii) local self government ; (iii) constitution and powers of cantonment authorities ; (iv) regulation of house accommodation, including control of rents

*Administration of justice*, which is a State subject under entry 3 of List II, includes administration of justice in cantonments just as in other areas of the State.<sup>6</sup>

'Regulation of house accommodation'—Overruling a number of High Court decisions,<sup>7</sup> the Supreme Court<sup>8</sup> has settled the law on this point, by laying down the following propositions :

(i) The present Entry vests in Parliament the exclusive power to regulate house accommodation in Cantonment areas, without any qualifying words, so that the power comprehends all aspects, including regulation of grant of leases, ejection of lessees and ensuring that accommodation is available on proper terms as to rents, though with respect of the areas outside the Cantonment areas, the power to legislate with respect to such matters belongs to the State Legislature.<sup>9</sup>

(ii) The foregoing power with respect to Cantonment areas is not confined to accommodation required for military purposes only, but extends to all house accommodation in the Cantonment areas, whether owned or occupied by the military or the civil population.<sup>9</sup>

(iii) The foregoing power of Parliament also includes the power to direct or control who is to make the constructions, under what conditions the constructions can be altered, who is to occupy the accommodation and for how long.<sup>9</sup>

(iv) The power to acquire or requisition property in Cantonment areas is to be drawn not from the present Entry, but from Entry 42 of List III.<sup>7</sup>

5. *Sudhindra v. Commr.*, H R E, A. 1951 Mad. 491.

6. Cf. *United Provinces v. Governor General*, A. 1 89 F O 66 (69).

7. *Patel v. Viswanath*, A. 1954 Bom. 340 ; *Kameelchand v. Dashrathlal*, A. 1955 Nag. 209 (1972) ; *Jagjiamand v. Satyanarayanjil*, A. 1961 Pat. 207 ; *Darukhamulla v. Khamechand*, A. 1954 um. 234

8. *Indu Bhushan v. Rama Sundari*, (1960) 2 S.C.O. 230 (199-204, 250, 256).

(v) The relationship of landlord and tenant in respect of house accommodation in Cantonment areas is covered by the present Entry, though outside such area, the power is to be derived from the Concurrent Entries 6 and 7 of List III.<sup>9</sup>

4. Naval, military and air force works.
5. Arms, firearms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Central Bureau of Intelligence and Investigation.
9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India ; persons subjected to such detention.

#### Preventive detention.

Preventive detention for reasons other than those mentioned in the present Entry are included in Entry 3 of List III

#### 'Connected with Foreign Affairs'.

The expression is wide enough to cover the power to provide for the preventive detention of foreigners, for the purpose of making arrangements for their expulsion from India or for any other reason<sup>10</sup>

#### 'Foreign affairs'.

The Constitution (Declaration as to Foreign States) Order, 1950 declares that a Commonwealth country shall not be a 'Foreign State' for the purposes of this Constitution. But this Order cannot be brought into aid for interpreting the expression 'Foreign affairs' in entry 9 of List I of the Constitution or 'foreign powers' in s. 3 of the Preventive Detention Act 1950. These latter expressions, therefore, would include Pakistan and it would be permissible to detain a person who is acting in a manner prejudicial to the relations of India with Pakistan.<sup>11</sup>

#### 'Security of the State'.

As suggested by Art. 35, security of the State may be threatened either by external aggression or internal disturbances. What is meant by 'internal disturbances' is something more than an ordinary breach of the public peace, i.e., a rebellion or insurrection.<sup>12</sup>

10. Foreign Affairs ; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and, implementing of treaties, agreements and conventions with foreign countries.

#### Implementation of treaties and agreements.

The Abducted Persons Recovery and Restoration Act, 1949, was enacted

9. *Indu Bhushan v. Ramasundaram*, (1949) 2 SCC 289.  
 10. *Hans Muller v. Supdt.*, (1955) 1 S.O.R. 1285 (1289).  
 11. *Jaganath v. Union of India*, A. 1960 S.C. 625.  
 12. *Ram Nandan v. State*, A 1969 All. 101 F.B.



under item 3 of List I of the Government of India Act, 1935, which corresponded to the present Entry.<sup>12-14</sup>

#### How far is legislation necessary to make treaties.

1. In India, legislation would be required to give effect to a treaty in the following cases—

(a) Where it provides for money to a foreign power,<sup>15</sup> which must be withdrawn from the Consolidated Fund of India.

(b) Where the treaty affects the justiciable rights of a citizen of India.<sup>16-17</sup>

(c) Where it requires the taking of property [Art. 5 (1)], life or liberty [Art. 21] or the imposition of a tax [Art. 265], which can be done only by legislation.

Outside these exceptional cases, it is competent for the Executive in India to enter into treaties binding on the State.<sup>17</sup>

2. An amendment of the Constitution itself would be necessary to cede Indian territory to a foreign State, by reason of Art. I.<sup>18</sup>

3. But no amendment of the Constitution, nor even legislation is necessary, for an agreement to refer a dispute regarding boundaries with a foreign State, for settlement of a boundary dispute does not amount to 'cession of territory'.<sup>17</sup> This can, therefore, be done by the Executive and the settlement so arrived at should be recognised by the municipal Courts.<sup>17</sup>

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

#### 'Citizenship'.

Part II of our Constitution simply provides for acquisition of citizenship at the commencement of the Constitution. Art. 11 together with the present Entry empowers Parliament to legislate on the subject of citizenship

18. Extradition.

19. Admission into, and emigration and expulsion from, India ; passports and visas.

#### 'Expulsion from India'.

The power to provide for expulsion must be distinguished from the power to provide for extradition, which is separately mentioned in Entry 18. Extradition is, in essence, a special branch of the law of crimes, but in expulsion, no idea of punishment is necessarily involved.

Though a foreigner and a citizen are equally liable to be expelled from India under this power, in the case of a citizen, the law would be unconstitutional if it does not comply with the requirements of cl. (5), read with cl. (1) (a) of Art. 19.<sup>17</sup> But a foreigner is not entitled to the protection of Art. 19 and can not, therefore, challenge the validity of an expulsion on the above ground.<sup>19</sup>

12-14. *Bima v. Chaturvedi*, A. 1955 All. 614.

15. *Moti Lal v. Uttar Pradesh Govt.*, A. 1961 All. 257 (F.B.).

16. *Nirmal v. Union of India*, A. 1969 Cal. 506 (515).

17. *Maganbhai v. Union of India*, A. 1969 S.C. 783 (807).

18. *Re Berubari Union*, A. 1960 S.C. 845 (859).

19. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (199); *Abraham Vazir v. State of Bombay*, (1964) S.C.R. 933: (1962-4) 2 C.C. 151.

20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air ; offences against the law of nations committed on land or the high seas or in the air.

22. Railways.

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways as regards mechanically propelled vessels ; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters ; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

‘Shipping and navigation in national waterways’.

While Entry 24 of List I gives the Union Parliament exclusive jurisdiction in respect of shipping and navigation in those inland waterways which shall be declared by it to be ‘national waterways’, Entry 32 of List III makes shipping and navigation in other inland waterways a concurrent subject. Both these Entries, however, are confined to shipping and navigation by *mechanically propelled vessels*. Navigation on inland waterways by means of *any other kind of vessel*, is a State subject under Entry 13 of List II.

Shipping and navigation on the coast or inland, is an exclusive Union subject (Entry 25, List I).

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

‘Major ports’.

This Entry gives the Union Parliament power as regards ports—(a) It is confined to ‘major ports’ (see Art. 3 (1) (i)). It is restricted to the specified matters only viz., ‘delimitation, constitution and powers of port authorities therein’.

Other ports will come within Entry 31 of List III.

28. Port quarantine, including hospitals connected therewith ; seamen’s and marine hospitals.

29. Airways ; aircraft and air navigation ; provision of aerodromes ; regulation and organisation of air traffic and of aerodromes ; provisions for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

‘Carriage by railway, sea or air’.

This Entry deals with carriage of passengers and goods by railway, sea or air, or by national waterways by ‘mechanically propelled vessels’.

Carriage of passengers and goods by roads comes under the State List [Entry 19 List II], while carriage by inland waterways comes within the Concurrent List [Entry 32, List III].

‘Mechanically propelled vehicles’, themselves come under Entry 35 of List III.

**31. Posts and telegraphs; telephones, wireless broadcasting and other like forms of communication.**

'Other like forms of communication'.—Under this Entry would come the control or manufacture and licensing of sound amplifiers but not the control of their use in the interests of health and tranquillity, which would fall under Entries 1 and 6 of List II.<sup>20</sup>

**32. Property of the Union and revenue therefrom, but as regards property situated in a State.....<sup>21</sup> subject to legislation by the State, save in so far as Parliament by law otherwise provides.**

'Property of the Union'.

By reason of the Entry, Parliament has power to legislate with respect to agricultural land belonging to the Union even though the State Legislature has exclusive jurisdiction over such lands, under Entry 18 of List II.<sup>22</sup>

The State Legislature shall have the power to legislate over property situated within the State, subject to legislation by Parliament.<sup>23</sup>

**33.**

**34. Courts of Wards for the-estates of Rulers of Indian States.**

**35. Public debt of the Union.**

**36. Currency, coinage and legal tender; foreign exchange.**

'Foreign Exchange'.

This power includes not only the power to control foreign exchange but also to acquire it for the betterment of the economic stability of the country.<sup>24</sup> e.g., by promoting export.<sup>25</sup>

**37. Foreign loans.**

**38. Reserve Bank of India.**

**39. Post Office Savings Bank.**

**40. Lotteries organised by the Government of India or the Government of a State.**

**Lotteries.**

Lotteries organised by Government come under the present Entry, all other lotteries will come under the general Entry 31 (betting and gambling) in List II.<sup>26</sup>

**41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.**

'Import'.

Import does not include 'sale' or 'possession' of the imported goods.<sup>27</sup>

**42. Inter-State trade and commerce.**

**Distribution of legislative power with respect to Trade and Commerce.**

\* While foreign trade and commerce is dealt with in Entry 41 of List I the legislative power as regards trade and commerce within a State or between different States of India, are dealt with in 8 other Entries of the 7th Schedule.

20. *State of Rajasthan v. Chawla*, A. 1959 S.C. 544 (546).

21. Omitted by the Constitution (Seventh Amendment) Act, 1956.

21a. *Hari Singh v. Military Estate Officer*, A. 1964 Punj. 304.

22. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124.

23. *State of Bombay v. Chamarbagwala*, A. 1956 Bom. 1 (5).

24. *State of Bombay v. Bahara*, A. 1951 S.C. 318.

Entry 42 of List I, is—"Inter-State trade and commerce".

Entry 26 of List II,—“Trade and commerce within the State, subject to the provisions of Entry 33 of List III.”

Entry 33 of List III, is—"Trade and commerce in, and the production, supply and distribution of, the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest.."

Since the three entries are to be read together, and under Art. 246, the State and Concurrent powers are to be read subject to the exclusive power of Parliament with respect to any matter in List I, it follows that when a matter is *with respect* to 'inter-State trade and commerce', the jurisdiction of Parliament is exclusive, irrespective of any other question. When the matter is *with respect* to 'trade and commerce' *within* the State, the State Legislature has exclusive power, subject, however, to the power of Parliament with respect to inter-State trade and commerce *vide* Art. 246 (3). But even when the matter is with respect to trade and commerce within the State, but the trade and commerce relates to the products of industries the control of which by the Union has been declared by Parliament to be expedient in the public interest, the legislative power shall be *concurrent*. The power of Parliament to declare industries to be of the above nature is conferred by Entry 52 of List I. The Constitution Third Amendment Act has widened the scope of Entry 33 by including imported goods of the same kind as products which are declared under Entry 52 of List I, as well as certain other specified commodities, such as foodstuffs (see, further, under Entry 33, *post*).

In short, the power of the State Legislature under Entry 26 of List II is subject to the powers conferred by Entry 12 of List I and 33 of List III.

### Scope of Entry 42.

This Entry confers general legislative power relating to inter-State trade and commerce<sup>25</sup>. The power to tax inter-State sales is not included in this Entry. That power belongs to the State Legislature under Entry 54 of List II, subject to Art. 286<sup>26</sup>.

**43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and any financial corporations but not including co-operative societies.**

**'Incorporation, regulation and winding up of trading corporations'.**

1. An Act which regulates the affairs of a company by laying down certain special rules for its management and administration is fully covered by this item.<sup>27</sup> It would even include legislation providing for the amalgamation of companies,<sup>28</sup> but not the regulation of their functions.

2. Read with Entry 95 of List I, the present Entry empowers Parliament to define the jurisdiction of Courts (other than the Supreme Court) relating to the subject-matters coming under the present Entry, e.g., banking companies.<sup>29</sup>

**44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.**

### 45. Banking.

25. *Sundaram v. State of A.P.*, A. 1958 SC 468 (491)  
1. *Chiranjit Lal v. Union of India*, (1950) SC R 689

2. *Narayanprasad v. Iron & Steel Co. A*, 1955 Cal 695

3. *Hannuman Bank v. Munda*, A. 1958 Mad 279

**'Banking'.**

1. It would be too much to say that every law which in its operation might affect the property or interest of a Bank *just as it affects the property or interest of other persons* would constitute an encroachment on the present Entry. The Entry must be limited to laws which affect the conduct of the business of banks *qua* banks.<sup>4, 5</sup>

But—

(i) A law which solely affects the amounts recoverable by banks in execution of decrees obtained by them would encroach upon the present Entry.<sup>6</sup>

(ii) The power under this Entry, read with Entry 46 of List I, is wide enough to include the power to prohibit a bank from accepting deposits by cheques.<sup>7</sup>

46. Bills of exchange, cheques, promissory notes and other like instruments.

**'Other like instruments'.**

This phrase means 'instruments of the same genus as cheques, bills of exchange and promissory notes'. *Negotiability* is the common essential attribute of all instruments coming under the present Entry.<sup>8</sup> Other aspects of these instruments, e.g., interest on promissory notes, do not come under this Entry.

47. Insurance.

48. Stock exchanges and futures markets.

**Future markets.**—Legislation on forward contracts comes under this Entry and not under Entry 26 of List II.<sup>9, 9</sup> The word 'market', in this Entry, refers to business and not the place where business is carried on.<sup>8</sup>

*Acts coming under this Entry.*—Forward Contracts (Regulation) Act, 1952.<sup>8</sup>

49. Patents, inventions and designs ; copyright ; trade marks and merchandise marks.

50 Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

**'Industry'.**

1. In the present context, 'industry' means the process of manufacture or production and does not include the raw materials used in the industry, or in distribution of the products of the industry.<sup>10</sup> It would include the manufacture of gold ornaments.<sup>10a</sup>

2. The words 'industry' cannot have different meanings in Entries 52 of List I and 24 of List II. But 'Industries' in Entry 24 of List II excludes 'gas and gas-works' in their entirety. It follows that 'gas and gas-works' are exclusively a State subject and the Union cannot assume jurisdiction over them even by making a declaration under Entry 52 of List I.<sup>11</sup> In the result, the Industries (Development and Regulation) Act, 1951, in so far as it purports to deal with the gas industry is *ultra vires*.<sup>11</sup>

4-5. *Bank of Commerce v. Nripendra*, A. 1945 F.C. 7 (8).

6. *Bank of Commerce v. Kunja Behari*, A. 1944 Cal. 196.

7. *Kurion v. Union of India*, A. 1962 Ker. 267 (280).

8. *Waverly Jute Mills v. Raymon & Co.*, A. 1963 S.C. 90 (95).

9. *Dani Chand v. Bhuvalka Bros.*, (1955) 1 S.C.R. 1071.

10. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (411, 420).

10a. *Harakhchand v. Union of India*, A. 1970 SC 1453 (1460).

11. *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1051-2).

### Production, supply and distribution.

While the general power as to production, supply and distribution of goods is included in Entry 27 of List II, the production, supply and distribution of goods produced by industries declared under the present Entry comes under Entry 33 (a) of List III.<sup>10</sup> But Entry 33 (a) is concerned only with 'products', so that raw products used in the industrial process come under Entry 27 of List II, even though the industry is a controlled industry under Entry 52 of List I.<sup>10</sup>

### 'Taxation'.

A tax on the entry of raw materials into a factory premises is a tax under Entry 52 of List II, and the State is not debarred from levying it by reason of the present Entry.<sup>12</sup>

### 'Declared by Parliament by law'.

1. This expression means a declaration made by Parliament subsequent to the coming into force of the Constitution.<sup>12</sup> A pre Constitution law relating to the subject will not satisfy the requirement of Entries 52, 53, 54 or 69 of List I, where this expression is used.<sup>14</sup>

2. So long as such declaration is not made by Parliament, the legislative competence of the State Legislature under Entry 27 of List II is not lost with respect to any industry.<sup>14</sup>

2. But even after such declaration, the State Legislature does not cease to have the power conferred by an independent Entry, which has no proximate connection with the 'control' or regulation of the declared industry, e.g., the power to impose a cess or tax on land under Entry 49 of List II<sup>15</sup> or to impose a tax on the minerals won, under Entry 50 of List II;<sup>16</sup> to provide for the development of mining in the State under Entry 23 of List II, subject to legislation by Parliament under List I,<sup>18</sup> to acquire or requisition property for gas-works, under Entry 15 of List II;<sup>11</sup> to provide for public health and sanitation, with respect to the declared industries.<sup>16</sup>

53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

'Declared by Parliament by law'.—See under Entry 52 of List I, *ante*.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

### Entries 54 of List I and 23 of List II.

To the extent that there is no declaration by Parliament in exercise of the power conferred by the present Entry by a post-Constitution law,<sup>19</sup> the power of 'regulation of mines and mineral development' belongs to the State Legislature, under Entry 23 of List II. But as soon as such declaration is made by Parliament, the State legislative power is to that extent withdrawn.<sup>17</sup>

12. *Murl v. State of U. P.*, A. 1957 All. 159 (161).

13. *Hingir-Rampur Coal Co. v. State of Orissa*, A. 1961 SC 459 (472). [This view of the Author, expressed at p. 723 of C. 3, Vol. II, has thus been confirmed by the Supreme Court. The contrary *obiter* in the majority judgment in *State of W. B. v. Union of India*, A. 1963 SC. 1941 that the declaration in s. 2 of the Minerals and Mining (Regulation & Development) Act, 1948 had the effect of a declaration made under Entry 52 of List I of the Constitution, it is submitted, overlooks the above expression].

14. *Peresh v. State of Assam*, (1962) 1 S.C.A. 539.

15. *Murthy v. Collector of Chittoor*, (1961) C.A. 316A/62.

16. *Elavally Panchayat v. Rosa*, A. 1970 Ker. 88 (93).

17. *State of Orissa v. Tulloch*, A. 1964 S.C. 1284.

**'Regulation'.**

The Calcutta High Court has held<sup>18</sup> that the word 'regulation' as such would not authorise the imposition of a tax.<sup>19</sup>

The meaning of the word 'mineral' is not restricted by the preceding word 'mine'.<sup>20</sup> Hence, brick earth,<sup>20</sup> or brick-clay may well be covered by the words 'minerals'.<sup>20</sup>

**55. Regulation of labour and safety in mines and oilfields.****Labour in mines and coalfields.**

The general power relating to 'welfare of labour' is concurrent, under Entry 24 of List III and the present Entry is in the nature of an exception to that general power

**56. Regulation and development of inter State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.**

**57. Fishing and fisheries beyond territorial waters.****Fisheries.**

"Fisheries" is an exclusive State subject under entry 21 of List II, while "fisheries beyond territorial waters" is an exclusive Union subject under Entry 56 of List I. The State Legislature has thus exclusive competence over fisheries situated within the territory of its State, including those within its adjoining territorial waters.

**58. Manufacture, supply and distribution of salt by Union agencies ; regulation and control of manufacture, supply and distribution of salt by other agencies.**

**59. Cultivation, manufacture, and sale for export, of opium.****Opium.**

1. This Entry is not exhaustive with respect to opium. It relates only to (a) cultivation ; (b) manufacture and (c) sales for the purposes of export. Other matters relating to opium, e.g., possession, storage and sales within the country, are governed by Entry 19 of List II, which is the residuary Entry regarding opium.<sup>21</sup>

2. While the present entry gives the Union exclusive control over only cultivation, manufacture and sale for export,—duties of excise on the production of opium is a State subject under Entry 51 of List II.<sup>22</sup>

**60. Sanctioning of cinematograph films for exhibition.****'Sanctioning of cinematograph films for exhibition'.**

This Entry relates to only one particular aspect of cinematograph, viz. the *sanctioning* of films for exhibition. All other matters relating to cinemas

18. *Aluminium Corp. v. Coal Board*, A. 1959 Cal 222 (225).

[But the bearing of Entry 97 of List I was not considered in this context. The actual imposition in the case was held to come under Entry 84 of List I. The contrary view in *Laddu v. State of Bihar*, A. 1965 Pat. 491 (495), it is submitted, deserves consideration.

19. In *State of W. B. v. Union of India*, A. 1963 S.C. 1241 (1266), there is an obiter in the majority judgment that this Entry gives to the Union the power to *acquire* mines and minerals, by necessary implication. But, it is submitted, in this reasoning were available in respect of similar Entries in Lists I and II, a separate Entry for acquisition in the Concurrent List would not have been required at all.

20. *Laddu v. State of Bihar*, A. 1965 Pat. 491 (497-8).; *Balganesh v. State of Bihar*, A. 1970 SC 1431 (1444).

21. *Laminarayan v. State*, A. 1961 M.P. 13.

22. *Indian Chemical Works v. State of A. P.*, A. 1966 S.C. 713 (715).

is included in Entry 33 of List II, including regulation of storage of films or cleansing of storages.<sup>23</sup>

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

(a) professional, vocational or technical training, including the training of police officers ; or

(b) the promotion of special studies or research ; or

(c) Scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Standards for higher education.

1. While 'education' is a Subject under Entry 11 of List II, entries 65 and 66 give the Union power to do that the standard of education is not lowered at the hands of a particular State or State to the detriment of national progress and the power of the State Legislature must be exercised as not to directly encroach upon the Union power under the present Entry.<sup>24</sup>

2. The power to 'co-ordinate' is not merely power to arrange but to harmonise or secure co-operation for concerted action. This power under the present Entry is not confined by the existence of a state of emergency or unequal standards, either, for the exercise of the power.

3. 'Medium of instruction' is not an item in the List. Hence, this should be regarded as an incident of the power to regulate education, both under Entry 11 of List II as well as under Entries 65 & 66 of List II. Consequently, though the State Legislature has exclusive power to legislate relating to medium of instruction in institutions for primary or secondary education, the State Legislature shall have no power to legislate as to the medium of instruction in institutions for higher and scientific or technical education. If such legislation is likely to result in a lowering of the standards in such institutions.<sup>25</sup>

23 *De Lave Film Exhibit v. Confédération Générale du Travail*—DLR 141 (Cal.)  
24 *Chitralekha v. State of Mysore* A 1964 SC 1823 (1961)

25 *Gujarat University v. State of India* A 1962 SC 773 (1962) per Subba Rao, Wanchao, Ayyangar JJ and Sarda CJ. It is submitted that words 'subject' in Entry 11 does not exclude the subjects included in Entries 65 & 66 of List II altogether from the State List but only makes State legislation under Entry 11 subject to the paramount legislation if any made by Parliament in exercise of the powers conferred by the specified Entries in List I. Other use there would be no meaning in including 'universities' in Entry 11 of List II. This does not mean as held by Subba Rao J. that the State Legislature has exclusive power to legislate as to the medium of education even in institutions for higher or scientific and technical education but only that if Parliament chooses to legislate with respect to the medium of education as regards such institutions in order to maintain the standards of such education or for the purposes of co-ordination, the State legislation shall *pro tanto* be superseded.



**67. Ancient 'and historical monuments and records, and archaeological sites and remains, declared by or under law made by' Parliament to be of national importance.**

**Amendments.**—The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante*.

**Ancient monuments and archaeological site and remains.**

1. Ancient monuments other than those which are declared to be of national importance are included in Entry 12 of List II, while archaeological sites, other than those declared by Parliament to be of national importance, are included in Entry 40 of List III. A monument or site would, however, come under the Union list when Parliament declares it be of national importance. Such declaration must be a specific declaration and, in the absence of any such specific declaration in a Union law, the State Legislature holds the field,<sup>1</sup> and a State Act will prevail notwithstanding any Central Act relating to monuments or archaeological sites.

2. "Monument" means, among others, "a structure surviving from a former period", whereas "archaeology" is the scientific study of the life and culture of ancient people. Archaeological site or remains, therefore, is a site or remains which could be explored in order to study the life and culture of the ancient peoples. The two expressions, therefore, bear different meanings<sup>2</sup>.

**68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India ; Meteorological organisations.**

**69. Census.**

**70. Union public services ; all-India services ; Union Public Service Commission.**

**Entries 70 of List I and 41 of List II.**

These two Entries give the legislature power to legislate with respect to conditions of service, which is referred to in Art. 309.

**71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.**

**72. Elections to Parliament, to the Legislatures of States<sup>3</sup> and to the offices of President and Vice-President ; the Election Commission.**

**Election to Parliament and State Legislatures.**

1. Read with Entry 93 of List I, the present Entry gives power to Parliament to legislate with respect to election offences relating to elections to Parliament and the State Legislature,<sup>4</sup> even though some aspects of the offences created may relate to 'public order', e.g., to provide for maintenance of public order during elections.<sup>5</sup>

2. The power to legislate with respect to—

"Elections to the Legislature of the State subject to the provisions of any law made by Parliament"

belongs to the State Legislature under Entry 37 of List II. The result is that the State Legislature has also the power to enact laws relating to elections to the State Legislature, so long as Parliament does not legislate *to the contrary*. Or, in other words, in case of repugnancy, the Union law will prevail even though it relates to election to the State Legislature.

1. Inserted by the Constitution (Seventh Amendment) Act, 1956.

2. *Joseph v. State of Kerala*, (1965) 2 S.C.R. 868.

3-4. *Narandya v. The State*, A. 1964 Pat. 358.

5. *Rameshwar v. State*, A. 1967 Pat. 282 (365).

73. Salaries and allowances<sup>6</sup> of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

75. Emoluments, allowances, and rights in respect of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

**'Constitution and jurisdiction of Courts'.**

(a) The jurisdiction and powers of Courts is dealt with by several Entries :

Entry 77, List I : Of the Supreme Court, relating to any matter.

Entry 96, List I : Of all Courts other than the Supreme Court, relating to any matter in List I.

Entry 65, List II : Of all Courts other than the Supreme Court, relating to any matter in List II

Entry 56, List III : Of all Courts except the Supreme Court, relating to any matter in List III.

(b) The Constitution of Courts, again, is dealt with in the following Entries—

Entry 77, List I : Of the Supreme Court

Entry 78, List I : Of the High Courts

Entry 3, List II : Of all Courts except the Supreme Court and the High Courts.

**'Entitled to practise'.**

This Entry authorises Parliament to lay down the qualifications which would entitle a person to practise before the Supreme Court. The Supreme Court itself has the same power<sup>6</sup> by making Rules under Art 145 (1) (a) but the rule-making power is subject to the law made by Parliament, if any, under the present Entry<sup>6</sup>. Hence, if there is any conflict between a Rule made by the Supreme Court relating to this matter and the law made by Parliament under this Entry, the latter shall prevail<sup>6</sup>.

78. Constitution and organisation (including vacations<sup>7</sup> of the High Courts except provisions as to officers and servants of High Court, persons entitled to practice before the High Courts'.

**'Union's Control over High Courts'.**

By the present Entry, the Union is given exclusive power over the constitution and organisation of the High Courts. By Arts. 216-7, the power of appointment of the High Court Judges has been vested in the President.

6. Lily Isabel Thomas, in re. A. 1964 S.C. 855.

7-8. Inserted, with retrospective effect, by the Constitution (Fifteenth Amendment) Act, 1963. •

The power over constitution of the High Courts is given to Parliament for the sake of uniformity, while 'administration of justice', in general, is a State subject [Entry 3, List II].

Again legal profession is a concurrent subject [Entry 26, List III]. But the Union is given, by the present Entry, the exclusive power of prescribing the qualifications for practising before the High Courts.

Entries 77 and 78 of List I are in the nature of exceptions to the general power conferred by Entry 26 of List III.<sup>9</sup>

### 'Constitution and organisation of High Courts'.

This expression includes the setting up of a High Court and matters connected with the giving of final shape to the Court so that it may start functioning, such as the appointment of Judges, the division into departments, making provision for housing of the Courts.<sup>10</sup>

But—

1. This Entry does not include the power to regulate the sittings of the High Court or things connected with its actual functioning, which would be included in 'administration of justice' [Entry 3, List II].<sup>11</sup>

2. This Entry does not include an arrangement to deal with a class of cases, e.g., to provide that all appeals shall be heard by not less than two Judges. This is a matter which appropriately comes under 'administration of justice' in Entry 3 of List II.<sup>12</sup>

3. The present Entry does not include any power relating to jurisdiction of the High Court.<sup>13</sup> [See under Entry 95 of List I and Entry 3 List II, *post*].

### 'Practice'.

The word includes the functions of both acting and pleading on behalf of a suitor.<sup>14</sup>

By reason of the present Entry, a State Legislature has no power to amend the Bar Councils Act.<sup>15</sup>

79. Extension of the jurisdiction of a High Court to and exclusion of the jurisdiction of a High Court from, any Union territory.<sup>16</sup>

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of police force belonging to any State to railway areas outside that State.

'Belonging to.'—This expression has been used in the sense of 'functioning in an area.' Hence, the Police force functioning in a Union Territory can have their jurisdiction extended to another State by an Act of Parliament, e.g., the Delhi Special Police Establishment Act, 1946.<sup>17</sup>

81. Inter-State migration; inter-State quarantine.

### Inter-State migration.

By reason of this Entry, it is not within the competence of a State Legis-

9. *Durgeshwar v. Bar Council*, A. 1954 All. 728 (733)

10. *Pramatha v. Chief Justice*, A. 1961 Cal. 545.

11. *Siddamma v. Nanje*, A. 1952 Mys. 75.

12. *Amarendra v. Bikash*, A. 1957 Cal. 534 (543).

13. *Aswini v. Arabinda*, (1952) S.C.J. 568 (673).

14. Changes made by the Constitution (Seventh Amendment) Act, 1956.

15. *Advance Inst. Co. v. Gurudasmal*, A. 1970 S.C. 1126 (1132).

lature to legislate relating to refugees from one State within the territory of India to another.<sup>16-17</sup>

## 82. Taxes on income other than agricultural income.

### 'Taxes on income'.

(A) 1. Entry 82 of List I is, however, a head of legislative power which should not be interpreted in any restricted sense either with reference to anything in the Indian Income Tax Act or in the English or American law relating to income-tax.<sup>18</sup> Since there is no definition of the word 'income' in the Constitution itself, the word is to be interpreted according to its natural and grammatical meaning which means 'a thing that comes in'<sup>19</sup> and is thus a word of the 'broadest connotation'.<sup>20</sup>

2. It would, thus, embrace any profit or gain which is actually received.<sup>21</sup> Hence, it would include—

(i) A tax on 'capital gains' e.g. the sale proceeds of certain properties which formed the capital of a business concern).<sup>22</sup>

(ii) Again, it would include not only income which has actually accrued but also income which is supposed by the Legislature to have notionally accrued.<sup>23</sup>

(iii) For the same reason, it may mean the gross receipts of a person and is not necessarily restricted to his profits or receipts after deducting his expenses.<sup>24</sup>

(iv) The Entry is wide enough to confer power to prevent evasion of income-tax.<sup>25</sup>

(B) On the other hand,—

The doctrine of liberal interpretation does not mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's 'income'.<sup>26</sup> The tests prescribed by the existing income-tax Act are not a proper guide for determining whether there is such a rational connection between an item charged and the assessee's 'income'.<sup>27</sup> But the resort to a 'fiction' is permissible where it is necessary to deal with a device to avoid legitimate taxation.<sup>28</sup>

4. Taxes on the income from trade or profession (Entry 60 List II) is excluded from the scope of the present Entry, by Art. 276 (ante)

### Ancillary matters.

It is competent, under the present power, to provide for the prevention of evasion of income tax, as an ancillary measure,<sup>29</sup> e.g., to tax a loan where it is taken as measure of evading the tax liability of income,<sup>30</sup> or to tax the shareholders on the basis of the accumulated profits of the company when the distribution of such profits is deliberately withheld to avoid taxation as 'dividend'.<sup>31</sup>

16-17. Cf. *Sankatdas v. State of Bombay*, A. 1953 Bom. 41.

18. *Navinchandra v. Commr. of I. T.*, A. 1955 S.C. (61); A. 1955 S.C. 58.

19. Cf. *Commr. of I. T. v. Shaw Wallace*, (1932) 59 Cal. 1343 (P.C.).

20. *Kamakhyia v. Commr. of I. T.*, A. 1943 P.C. 153.

21. *Commr. of I. T. v. Bhaglal*, A. 1951 S.C. 155.

22. *Travancore Rubber Co. v. State of Kerala*, A. 1964 S.C. 572.

23. *Punjab Distilling Industries v. C. I. T.*, A. 1965 S.C. 1862 (1865).

24. *Navnit Lal v. I. T. A.*, A. Commr. A. 1965 S.C. 1375 (1379, 3382).

25. *Navinchandra v. Commr. of I. T.*, (1955) 1 S.C.R. 829.

26. *Balaji v. I. T. O.*, A. 1962 S.C. 123 (125).

27. *Baldev Singh v. Commr. of I. T.*, (1961) 1 S.C.R. 482; A. 1961 S.C. 746.

**83. Duties of customs including export duties.****'Customs'.**

A duty of customs being a tax on the act of importation or exportation, cannot be regarded as a tax on *property*.<sup>3</sup>

**84. Duties of excise on tobacco and other goods manufactured or produced in India except—**

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

**Entries 84 of List I and 51 of List II.**

Under Entry 51 of List II, the States have the power to levy excise duty on alcoholic liquor for human consumption and on hemp and other narcotic drugs and narcotics.

But under Entry 84 of List I, the Union has the power to levy excise duty on (a) tobacco ; and (b) medicinal and toilet preparations containing alcohol, or opium, hemp or other narcotic drugs and narcotics.\*

**'Duty of excise'.**

1. A duty of excise is primarily levied upon a manufacture or producer in respect of the commodity *manufactured or produced*.<sup>4</sup> It is a tax upon goods, not upon sales or the proceeds of sale of goods.<sup>5</sup>

2. The taxable event in respect of a duty of excise is 'manufacture' or 'production'.<sup>7</sup> When the tax upon consumption of electrical energy is payable by a producer of electrical energy *only* when he *consumes* it, it is not a duty of excise.<sup>7</sup> Conversely, an excise duty imposed on the manufacture or production of goods does not cease to be so merely because the producer happens to be a consumer himself,<sup>8</sup> or the tax is imposed at a stage subsequent to the manufacture or production.<sup>10</sup>

3. An excise duty is a levy on home-produced goods of a specified class or description, the duty being calculated according to the quantity or the value of the goods produced and is not dependent on any commercial transaction in them.<sup>11</sup> Hence, this Entry would not authorise a duty on the purchase of goods which are acquired for the purpose of manufacturing other goods.<sup>12</sup>

4. Nor does it include a tax on raw materials which are *subsequently* required in the process of manufacture.<sup>13</sup> It is also to be distinguished from a tax on the transportation of goods.<sup>14</sup>

5. But if a tax is imposed on the manufacturer or producer, it does not cease to be an excise duty simply because it is collected at the stage of issue

3. Sea Customs Act, in re., A. 1964 S.C. 1760 (1775).

4. *Sakti Ousadhalaya v Union of India*, A. 1963 S.C. 622 (623).

5. In re C. P. & Berar Motor Spirit Taxation Act, 1938 A. 1939 F.C. 1.

7. *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.), affirming *Province of Madras v. Boddu Paidanna*, A. 1942 F.C. 33.

7. *Jijeejee Rao Cotton Mills v State of M. P.*, A. 1959 S.C. 270.

8. *Jagannath v. State of M. P.*, A. 1963 S.C. 414.

9. *Aluminium Corpn. v. Coal Board*, A. 1959 Cal. 222 (227).

10. *Abdulkadir v. Union of Kerala*, A. 1962 S.C. 922.

11. *Chhotabhai v. Union of India*, A. 1962 S.C. 1008 (1018).

12. *N. R. & O. Mills v. State of Punjab*, A. 1963 Punj. 549 (552).

13. *Murl v. State of U. P.*, A. 1967 All. 159 (164).

14. *H. P. Barua v. State of Assam*, A. 1965 Assam 249.

of the products out of the mills,<sup>10,11</sup> or because the duty on local produced in a mine is computed on the tonnage of the coal *despatched* from the mine,<sup>9</sup> or because it is imposed with retrospective effect,<sup>11</sup> or because it is not possible for the producer to pass it on to the consumer.<sup>17</sup>

6. So long as the character of the impost, namely, that it is a duty on the *manufacture* or *production*, is not lost the method of collection does not make it other than an excise duty.<sup>16</sup> Whether in a particular case the impost ceases to be an excise duty and the rational connection between the duty and the person on whom it is imposed ceases to exist, is to be decided on a fair construction of the provisions of a particular Act.<sup>16</sup>

'Goods'.—See under Art 366 (12), *ante*.

'Manufactured or produced'.

The word 'produced' has been used in juxtaposition to the word 'manufactured'. While 'manufacture' refers to the turning out of a raw material into something altogether different from the material, the word 'produced' refers to the application of human skill or labour in some form to make a material, even though it be a natural product such as a coal, so that it may be fit for human consumption.<sup>2</sup>

*Acts coming under the present Entry*—Medicinal and Toilet Preparations (Excise Duties) Act, 1955.<sup>17</sup>

**Excise duty and customs.**

Excise differs from customs (Entry 83, List I) in that excise is a tax on articles produced or manufactured in the taxing country and intended for *home consumption*, while customs is a tax on consumption outside the taxing State or on home consumption of goods imported from abroad.<sup>18</sup>

**Excise duty and sales tax.**

1. While a duty of excise is levied upon a manufacturer in respect of the goods *manufactured*, a sales tax (Entry 51, List II) levied upon a vendor in respect of his *sales*. There is no overlapping between the two imposts, and while Parliament may impose a duty of excise on excisable goods under the present Entry, the State Legislature may impose a tax upon the sale of the same goods.<sup>19</sup>

2. A tax on the first sale effected by a manufacturer or producer is a sales tax and not an excise duty.<sup>20</sup>

3. Where a tax is imposed on the sale, it does not become an excise duty merely because the State Legislature lays down the place of manufacture to be regarded as the *situs* of the sale.<sup>21</sup>

**Excise Duty and Agricultural Income-tax.**

A duty of excise is a tax on the goods, while an income tax is a tax on *income* and on nothing else.<sup>22</sup> A tax on the income derived from the cultivation of tobacco does not amount to a duty of excise under the present Entry.<sup>23</sup>

15. *Bihar Cotton Mills v. Union of India*, A. 1957 Pat 131  
16. *R. C. Jai v. Union of India*, A. 1962 SC 1281 (1287).

17. *Cf. Sakti Ousadhalaya v. Union of India*, A. 1963 SC. 622

18. *In re C. P. Motor Spirit Act*, A. 1940 FC. 1

19. *Governor-General v. Province of Madras*, (1945) 49 C.W.N 381 (P.C.), affirming  
*Province of Madras v. Boddu Paidanna*, A. 1942 FC. 33

20. *Ram Raj Trading Co. v. Asst. Commercial Tax Officer*, A. 1957 Mad. 325

21. *Tata Iron & Steel Co. v. State of Bihar*, A. 1958 SC. 453 (459).

22. *Ramakrishna v. Agricultural I. T. O.*, A. 1961 Ker 111.

**Incidental and ancillary matters.**

A legislation, which, in its 'pith and substance', is one for the levy of an excise duty on tobacco does not cease to be so under the present entry, merely because it provides for ancillary matters to make the legislation effective, e. g., the licensing of the manufacture, sale or storage of the excisable goods [Entries 26 27 of List II], including the imposition of a licence fee.<sup>22</sup>

**85. Corporation tax.**

**86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies.**

'Individuals'—This word includes an association or group of individuals<sup>23</sup>, such as a Hindu undivided family,<sup>24</sup> where the capital assets are owned by such association or group.<sup>25</sup>

'Agricultural land'—See under Entry 18 of List II

*Acts coming under the present Entry.*—Wealth Tax Act, 1957.<sup>26</sup>

**87. Estate duty in respect of property other than agricultural land.**

**88. Duties in respect of succession to property other than agricultural land.**

**Estate Duty and Succession Duty.**

1. There are real and substantial differences between Succession Duty and Estate Duty. There is one feature common to both taxes, viz., that the occasion for the levy is the death of a person ; but while Succession Duty [Entry 88 of List I] has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view,—the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it.<sup>27</sup>

While a succession duty falls upon the person who takes the property of the deceased, an estate duty falls upon the property whoever may be the successor to the property on the death of the previous owner.<sup>28</sup>

2. Since the word 'succession' implies the passing of property on the death of a person to another,<sup>29</sup> a tax on a gift *inter vivos* would not come under the present Entry.<sup>1</sup>

**89. Terminal taxes on goods or passengers, carried by railway, sea or air ; taxes on railway fares and freights.**

**'Terminal tax'.**

1. While the present Entry gives to the Union the power to levy terminal taxes on goods or passengers carried by railway, sea or air, Entry 52 of List II gives to the State the power to levy taxes on the entry of goods into a local area for consumption, use or sale therein. Entry 56 of List II, on the other hand, empowers the State to impose taxes on goods and passengers carried by road or on inland waterways.

2. The terminal tax in List I must be—(a) terminal ; (b) confined to goods and passengers carried by railway, sea or air. They must be charge-

23. *Mahavirprasad v. Yajnik*, A. 1960 Bom. 191. [The Mysore High Court differs (*Sampath v. State of Mysore*, A. 1962 Mys. 192 (195), without adverting to the Bombay decision).

24. *Benares v. Wealth Tax Officer*, A. 1965 S.C. 1367, affirming *Jugal Kishore v. W. T. Officer*, A. 1961 All. 487.

25. *In the matter of Duty on Non-agricultural Property*, A. 1944 F.C. 73.

1. *Seetharam v. Gift Tax Officer*, A. 1960 A.P. 115 (119).

able at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation.<sup>2</sup> Another point of difference between the two Entries is that while under the present Entry, a terminal tax may be levied on goods and passengers while entering as well as leaving an area, the power of the State under Entry 52 of List II is confined to goods and only when the goods enter into a local area and for particular purposes, viz., consumption, use or sale in that area. [See further under Entry 52, List II].

3. The requirements of a tax under Entry 52 of List II, on the other hand, are—(a) the entry of goods into a definite area and (b) the entry must be for the purpose of consumption, use or sale of the goods in such local area.<sup>3</sup> There is no limitation to be implied in this Entry, in regard to the manner in which goods may be transported into a local area.<sup>4</sup>

4. It follows that so far as rail-borne goods are concerned the same goods may well be subjected to taxation under Entry 59 of List I and Entry 52 of List II. The grounds of taxation under the two Entries are radically different.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

**Taxes on sale of newspapers.**

Taxes on sale of goods and on advertisements are included in Entries 54-5 of List II, but taxes on sale of newspapers and on newspaper advertisements are excluded from those entries and included in the present Entry.

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

**Amendment.**—This Entry has been inserted by the Constitution (Sixth Amendment) Act, 1956.

**Fees.**—Read with Entry 91, *lost*, this Entry would empower Parliament to impose a fee on inter-State sales,<sup>5</sup> but not a 'market fee' which would come under Entry 28 of List II.<sup>6</sup>

93. Offences against laws with respect to any of the matters in this List.

**Offences with respect to matters in List I.**

The Union Legislature has exclusive power to create offences in respect of insurance, under the present Entry.<sup>7</sup>

94. Inquiries, surveys and statistics for the purposes of any of the matters in this List.

**'Inquiry'.**

An inquiry necessarily involves investigation into facts and collection of material facts from the evidence brought to the notice of the person or body making the inquiry the inquiry and also includes ancillary matters, e.g.,

(i) the recording of the findings of the inquiring body on the facts ;

2. *Punjab Flour Mills v. Corp. of Lahore*, (1947) F.C.R. 17.

3. *Cf. Krishna Coconut Co. v. E. G. C. Committee*, A. 1967 S.C. 973.

4. *Mavulurathya v. State*, A. 1970 Mys. 114 (128-9).

5. *Raghuraj v. Emp.*, A. 1944 F.C. 25.



(ii) the views of the inquiring body on the facts found, for the consideration of the Government which set up the inquiry, with recommendations for the suppression of the mischief in future.

It cannot, however, include any recommendation as to the award of punishment for wrongs *already done or committed*, for, that is a function which can be exercised only by a court of law properly constituted and not by an 'inquiring body'. A law made under the present Entry or under Entry 45 of List III cannot, accordingly, empower the inquiring authority to suggest the action necessary by way of securing 'redress or punishment' for wrongs already committed.<sup>6</sup>

**'For the purpose of...List'.**

This Entry authorises Parliament to make a law for making inquiry into any matter relating to any subject which is enumerated in List I. The purpose of the inquiry may be administrative or otherwise and is not confined to the undertaking of some future legislation<sup>7</sup>. The law made under the present Entry may cover inquiries into any aspect of the matters enumerated in the List and is not confined to those matters as mere heads of legislative topic.<sup>8</sup>

*Acts coming under the present Entry.*—Commissions of Inquiry Act, 1952.<sup>9</sup>

**95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this ; admiralty jurisdiction.**

**Entry 95 of List I and Entry 65 of List II.**

The effect of these entries is that while legislating with regard to matters in their respective lists the two Legislatures are competent to make provisions in the several Acts enacted by them, concerning the jurisdiction and powers of Courts in regard to the subject-matter of the Acts, because otherwise the legislation may not be quite complete or effective. These entries are wide enough to empower the two Legislatures to legislate negatively as well as affirmatively, with regard to the jurisdiction of the Courts in regard to the matters within their respective legislative ambits. They can bar the jurisdiction of the Courts in regard to those matters and they can also confer special jurisdiction on certain Courts.<sup>10</sup>

(See further under Entry 3, List II).<sup>11</sup>

*Acts coming under this Entry.*—Ss. 45A-B of the Banking Companies Act, 1949.<sup>12</sup>

**96. Fees in respect of any of the matters in this List, but not including fees taken in any court.**

**'Fees'.**

1. In order to come under the present Entry or under Entry 66 of List II or Entry 47 of List III, the levy must be a 'fee' as distinguished from a tax or other impost, for, the different imposts are distributed between the Union and the States by different entries, on different principles. Thus, where no expenses are incurred at all for rendering an alleged service, the imposition of a 'fee' would be *ultra vires*, if the imposition is purported to be made under an Entry relating to 'Fees'.<sup>13</sup>

2. This Entry authorises the imposition of a licence fee where licensing can be legitimately resorted to as ancillary to the taxing power.<sup>14</sup>

6. *Ramkrishna Dalmia v. Tendolkar*, (1953) S.C.A. 754 (769).

7. *State of Bombay v. Narottamdas*, A. 1961 S.C. 69 (71, Fazl Ali J.).

8. *Thanga v. Hanuman Bank*, A. 1958 Mad. 403 (410).

9. *Raj Kishore v. Dt. Board*, A. 1964 All. 675 (679).

10. *Gurwiah v. State of Madras*, A. 1958 Mad. 158 (169).

**'Not including fees taken in any court.'**

Fees taken in all Courts other than the Supreme Court is included in Entry 2 of List II. But if the tribunal or authority in relation to which the fee is taken be not a 'court' and the matter is included in any Entry of List I, it is within the competence of Parliament to levy a fee. Thus, Parliament may impose a fee for appeal to the Appellate Tribunal under the Income-tax Act, for, the Appellate Tribunal is not a 'Court' and taxation of non-agricultural income is enumerated in Entry 82 of List I.<sup>11</sup>

**97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.**

**Laws covered by the residuary Entry.**

The following have been held to be covered by the present Entry—

(i) A gift tax on gifts of movable and immovable property, including land.<sup>12</sup>

(ii) A tax on building contracts, even though no 'sale' is involved therein.<sup>13</sup>

(iii) A tax on loan.<sup>14</sup>

(iv) A cess upon the entry of sugarcane into the premises of a factory.<sup>15</sup>

(v) The constitution of a Legislature for a Part C State<sup>16</sup>, now a Union Territory under Art. 239A (1).

(vi) Providing for collection of annuity deposits from tax-payers,—in the nature of borrowing.<sup>17</sup>

**List II—State List.**

**1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).**

**'Public Order'.**

1. 'Public Order' is a most comprehensive term and subject to the exception mentioned, viz., use of the armed forces in aid of the civil power, the State Legislature is given plenary authority to legislate on all matters which relate to or are necessary for the maintenance of public order,<sup>2</sup> including the prevention of insult to national honour.<sup>3</sup>

2. Public order implies absence of violence and an orderly state of affairs, in which citizens can peacefully pursue their normal avocation of life.<sup>4</sup> Anything which disturbs public tranquillity disturbs public order.<sup>4</sup> This entry also includes 'public safety' in its relation to the maintenance of

11. Cf. *Seshadri v. I. T. Officer*, A 1954 Mad. 806 (808).

12. *Second Gift Tax Officer v. Hazareth*, A 1957 S.C. 999 (reversing *Hazareth v. G. T. O.*, A 1962 Mys. 269, and affirming the view taken by the Author at 5 Sch. (51, fn. 9) that it does not fall under Entry 49 of List II).

13. *Mithan Lal v. State of Delhi*, (1959) S.C.R. 445.

14. *Lakshmana v. Addl. I. T. O.*, A 1961 Mad. 146 (151).

15. *Diamond Sugar Mills v. State of U. P.*, A 1961 S.C. 652 (658); *Jara Sugar Mills v. State of M. P.*, A 1964 M.P. 118 (122).

16. *Jadab v. H. P. Administration*, A 1960 S.C. 1008.

17. *Hari Krishna v. Union of India*, A 1966 S.C. 619 (622).

1. Natarajan, in re. A 1935 Mad. 11.

2. *Lakshminarayan v. Province of Bihar*, (1949) 5 D.L.R. 17 (22) F.C.

3. *Borade v. Rex*, (1949) D.L.R. 186 All. (F.B.).

4. *Ramesh Thapper v. State of Madras* (1960) S.C.J. 418 (423).

public order.<sup>6</sup> In short, 'public order' is synonymous with public peace, safety and tranquillity,<sup>7</sup> and would, therefore, cover legislation to regulate the use of sound amplifiers.<sup>17</sup>

3. It is to be carefully noted in this connection that while the ambit of the expression 'public order' is very wide the qualifying expression 'reasonable restriction' in Art. 19 (2) or 'for reasons connected with' in Entry 3 of List III restrict the ambit of legislative power under those provisions and 'public order' must be "real and proximate, not far-fetched and and problematic".<sup>8</sup> Under the latter provisions it has been held that—

(a) Blackmarketing ;<sup>9</sup>

(b) Contempt of Court ;<sup>10</sup>

(c) Incitement not to pay taxes or other Government dues, unless the restriction is exclusively aimed at a general campaign for non-payment ;<sup>8</sup>

(d) Holding of meetings and processions when there is no allegation for violence ;<sup>11</sup>

cannot be penalised by the Legislature in the interests of' or 'for reasons connected with' public order.

The decisions under those provisions should not be imported to restrict the meaning of 'public order' under Entry 1 of List II where the question is one of legislative competence, which is governed by the expression 'with respect to'.

The power to legislate relating to offences relating to matters specified in Lists I and II.

Entries 93 of List I and 64 of List II confer specific power on the respective Legislatures to legislate with respect to 'offences against laws with respect to any of the matters' specified in those lists. The general power conferred by Entry 1 of List II must, therefore, be read subject to the above specific powers. For instance, Parliament shall be competent to make a law relating to 'election offences' even though certain aspects of the offences so created may relate to 'public order'.<sup>12</sup>

## 2. Police, including railway and village police.

### 'Police'.

The word is wide enough to empower the State Legislature to create an armed constabulary.<sup>13</sup>

3. Administration of justice ; constitution and organisation of all courts, except the Supreme Court and the High Court ; officers and servants of the High Court ; procedure in rent and revenue courts ; fees taken in all courts except the Supreme Court.

### 'Administration of justice: constitution and organisation of Courts'.

1. This expression is wide enough to include the power to confer

5. *Nek Mohammedi v. Prov. of Bihar*, A. 1949 Pat 1 (F.B.), *Emp. v. Sibnath*, A 1943 F.C. 1.

6. *Superintendent v. Ram Manohar*, A 1960 S.C. 633 (639).

7. *State of Rajasthan v. Chawla*, A. 1959 S.C. 544 (547).

8. *Supdt., Central Prison v. Ram Manohar*, A. 1960 S.C. 633 (639).

9. *R. v. Basudeva*, A. 1950 F.C. 67 (69).

10. *Sodhi Shamsher v. State of Punjab*, A. 1954 S.C. 276.

11. *Uma Ram v. State of Rajasthan*, A. 1955 Raj. 6 (10).

12. *Cf. Nagendra v. State*, A. 1954 Pat. 386 (387).

13. *Shantaram v. Adv. General*, A. 1955 All. 370 (372).

jurisdiction (both civil and criminal) upon the Courts set up by the State Legislature under the present Entry.

2. While Entry 95 of List I, Entry 65 of List II and Entry 46 of List III of the Constitution confer power in the respective Legislatures to invest the Courts with special jurisdiction relating to particular subjects included in those Lists, when the Legislature was dealing with those subjects, item 3 of List II confers power upon the State Legislature to invest the Courts with general jurisdiction to try all causes of civil nature, subject to the power of the Central and State Legislatures to make 'special provisions' relating to the particular subjects included in their respective legislative lists.<sup>14</sup>

3. In exercise of this power relating to jurisdiction of Courts, the State Legislature is competent to legislate with regard to the jurisdiction of Court, both affirmatively as well as negatively. In other words, it can not only confer jurisdiction upon the Courts, but also bar jurisdiction upon any matter or taken away existing jurisdiction from them. This power must include the power of defining, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily.<sup>14-15</sup> It is, of course, open to the Union Legislature to bar the jurisdiction of the new Court by a special enactment with regard to any of the matters in List I but so long as such jurisdiction is not barred, the Court will have jurisdiction to try all suits and proceedings, including those which relate to matters within List I.<sup>14-17</sup>

### Procedure in Courts.

1. The 'constitution and organisation of High Courts' is an exclusive Union subject under Entry 74 of List I. But the regulation of the practice and procedure<sup>18</sup> in and the jurisdiction of<sup>19-21</sup> the High Court is a law relating to the 'administration of justice' which assumes the existence of a duly constituted High Court. 'Constitution,' in this context, refers to 'establishment'.<sup>19</sup>

2. Read with Entry 3 of List III, it gives the State Legislature the power to legislate as to the enforcement of foreign judgment.<sup>21</sup>

### 'Constitution of Courts'.

1. Barring the Supreme Court and High Courts [see Entries 77-8, List I], the constitution of all Courts is a Provincial subject. The Indian Constitution thus followed the Canadian example and differs from the American system by avoiding a dual hierarchy of Courts—Federal and State. It is the State Courts which are to administer both Federal and State laws, and administration of justice as a whole [subject to Entries 77-9 of List III] is made a State subject. Of course, Parliament has the power to create additional Courts for the better administration of particular Union Laws Art 247]

2. While both the constitution as well as jurisdiction of the Supreme Court is included in Entry 77 of List I, only the constitution of the High Court is included in Entry 78 of List I, but the administration of justice in all Courts

14. *State of Bombay v. Narottumdas* (1951) SCR 51 (1950-51) CC 292 (296-7, 299).

15. *Kumaraswami v. Premier Electric Co.* A 1959 AP 3; *Amarindra v. Bikash*, A 1957 Cal. 534 (544), *Kachikka v. Kunjipenna* A 1951 Ker 226 (230)

16. *Ahmed v. Inspector*, A. 1959 Mad. 261 (268)

17. *Siddanna v. Nanje*, A. 1952 Mys. 75.

18. *Kachikka v. Kunjipenna*, A. 1961 Ker 226 (F.B.)

19. *Shivaramdrappa v. Kapurchand*, A. 1965 Mys 76 (80)

20. *Amarendra v. Bikash*, A. 1957 Cal 534 (543)

21. *Gauri Lal v. Jugal*, A. 1959 Punj. 255 (269) F.B.

including the High Court is included in Entry 3 of List II, so<sup>22</sup> that the jurisdiction of the High Court, which is included in 'administration of justice' is a State subject.<sup>23</sup>

#### Fees taken in Courts<sup>24</sup>.

The present power does not extend to any tribunal which is not a 'Court' in the proper sense of the term, though it may possess the trappings of a Court, e.g., an Income-Tax Appellate Tribunal,<sup>25</sup> an Assistant Collector or a Revenue Commissioner under a Sales Tax Act.<sup>26</sup> But it enables the State Legislature to prescribe fees charged in the High Court.<sup>27</sup>

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

#### 'Local Government'.

1. The Entry is very wide and empowers the State Legislature to legislate with respect to any subject relating to local government. It can also confer such powers as it itself possesses,<sup>1</sup> upon a local authority, including the power of taxation (within the limits of List II<sup>2-3</sup>), for the purposes of local self government.<sup>4</sup>

2 In conferring power to tax upon a local authority, the Legislature does not abdicate its functions, provided it lays down a principle and fixes a standard which the local authority has to follow in imposing the tax.<sup>5</sup>

3. Where a taxing power is thus conferred by a State Legislature upon a local or municipal authority it does not mean that the State Legislature loses its power to impose a tax on the same subject-matter as long as the authorisation in favour of the local authority subsists or that the same subject-matter cannot be taxed both by the State Legislature and the local or municipal authority. There is no such bar in the Constitution.<sup>6</sup> Thus,

22 *Shivarudrappa v Kapurchand*, A 1965 Mys. 76 (82).

23 *Sethadri v Second Addl I T. O.*, A 1954 Mad. 806

24 *Chakko v State of Orissa*, A 1956 Orissa 7

25 *Manyamma v Municipal Commr.*, A 1959 A.P. 271.

1. *Ram Krishna v. Janpad Sabha*, A 1962 S.C. 1073.

2. *Kisan v Bhusawal Municipality*, A 1966 Bom 15 (18)

3. *Municipal Council v. Mansoor*, A 1966 Mad 20

4. *Western India Theatres v. Municipal Corpn.*, A. 1959 S.C. 586.

5. *Calcutta Corpn. v. Sarat*, A 1959 Cal. 704 [Das Gupta C.J., held that the Legislature cannot confer upon the local authority the power to determine the rate of a tax, since that is a power which must be exercised by the Legislature itself. Similar view has been taken in *Standard Motor Union v. State of Kerala*, A 1962 Ker. 298, *Chattannatha v State of Madras*, A. 1966 Mad 229 (222). It is submitted that that view overlooks the language of Entry 5 which empowers the 'powers' of local authorities without any limitation.

The above view of the Author, expressed at p. 713 of the previous Ed., now finds support from the Supreme Court decision upholding the validity of the Bombay District Municipal Act, which had empowered the Municipalities to impose 'any other tax for the purposes of the Act' without indicating the rate or any ceiling in that behalf. Nevertheless, the Court observed that since the purposes of the tax had been indicated by the Legislature, there was no unconstitutional delegation of its functions [*Western India Theatres v. Municipal Corpn.*, A. 1959 S.C. 586]. See also *Corporation of Calcutta v. Liberty Cinema*, (1965) 2 S.C.R. 477 (492-3).

*Entertainment Board v. W. I. Theatres*, A. 1954 Bom. 261 (265).

a tax on entertainments or on property may be constitutionally levied both by a State Legislature as well as by a local body authorised by it for purposes of local self-government.<sup>6</sup>

4. Read with Entries 64 and 65 of List II, the State Legislature is competent not only to constitute local bodies but also to define and punish offences and to define and regulate the jurisdiction of all Courts (except the Supreme Court) with respect to the same.<sup>7-2</sup>

#### Ancillary powers.

This Entry includes, *inter alia*, the ancillary power of providing for—

The election of local authorities and for the settlement of disputes arising thereof.<sup>7-2a</sup>

#### 6. Public health and sanitation : hospital and dispensaries.

##### 'Public health'.

1. Under this Entry (read with Entry 1 of List II), the State Legislature is competent to prohibit or control the use of amplifiers to the detriment of public health and tranquillity even though the amplifiers themselves are instruments of broadcasting and the manufacture or control of ownership of such instruments would fall under Entry 31 of List I.<sup>1-2</sup>

2. Protection against fire will come either under Entry 5 or under the present Entry.<sup>2</sup>

#### 7. Pilgrimage, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

##### 'Intoxicating liquors'.

The words 'intoxicating liquor' in item 31 of List I of the Government of India Act, 1935 (Entry 8 of List II of the Constitution) cover not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol,<sup>3</sup> which may be used as their substitutes.

From this, the Gujarat High Court<sup>5</sup> has held that the expression would include all preparations which contain ethyl alcohol, even though poisonous substances are added so as to make it dangerous to human life, e.g., French polish.<sup>5</sup> At any rate, the State Legislature may prohibit the possession etc. of such preparations as an ancillary power under the present Entry, in order to effectuate its policy of prohibition of intoxicating liquors.

##### 'That is to say'.

These words show that the words 'production etc.' which follow are merely illustrative and not words of limitation. By reason of these words, the entire field of legislation on the subject of intoxicating liquors, including prohibition, belongs exclusively to the State Legislature.<sup>6</sup>

##### 'Possession and sale'.

The words 'possession and sale' occurring in Item 8 of List II of the Government of India Act, 1935 must be read without any qualification (having

7-25. *State of Mysore v. Gurupadapa*, A. 1962 Mys 237 (259)

1-2. *State of Rajasthan v. Chawla*, A. 1959 SC 544.

3. *Caltex Ltd. v. Director*, A. 1960 Cal. 219 (222).

4. *State of Bombay v. Balsara*, (1950 51) CC 308 (1951) S.C.R. 682 (685).

5. *Chandulal v. State of Gujarat*, A. 1964 Guj. 59 (67 8).

6. *Bhoja Prasad v. Emp.*, A. 1942 F.C. 17.

no reference to import or export) and the word 'import' in item 41 of List I standing by itself will not include either sale or possession of the article imported into the country. There is thus no conflict between the two items (i.e., between Entries 8 of List II and 41 of List I) of the Government of India Act.<sup>5</sup>

### **'Prohibition.'**

1. The power to legislate with respect to intoxicating liquors<sup>6</sup> and narcotics includes the power to introduce partial or total prohibition.<sup>8</sup> The words "that is to say, the production, manufacture..." are explanatory or illustrative words, and not words either of amplification or limitation.<sup>5</sup> The right to legislate as to possession of intoxicating liquors necessarily involves a right to prohibit possession.<sup>5</sup>

2. A statute relating to prohibition of intoxicating liquor can widely regulate the manufacture, sale and consumption of allied products like medicinal preparations, not for the purpose of interfering with the rights of citizens to acquire, hold or dispose of them, but for preventing them from being diverted from their purpose and utilised for defeating the provisions of the law relating to prohibition.<sup>7</sup>

### **No conflict with Entry 41 of List I.**

There is no conflict between the present Entry and Entry 41 of List I and that the right of the State Legislature to prohibit the possession, purchase and sale of intoxicating liquor includes *foreign* or *imported* liquor as well. The words 'possession and sale' in the present Entry are to be read without any qualification whatsoever.<sup>4</sup>

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.

### **'Education.'**

1. The present Entry gives the residuary power over education and Universities to the States, subject to the exceptions specified in the Entry itself. These exceptions are—(i) Universities mentioned in Entry 63 List I; (ii) Institutions of national importance (Entry 64, List I); (iii) Union agencies for professional education, etc. (Entry 65, List I), (iv) Co-ordination and determination of standards (Entry 66, List I); (v) Vocational and technical training of labour (Entry 25, List III).

2. The State Legislature has no power to legislate with respect to the matters included in Entries 6-66 of List I. In the result, though the State Legislature has the power to legislate with respect to the medium of instruction, if legislation for imposition of an exclusive medium of instruction in a regional language or in Hindi is likely to result in the lowering of standards in institutions for higher education or research or scientific or technical education, the subject would be excluded from the State List and fall within Entry 66 of List I.<sup>9</sup>

3. This power includes the power to impose restrictions on the management of educational institutions in matters relating to education, even though such institutions be charitable,<sup>9</sup> or to levy an 'education cess' for the purpose of promoting education.<sup>10</sup>

7. *Nagarm v. State of Madras*, A. 1954 Mad. 643.

8. *Gujarat University v. Sri Krishna*, A. 1963 S.C. 703 (716-7).

9. *Katra Education Society v. State of U. P.*, A. 1966 S.C. 1307 (1311).

10. *Ramchand v. Mulhapur Municipality*, A. 1970 Bom. 154 (157).

**'Subject to the provisions of entries 63-66 of List.'**

By reason of these words, the present Entry must be harmoniously construed with Entries 63-66 of List I. The result is—

I. Entries 63-66 of List I are carved out of the subject of education and in respect of the subjects included in Entries 63-66, the power to legislate is vested exclusively in Parliament,<sup>11</sup> even though they relate to 'education' or 'Universities'.<sup>12</sup>

II. Entries 11 of List II and 66 of List I necessarily overlap; but to the extent of overlapping, the power conferred by Entry 66 of List I must prevail over the power of the State under Entry 11. Thus, the medium of instruction, not being an item in the Legislative List, has to be regarded as a power incidental to the power to legislate regarding 'education'. Power to legislate in respect of the medium of instruction, in so far as it has a direct bearing and impact upon the regulative head of 'co-ordination and determination of standards in institutions of higher education or research and scientific and technical institutions', must also be deemed to be vested in the Union (by Entry 66 of List I).<sup>13</sup>

In other words, though the State Legislature has exclusive power to legislate relating to medium of instruction in institutions for primary or secondary education, the State Legislature shall have no power to legislate as to the medium of instruction in institutions for higher and scientific or technical education, if such legislation is likely to result in a lowering of the standards in such institutions.<sup>14</sup>

III. Whether State legislation relating to medium of instruction<sup>15</sup> or syllabi, courses of study<sup>16</sup> or standards for admission<sup>17</sup> to Universities and other institutions for higher and technical education shall be invalid will, thus, depend upon whether such legislation should render it impossible or difficult for Parliament to exercise its power with respect to co-ordination and determination of standards in the institutions for higher education.<sup>18</sup> Thus,

(i) If State legislation relating to the imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text-books and journals, competent teachers and incapacity of students to understand the subjects, is likely to result in the lowering of standards in institutions for higher education, the legislation would be invalid.<sup>19</sup>

(ii) But—

(a) A State legislation which extends the period of use of English as the medium of education by ten years cannot be invalid inasmuch as English being the only medium of instruction all over the country until such legislation, the continuance of its use cannot have the effect of lowering the standards.<sup>20</sup>

(b) If a State law prescribes a higher percentage of marks for extra-curricular activities in the matter of admission to colleges it cannot be said that it would appreciably encroach upon the Central field by lowering the standard.<sup>21</sup>

IV. Once, however, it is held that a State legislation, in its pith and substance, relates to the co-ordination and determination of standards for higher education or would directly affect the power of Parliament relating to that subject, the State legislation would be invalid, whether or not Parliament has actually exercised its power under Entry 66 of List I.<sup>22</sup>

**Entry 11, List II and Entry 44 of List I.**

The State Legislature does not lose its jurisdiction under the present Entry to regulate the working of a college affiliated to a University only<sup>23</sup> because the college is run by a company.<sup>24</sup>

11. *Chitralokha v State of Mysore*, A. 1964 S.C. 1828.

12. *Subhashini v State*, A. 1966 Mys. 40 (47).

13. *Mother Provincial v. State*, A 1970 Ker 196.



12. Libraries, museums and other similar institutions controlled or financed by the State ; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

*Amendment.*—The words in italics were inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante*.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I ; municipal tramways ; ropeways ; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways ; vehicles other than mechanically propelled vehicles.

#### 'Communications'.

Means of communication excepted from the present Entry are those included in Entries 22-25, 30-31 of List I ; 32, 35 of List III.

Reading all those entries together, the division of the power over 'communications' may be explained thus :

<i>Union</i>	<i>State</i>	<i>Concurrent</i>
Railways (Entry 22, List I) ; 'National highways' (Entry 23, List I) ; Shipping and navigation by mechanically propelled vehicles on inland waterways declared to be 'national waterways' (Entry 24, List I) ; Maritime shipping and navigation, including shipping and navigation in tidal waters (Entry 25, List I) ; carriage of passengers and goods by railways, sea or air or by national waterways in mechanically propelled vehicles (Entry 30, List I) ; Post and Telegraphs, telephones, wireless broadcasting and other 'like' forms of communication (Entry 31, List I).	Roads, bridges, ferries, municipal tramways, ropeways, inland waterways other than 'national waterways' and traffic thereon by vehicles other than mechanically propelled vehicles, other means of communication not specified in List II (Entry 13, List II)	Shipping and navigation on inland waterways (other than 'national waterways') by mechanically propelled vehicles and carriage of passengers and goods on such waterways (Entry 32, List III) ; mechanically propelled vehicles (Entry 35, List III).

#### 'Municipal tramways'.

The Entry is wide enough to authorise a Municipal tramway to fix and charge fares.

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

15. Preservation, protection and improvement of stock and prevention of animal diseases ; veterinary training and practice.

#### 'Preservation.....improvement of stock'.

This power enables the State Legislature to make a law to implement the directive contained in Art. 48 to prohibit the slaughter of milch and draught cattle.<sup>126</sup>

**16. Pounds and the prevention of cattle trespass.**

**17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.**

**18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.**

**'Land'.**

1. The earlier portion of the entry is not restricted to agricultural<sup>13b</sup> land, but includes all species of 'land'

2. The words 'rights in or over land' confer very wide powers

The present Entry is thus wide enough to cover—

(i) Land reform and alteration of land tenure,<sup>13c</sup> but not 'acquisition' of land which is included in Entry 12 of List III,<sup>14</sup> or transfer of property other than agricultural land, which is included in List III, Entry 6.<sup>15</sup> It is permissible, under this Entry, to extend the rights of tenants or the lands available for cultivation by tenants by limiting the extent of lands in the possession of landowners,<sup>16</sup> or to do away with intermediaries or to provide for the cancellation of leases made not in the normal course of management but in anticipation of acquisition for the abolition of intermediaries;<sup>17</sup> transfer to tenants in possession, by way of compulsory purchase, of all lands not required by the landholders for their personal cultivation.<sup>18</sup>

(ii) Settlement of disputes relating to land as well as determination of jurisdiction of Courts in respect of land as ancillary matters,<sup>19</sup> including stay of suits or suits or other proceedings relating to such disputes.<sup>20</sup>

(iii) Prevention of encroachments on public lands, and removal of such encroachments.<sup>21</sup>

(iv) Restriction or extinction of existing interests in lands, including provision for the statutory purchase<sup>22</sup> by tenants of lands belonging to the landlord.<sup>23</sup>

(v) Consolidation proceedings relating to several parcels of land.<sup>24</sup>

(vi) Fixing a ceiling for the holding of land to give the excess land to the landless or to those who had land below that ceiling.<sup>25</sup>

(vii) Resumption of jagirs with ancillary provisions,<sup>26</sup> or cancellation of leases granted by ex-Rulers.<sup>27</sup>

13b. *Mugh Raj v Alla Rakha*, A. 1947 P.C. 72.

13c. *Atma Ram v State of Punjab*, A. 1959 S.C. 519 (522).

14. *State of Bihar v Kameshwar*, A. 1952 S.C. 252 (283), affirming *Kameshwar State of Bihar*, A. 1951 Pat. 41 (66).

15. *Mangtula v. Rathashyam*, A. 1951 Pat. 14 (29).

16. *Sri Ram v State of Bombay*, A. 1959 S.C. 459 (463).

17. *Kunhikoman v State of Kerala*, A. 1962 S.C. 78 (787).

18. *Raghbir v State of Ajmer*, A. 1959 S.C. 475 (477).

19. *Brij Bhukan v. S. D. O.*, A. 1956 Pat. 1 (15).

20. *Laxminarayan v Chhotu*, A. 1957 M.B. 62.

21. *Atma Ram v State of Punjab*, A. 1959 S.C. 519 (523).

22. *State of Punjab v. Kehar Singh*, A. 1959 Pat. 8.

23. *State of P. P. v Moradkhani*, A. 1962 S.C. 736 (799-100); *Amarsarjit v State of Punjab*, A. 1962 S.C. 1506.

**Whether 'land' includes 'buildings'.**

There was a conflict of opinion amongst the High Courts on this point.

(A) The Nagpur, Bombay and Allahabad High Courts were of the opinion that<sup>24</sup> 'land' includes houses and buildings. According to this view, control of letting and accommodation of premises would be covered by the present Entry.

(B) The Patna and Rajasthan High Courts,<sup>25</sup> on the other hand, held that 'land' cannot be so widely interpreted.

The Supreme Court has approved of the latter view, to hold that the power of the State Legislature to legislate in respect of landlord and tenant of buildings is to be found in Entries 6, 7 and 18 of List III and not in Entry 18 of List II, because the expression 'land tenures' in Entry 18 of List II would not cover tenancy of *buildings* or of house accommodation.<sup>1</sup>

**'Relation of landlord and tenant'.**

This expression and the next expression "collection of rents" relate to lands which are not agricultural equally with agricultural lands.<sup>2</sup>

This expression covers legislation not only relation to persons whose tenancy right subsists but also persons who continue in possession after the termination of their tenancy.<sup>3</sup> In other words, it includes an ex-landlord and an ex-tenant.<sup>4</sup>

Leases of non-agricultural property and all matters relating thereto are dealt with by Entries 6 and 7 of List III.<sup>5</sup>

**'Collection of rents'.**

These words confer power upon the State Legislature to legislate with respect to *remission* or *reduction* of rents as well as their *assessment*, *collection* or *recovery*, e.g. to provide that decrees for rent shall be executed only in some particular manner.<sup>6</sup>

**Transfer and alienation of agricultural land.**

While the preceding matters of the entry relate to both agricultural or non-agricultural land, the exclusive power of the Provincial Legislature to deal with transfer of land is confined to agricultural land, for transfer of property other than agricultural land is a concurrent subject under List III (Entry 6). A State law relating to transfer of agricultural land may override the provisions of the Transfer of Property Act,<sup>7</sup> say, as to mortgages of agricultural land.<sup>8</sup>

**Entries 18 and 45 of List II.**

These two entries, taken together, would comprehend the power to legislate regarding resumption of *jagirs*.<sup>9</sup>

24. *Monohar v. Datas* A. 1951 Nag. 88 (63 6), *Mangal v. State of M. P.* A. 1955 Nag. 153 (156), *Patel v. Vaswanath*, A. 1964 Bom. 204; *Raman v. State of U. P.* A. 1962 All. 70.

25. *Mangal v. Radhashyam*, A. 1958 Pat. 14; *Milap v. Dwarika*, A. 1954 Raj. 352 (355); *Nawal v. Nathu*, 1 L.R. 11 Raj. 421.

1. *Indu Bhushan v. Rama Sundari*, (1969) 2 S.C.O. 289 (299).

2. *Megh Raj v. Alla Rakha*, (1947) F.O.R. 77 (86) P.O.

3. *Santhanakrishna v. Vasthilingam*, A. 1964 Mad. 51 (52).

4. *Bhulpa v. Radhakumari*, A. 1956 Nag. 50 (52), *Subrahmanya v. Dharmalinga* A. 1958 Mad. 618 (615).

5. *United Provinces v. Atiga*, A. 1941 F.O. 16 (25); *Uday Chand v. Samartinda*, (1947) 63 C.L.J. 1 (F.O.).

6. *Paramananda v. Sanhar*, (1950) D.L.R. 81 (82) Outlook.

7. *Megh Raj v. Alla Rakha*, (1947) 5 O.W.N. 423 (538) P.O.

8. *Amarsarjit v. State of Punjab*, A. 1962 S.C. 1906 (1818).

**Entries 18 and 65 of List II.**

The words of Entry 18 are comprehensive enough to include the remedial as well as the *procedural* provisions concerning the reliefs in respect of the several rights and liabilities enumerated in this Entry. Of course, there is a separate Entry for 'Civil Procedure' (4 of List III), but there civil procedure is used in a general sense as the procedure applicable to litigation *generally*; it does not include a special law of procedure which is applicable only to a litigation regarding a special matter.<sup>9</sup> Entry 65 is wide enough to create and determine the powers and jurisdiction of Courts in respect of *land*, as a matter *ancillary* to the subject of Entry 14.<sup>7</sup>

**19. Forests.**

1. A State Act which has for its object the preservation of forests, defined a forest as including *land* recorded in the record of rights as 'forest' or jungle land. *Held*, the legislation was, in its pat<sup>h</sup> and substance, one under Entry 19 of List II and not under Entry 18 of List II relating to land.<sup>10</sup>

2. This Entry does not confer a power to impose a tax on forests. That power is to be had from Entry 19 of List II.<sup>11</sup>

**20. Protection of wild animals and birds.****21. Fisheries.****'Fisheries'.**

4. The present Entry would give the Legislature power over fisheries in inland and territorial waters to the State, while the legislative power over right of fishing beyond territorial waters belongs to the Union under Entry 57 of List I.

2. This includes the power not only to regulate fishing but also to prohibit fishing altogether in particular times.<sup>12</sup>

**22. Courts of wards subject to the provisions of entry 34 of List I, encumbered and attached estates.**

**23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.**

**Regulation of Mines.**

1. This Entry gives the State Legislature the power to legislate as regards regulation of mines and mineral development subject to legislation made by Parliament under Entry 54 of List I.<sup>13</sup>

2. The legislation under Entry 54 of List I must, however, be a *post* Constitution enactment. Nothing, not a pre-Constitution Central Act, say, the Mines and Mineral (Regulation and Development) Act, 1948, can operate as a declaration under Entry 54 of List I so as to limit the powers of the State Legislature.<sup>14</sup> The State Legislature is even competent to repeal such pre-Constitution Central Act.<sup>14</sup>

**Entries 23 List II and 54 of List I.**

1. The jurisdiction of the State Legislature under Entry 23 is subject

9. *Cf. Bux Bahram v. Tazari*, (1942) 46 C.W.N. 99 (1006) *Uday Chand v. Samarag-dra*, 947) 22 O.L.J. 1 (F.O.)
10. *Durgaji v. State of Bihar*, A. 1978 Pat. 65.
11. *Kunnathal v. State of Kerala*, A. 1961 S.C. 551 (564)
12. *United Provinces v. Aziz*, A. 1941 F.O. 16 (25).
13. *Hempir-Rampur Coal Co. v. State of Orissa*, A. 1961 S.C. 419 (472)
14. *Hempir-Rampur Coal Co. v. State of Orissa*, A. 1941 S.C. 459 (472)

to the limitation imposed by the latter part of the said entry which refers to Entry 54 of List I. If a Central Act has been passed which contains a declaration by Parliament as required by Entry 54 and if the said declaration covers the field occupied by a State enactment relating to mines and mineral development, the State Act would be *ultra vires*<sup>15</sup> not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law.<sup>16</sup> The limitation imposed by the latter part of Entry 33 is a limitation of the legislative competence of the State Legislature itself.<sup>18</sup>

2. Even where the declaration made by the Central Act under Entry 54 of List I is subsequent to the State Act, the State Act ceases to have operation from the date of enactment of the Act made by Parliament.<sup>17</sup>

3. But the denudation of the legislative power relating to this subject matter will be only to the extent to which regulation and development under the control of the Union has been declared by Parliament to be expedient. The legislative power of the State Legislature subsists outside that area.<sup>19</sup> To what extent the control of the Union should go is for Parliament to determine.<sup>18</sup>

4. If, however, the entire field of mineral development has been taken over by the Central Act, including the provision for amenities to workmen employed in the mines, the State Legislature would lose the power to levy any fee for the provision of such amenities and any fee imposed by a State Act prior to the Central Act would become invalid, even though no such levy has actually been made under the Act or the Rules framed under the Act have not yet been enforced,<sup>20</sup> because all that is required is a 'declaration' by Parliament.<sup>16-18</sup> Sums due under the levy prior to the disappearance of the State Act by virtue of the superior legislation may, however, be recovered.<sup>18</sup>

24. Industries subject to the provisions of entries 7 and<sup>18</sup> 52 of List I.

#### Amendment.

The words 'entries 7 and 2' have been substituted for the word 'entry', by the Constitution (Seventh Amendment) Act, 1956, in order to remove an obvious lacuna, for, the Union power relating to industries is contained not only in Entry 52 but also in Entry 7 of List I.

25. Gas and gas-works.

Entries 52 of List I and 25 of List II.

While Entry 24 of List II is subject to Entry 52 of List I, Entry 25 of List II makes 'Gas and Gas-works' independent of Entry 52 of List I. In the result, even though Parliament declares the production of 'gas' as an industry the control of which by the Union is expedient in the public interest, it is competent for the State Legislature to acquire or requisition the property of a particular 'gas-work'.<sup>14-21</sup>

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

• 'Trade and commerce within the State.'

Under the present Entry, the State Legislature can—

(a) Provide for the fixation of minimum price payable to cultivators of

15. *Balimath v State of Bihar*, A. 1970 S.C. 1436.

16. *State of Orissa v. Tulloch*, A. 1964 S.C. 1284.

17. *Muralid v State of Orissa*, A. 1962 Orissa 24.

18. Inserted by the Constitution (Seventh Amendment) Act, 1956.

19-21. *In re Oriental Gas Co.*, A. 1961 Cal. 207, affirmed by *Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1962).

jute, authorise the Government to control stocking of raw jute and make it compulsory to enter into contracts for the sale of raw jute only through a Jute Board constituted under the Act. Such legislation is not *ultra vires* even though it may have some direct effect upon export of raw jute in certain cases [Entry 41 of List I].<sup>23</sup>

(b) Regulate the hours, place, date and manner of sale of any particular commodity or commodities.<sup>24</sup> It could, for example, say that the sale of explosives or other dangerous substances should only be in selected areas, at specified times or on specified days when extra precautions for the general safety of the public and those directly concerned could be arranged for. In the same way, it could say that there shall be no sales on a particular day or on days of religious festivals and so forth.

On the other hand—

Though 'forward contracts' would be included in 'trade and commerce' in the ordinary sense<sup>25</sup> legislation on forward contracts would come not under the present Entry but under Entry 45 of List I so that the latter Entry, introduced by the Constitution, may not be rendered futile.<sup>26</sup>

**27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.**

**'Production, supply and distribution of goods'.**

1. Under the present Entry, the State Legislature has the power to restrict the export of essential commodities where such restriction is necessary for securing the maintenance or increase of the supply of such commodities, according to the doctrine of pith and substance.<sup>1</sup>

2. Fixation of price is included within the present power.<sup>2</sup>

The power to regulate 'production' supply and distribution of goods' includes the power not only to make general regulations or orders, but also *ad hoc* or special orders relating to particular producers or things.<sup>3</sup>

**'Goods'.**

By reason of the definition Art. 366 (2), 'goods' includes both raw materials and finished products. But the raw materials and finished products specified in Entry 33 of List III are excluded from the scope of the present entry.

**28. Markets and fairs.**

**Entries 28, 59 and 66.**

While the present Entry gives the State Legislature power to legislate on markets, Entries 59 and 66 (post) give the power with respect to tolls and fees respectively.<sup>4</sup>

**29. Weights and measures except establishment of standards.**

**30. Money-lending and money-lenders ; relief of agricultural indebtedness.**

**'Money-lending'.**

A State law which, in its pith and substance, deals with money-lending is not *ultra vires* if it incidentally affects promissory notes as security for<sup>5</sup>

23. *Albion Jute Mills v. Jute Brokers*, (1953) 57 O.W.N. 541.

24. *Mamohar Lal v. The State*, (1955) 1 S O R. 671.

25. *Duni Chand v. Bhawalal Bros.* (1955) 1 S O R. 1071 [a case under the Govt. of India Act, 1955].

26. *Waverly Mills v. Raymon & Co.*, A 1963 S O 90 (95).

1. *Darshan Singh v. State of Punjab* (1958) S O R. 319 (329).

2. *Perkatarubba v. Emp.*, A 1945 Mad 104.

3. *Jain v. State*, (1951) 1 L R. 90 Pat. 681.

4. *Havaldar v. Dibrugarh Municipality*, A 1958 Assam 156.

loan.<sup>4</sup> Similarly, a law providing for relief<sup>5</sup> against agricultural indebtedness and dealing with the relation between agricultural debtors and creditors is, not *ultra vires* the Provincial Legislature on the ground that it incidentally affects negotiable instruments.<sup>6</sup>

### 31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies.

#### Unincorporated society.

The incorporation of the Board of an incorporated society such as the Tibbia College and its dissolution come under the present Entry.<sup>7</sup>

33. Theatres and dramatic performances subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

#### 'Cinemas subject to the provisions of Entry 60 of List I'.

It is clear from the above words that the general power to legislate with regard to cinemas is in the State Legislature and only a particular power is reserved for the Union Legislature in Entry 60 of List I, viz. the sanctioning of films for exhibition.<sup>8</sup>

Hence, the regulation and licensing of the storage of films would also come within the State power under the present power unless and until Parliament declares cinematograph films as a 'dangerously inflammable substance' by a law made under Entry 53 of List I.<sup>9</sup> The West Bengal Fire Services Act, 1950 is, accordingly, *intra vires* the Constitution.<sup>10</sup>

#### 'Entertainments, amusements'.

These words in the present Entry as well as in Entry 62 of List II refer to objective sources of amusement or entertainment<sup>11</sup> offered by one person to another, and does not include the subjective satisfaction or pleasure which a person may derive from his own acts, *e.g.*, from reading an amusing literature or by solving crossword puzzles. Of course, where an objective amusement is offered by one person to another, the Legislature may tax either the person who offers or the person who enjoys it, under Entry 62 (*see post*).

### 34. Betting and gambling.

#### 'Gambling'.

It includes any activity or undertaking whose determination is controlled or influenced by chance or accident and which activity or undertaking is entered into or undertaken with the consciousness of that risk,<sup>12</sup> *e.g.*, 'prize competitions',<sup>13</sup> a wagering contract, such as a contract for the sale or purchase of goods at a given price at a future time, not intending an actual transfer of goods but only to pay or receive the difference according as the market price varied from the contract price.<sup>14</sup>

This Entry is wide enough to include all lotteries other than those organised by Government which come under Entry 40 of List I.<sup>15</sup>

4. *Prafulla v. Bank of Commerce*, (1947) 51 C. W. N. 599 (608) P.C.

5. *Board of Trustees v. State of Delhi*, A. 1962 S.O. 458 (471)

6. *De Luss Film Exhibitors v. Corporation of Calcutta*, (1952) 7 D. L. R. 144 (Cal.).

7. *State of Bombay v. Chamarbaugwella*, (1955) 57 Bom. L.R. 288 (331) : A. 1956 Bom. 1 (6).

8. *State of Bombay v. Chamarbaugwella*, A. 1957 S.O. 699 (720).

9. *Bullion & Grain Exchange v. State of Punjab*, A. 1951 S.O. 208.

**Entries 34 and 62 of List II.**

While 'betting and gambling' is included in the present Entry, the power to impose taxes on betting and gambling is included in Entry 62. The two are separate powers, so that by surrendering its power to regulate prize competitions, under Art. 252 (1), a State Legislature does not lose its power to impose a tax on such competitions.<sup>10</sup>

*Acts coming under this Entry*—W B Prize Competitions Act, 1955;<sup>11</sup> Prize Competition Act, 1955 (passed by Parliament under Art. 252).<sup>12</sup>

**35. Works, lands and buildings vested in or in the possession of the State.**

**36.**

**Amendment**—Entry 36, which was as follows, has been omitted by the Constitution (Seventh Amendment) Act, 1956—

"Acquisition or requisition of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III"

See, further, under Entry 42 of List III, *post*

**37. Election to the Legislature of the State subject to the provisions of any law made by Parliament.**

**38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.**

**39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.**

**40. Salaries and allowances of Ministers for the State.**

**41. State public services; State Public Service Commissions.**

**State public services.**

This Entry includes the power of integration of the services<sup>14</sup> and service personnel.<sup>15a</sup>

But the power of the State regarding integration of services under the present Entry must be exercised subject to the power of Parliament derived from Art. 4 of the Constitution.<sup>13b</sup>

**42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.**

**43. Public debt of the State.**

**44. Treasure trove.**

**45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.**

10. *R. M. D. C. v. State of Mysore*, A. 1962 SC 594 (549)

11. *J. N. Gupta v. State of W. B.*, A. 1959 Cal 141.

12. *Chamatbaugwala v. Union of India*, A. 1957 SC 628

13. Omitted by the Constitution (Seventh Amendment) Act, 1956.

14. *Jaleel v. State of Mysore*, A. 1961 Mys 210.

14a. *Patel v. State of Gujarat*, A. 1965 SC. Guj 23 (35); *Naganoor v. Union of India*, A. 1966 Mys. 95.

14b. *Pillai v. Govt. of India*, A. 1970 Ker. 110 (115) F.B.



**'Land revenue'.**

Read with Entry 18 of List II, this Entry give the State Legislature power to resume *jagirs*.<sup>15</sup>

**'Assessment of land revenue'.**

The State Legislature is competent, under this Entry, to assess land revenue in derogation of revenue-free grants previously made by the State.<sup>16</sup>

**'Maintenance of land records.'**

1. This expression would include not only the act of maintaining but all things incidental to the maintenance of land records.<sup>17</sup>

2. The expression 'land records' is wide enough to include title deeds and other documents relating to lands resumed by the State, kept both before and after such resumption.<sup>17</sup>

**46. Taxes on agricultural income.****Taxes on agricultural income.**

1. Even though Entry 19 of List II distinguishes 'forests' from 'agriculture' in Entry 14 of the same List, Entry 46 stands independent of either and would include a tax on income from forestry operations provided it falls within the definition of agricultural income in Art. 366 (1).<sup>18</sup>

2. The jurisdiction of the State Legislature to legislate under the present Entry is limited by the definition of 'agricultural income' in Art. 366 (1), and the State Legislature cannot extend its own jurisdiction by adopting a wider definition of 'agricultural income'.<sup>19-19a</sup>

**47. Duties in respect of succession to agricultural land.****48. Estate duty in respect of agricultural land.****49. Taxes on lands and buildings.****Taxes on lands and buildings.**

1. The present Entry confers power upon the State Legislature to levy taxes on 'lands and buildings' without any terms of 'limitation as to the manner in which the tax is to be levied'.<sup>20</sup> It is, therefore, open to a Municipality under the present Entry, to correlate its tax to the real value of the open lands for the purpose of determining the rate or amount of the tax that should be levied upon them.<sup>21</sup> Hence a municipal legislation which provides that the basis of valuation for the purpose of levying a tax on lands may be either capital or annual letting value is not *ultra vires*.<sup>20</sup>

2. A tax on building does not become a tax on income because it is levied on the basis of its annual value.<sup>22</sup> Similarly, a tax on holding is a tax under this Entry even though it is based on the annual value of the holding,<sup>23</sup> and such annual value is calculated on the basis of the royalty payable to the Government in the case of mining land.<sup>23a</sup>

15. *Amarsarjit v. State of Punjab*, A. 1962 S.C. 1305 (1313).

16. *Grijananda v. State of Assam*, A. 1958 Assam 33 (38, 46).

17. *Rinarbai v. State of Bombay*, A. 1962 Guj. 18.

18. *I. T. Commrs. v. Benoy*, A. 1956 S.C. 769 (772): (1956) S.C.R. 101.

19. *Prativa v. Agricultural I. T. O.*, 1958 Cal 585 (586).

19a. *Cl. Korimtharavi Tea Estates v. State of Kerala*, A. 1963 S.C. 760.

20. *Municipal Corporation v. Gordhandas*, I.L.R. (1954) Bom. 41 (52).

21. *Byramjee v. Prov. of Bombay*, (1939) 42 Bom.L.R. 10 (47).

22. *Ralla Ram v. Prov. of East Punjab*, A. 1949 F.C. 81.

23. *Quack Sugar Mills v. State*, A. 1956 All. 136.

23a. *Murthy v. Collector of Chittoor*, A. 1965 S.C. 177 (180).

3. A tax on land does not cease to be so because it is imposed upon property within a defined area or upon specified classes of property,<sup>24</sup> or because forests stand on it<sup>25</sup> or because it is described as a 'Bridge tax',<sup>26</sup> or a 'water tax',<sup>27</sup> or a 'land cess',<sup>28</sup> or because it is based on its annual value.<sup>29</sup>

4. A tax on land or building may be imposed either upon the occupier or upon the owner. It is not necessarily an 'occupation tax' in India.<sup>30</sup> A cess payable by an occupant of land, according to his land revenue assessment, would come under this Entry.<sup>31</sup>

5. The following taxes have been held to be covered by the present Entry—

(i) A 'market tax' being the license fee payable for holding a market on municipal land.<sup>32</sup>

(ii) A capital levy on agricultural land.<sup>33</sup>

(iii) A water tax assessed on the annual value of tanks and buildings,<sup>34</sup> as distinguished from the quantum of water supplied and consumed.<sup>35</sup>

6. A surcharge on property tax already levied is covered by this Entry.<sup>36</sup>

7. There has been a difference of opinion as to whether a Gift tax would fall under this Entry.<sup>37</sup>

The Supreme Court has settled the controversy by holding that a gift tax would come under Entry 47 and not the present Entry.<sup>38</sup>

8. On the other hand, a tax ceases to be a tax on 'buildings', if the floorage of a building is adopted as the measure of the tax or it is varied according to the number of buildings owned by the person taxed.<sup>39</sup>

(ii) The power to levy on land or buildings cannot be interpreted to include the power to tax machinery situated on a land or building, even though the machinery was there for the land or building, for a particular purpose.<sup>40</sup>

#### 'Lands'.

The Entry includes agricultural and all other kinds of lands,<sup>41</sup> including forest lands,<sup>42</sup> though the State Legislature has no power to tax forests as such.<sup>43</sup>

#### Land tax and Wealth tax.

In the case of a tax on 'lands and buildings', the value, capital or annual, would be determined by taking the land or buildings as a unit and subjecting the value to a percentage of tax.<sup>44</sup> In the case of wealth tax, on the other hand, the charge is on the valuation of the total assets (inclusive of lands and buildings) less the value of debts and other obligations which the assessee has to discharge. Merely because in determining the taxable quantum under

24. *Leventhal v Davis*, A 1941 P.C. 126 (152).

25. *Kunnathal v. State of Kerala*, A 1961 S.C. 22 (561).

1. *Raza Buland Sugar Co v Rampur Municipality*, A 1962 All 83.

2. *Ravivarma v State of Kerala*, A 1961 Ker 31.

3. *Habhuba v State of Bombay*, A 1949 Bom 43.

4. *Ajoy v. Local Bd.*, A 1959 Assam 221.

5. *Sesharatnam v Gift Tax Officer*, A 1960 AP 115 (117).

6. *Nizam Sugar Factory v. Reddar Municipality*, A 1965 AP 91.

7. *Kandayya v. Kurnool Municipality*, A 1961 AP 379 (390).

8. *Vide* 5 Sp. (68).

9. *Second Gift Tax Officer v. Haranath*, A 1970 SC 999.

10. *Bhuvaneshwariah v. State*, A 1965 Mys 170 (183, 206).

11. *New Manek Chowk Mills v. Ahmedabad Municipality*, A 1967 SC 1801 (1814).

12. *Jagannath v. State of U. P.*, A SC 1562 (1566).

13. *Kunnathal v. State of Kerala*, A 1961 SC 552 (561).

taxing statutes made in exercise of powers under Entries 86, List I and 49 of List II, the same basis of valuation of assets is adopted, trespass on the field of one legislative power over another may not be assumed.<sup>13</sup>

**50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.**

**Tax on mineral rights.**

1. A tax on mineral rights would ordinarily refer to tax on the extraction of minerals or on the right to do so.<sup>14</sup>

2. It would not include a cess payable according to the annual rent value of the mining land, which is a land tax, even though such rent, in the case of a mining land, exceeds the rent which would have been payable if the lease related to the use of the surface only.<sup>15</sup>

**51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—**

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics ; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

**Excise Duty.**—The powers conferred by Entries 51 and 54 being separate, there is nothing to debar the State Legislature to impose an excise tax because forests stand on it ;<sup>16</sup> or because it is described as a 'Bridge tax',<sup>17</sup> or a 'water tax',<sup>18</sup> or a 'land cess'.<sup>19</sup>

2. Unless the taxable event is the production or manufacture of goods, a levy cannot be held to be an 'excise duty'. Hence, a duty levied for the exclusive privilege of selling toddy from certain shops cannot be upheld as an excise duty under the present Entry.<sup>20</sup>

**'Countervailing duties'.**

1. This Entry gives power to the State Legislature—

(a) to impose duties of excise on alcoholic liquors where the goods are manufactured in the State ;

(b) to levy countervailing duties at the same or lower rates on similar goods manufactured elsewhere in India.

2. The countervailing duties are meant to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors produced in the State. Countervailing duties can, therefore, be imposed on imported liquors only if goods similar to those which are imported are actually manufactured or produced in the taxing State.<sup>21</sup>

3. An exception to the foregoing proposition is offered by duties imposed on goods brought from outside the State which might have been existing from before the commencement of the Constitution and which may have been continuing by virtue of Art. 372 ; but that protection would be lost if and

13. *Sudhir v. W. T. O.*, A. 1969 S.C. 59 (62).

14. *Murthy v. Collector of Chittoor*, A. 1965 S.C. 177 (182).

15. *Leventhal v. David*, A. 1930 P.C. 129 (132).

16. *Raza Buland Sugar Co. v. Rampur Municipality*, A. 1952 All. 83.

17. *Ravivarma v. State of Kerala*, A. 1964 Ker. 31.

18. *Shinde Bros.*, A. 1967 S.C. 1512 (1521).

19. *Kalyani Stores v. State of Orissa*, A. 1966 S.C. 1686 (1690).

in so far as that existing duty is enhanced after the commencement of the Constitution.<sup>20</sup>

### Narcotic drug.\*

While general legislation regarding drugs is a Concurrent subject under Entry 19 of List III, the State Legislature has exclusive power to impose excise duty upon a drug if it is a 'narcotic drug', e.g., chloral hydrate.<sup>21</sup>

### 52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

**Essential features of the tax under Entry 52 of List II : distinguished from 'terminal tax'.**

The essential features of the present tax are—(a) the entry of goods into a definite local area ; (b) the goods must enter for the purpose of consumption, use or sale therein.<sup>22, 23</sup> Hence, the tax cannot be imposed under the present entry on goods merely passing through<sup>24</sup> that local area and having terminus elsewhere. But there is no limitation on the manner by which the goods to be subjected to the tax may enter into that local area.<sup>25</sup>

The tax referred to by the present Entry is (when levied by a local authority) commonly known as 'octroi',<sup>26</sup> i.e., a tax on goods brought into a place 'for sale, consumption or use'.<sup>27</sup> It is to be noted that no such purpose restricts Entry 89 of List I, which relates to "terminal tax." A terminal tax is a tax collected at the terminal or outskirts of a local area, without reference to the purpose for which the goods enter that area. Entry 89 of List I, again, is limited by the words 'railway, sea or air'. But in the present Entry there is no limitation on the manner in which the goods may enter ; there is no ground for suggesting that the entry of goods by rail or air is any less contemplated by the present Entry by waterway or road. It follows that so far as railborne or air-borne goods are concerned, the same goods may well be subject to taxation by the Union under Entry 83 of List I as well as to local taxation under Entry 61 of List II, but the grounds of taxation under the two Entries are radically different.<sup>28</sup>

2. Once the two conditions mentioned in the Entry are satisfied, the imposition comes under the Entry, whether it is termed a 'tax' or a 'cess'.<sup>29, 30</sup>

3. The existence or non-existence of any provision for refunds is not an essential criterion of the present Entry.<sup>31</sup>

4. A tax under the present Entry has nothing to do with Art. 276, which is related exclusively to Entry 60 of List II.<sup>32</sup>

### 'Local area'.

In the context of the State legislative power under the present Entry, this expression means an area administered by a local body like a municipality, a district board, a local board, a panchayat or the like. It does not mean any area notified by the Government to be a local area and would not, therefore, include the premises of a factory.<sup>33</sup> Hence, the C. P. Sugarcane Cess Act, 1956

20. *Kalyani Stores v. State of Orissa*, A. 1956 S.C. 1686 (1690).  
 21. *Indian C. & P. Works v. State of A. P.*, A. 1966 S.C. 713 (718).  
 22-25. *Burmah Shell v. Belgaum Borough Municipality*, A. 1963 S.C. 906 (910).  
 1-12. *Central India Spinning Co. v. Municipal Committee*, (1958) S.C.R. 1102.  
 13. *Punjab Flour Mills v. Prov. of Punjab*, (1947) 81 C.L.J. 417 (424) (F.C.).  
 14. *Central India Spinning Co. v. Municipal Committee*, (1958) S.C.R. 1102.  
 15. *Ram Krishna v. Municipal Committee*, A. 1959 S.C. 11.  
 16. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (241).  
 17. *Murli v. State of U. P.*, A. 1957 All. 159.  
 18. *Bangalore Mills v. Bangalore Corpn.*, A. 1962 S.C. 562 (565).

which enrovered the imposition of a cess on the entry of sugarcane into the premises of a factory, is *ultra vires* the present Entry.<sup>19</sup>

**'Consumption,' 'use' or 'sale'.**

1. This Entry authorises the taxation of goods brought into a local area where the importer brings it—

(a) to be consumed by himself or for sale to consumers direct ; or

(b) for sale to dealers who in their turn sel the goods to consumers within such area, irrespective of the fact whether the consumers buy the goods for use in the area or outside it.<sup>20</sup>

2. It would not, however, authorise a tax on goods which are imported into a local area merely for the purpose of re-export.<sup>21</sup>

3. 'Consumption' means 'using up'.<sup>22</sup>

4. 'Use' in juxtaposition with the word 'consumption' must mean use for any purpose other than 'consumption' or using up<sup>23</sup> ; it would thus, include the bringing in of uncrushed salt for the the purpose of crushing.<sup>24</sup> 'User' may not necessarily cause any visible change in form or substance of the goods used.<sup>25</sup>

**53. Taxes on the consumption or sale of electricity.**

**'Consumption'.**

The word, not being limited in any way, authorises the imposition of a duty on the consumption of electricity by the producer himself. Such a duty cannot be regarded as a duty of excise within the meaning of Entry 84 of List I.<sup>27</sup>

**54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I**

**Amendment.**—The italicised words have been added by the Constitution (Sixth Amendment) Act, 1956.

**Scope of Entry 54.**

1. What this Entry authorises is a taxation of 'sale', subject to the conditions laid down by Art. 286<sup>28</sup> or any other provision of the Constitution.

2. The power to tax under the present Entry can be availed of only where there has, in fact, been 'sale' as recognised by the general law ;<sup>29-32</sup> otherwise the tax will be *ultra vires*.<sup>33</sup>

3. This does not mean that the State Legislature can enlarge the definition of 'sale' so as to bring within the ambit of sales taxation transactions which could not be a 'sale' according to the established concept of a 'sale' in the law of contract,<sup>34</sup> or more precisely, the Sale of Goods Act, 1930.<sup>35-38</sup> Any such attempt on the part of the State Legislature to enlarge the definition of a 'sale' must be held to be *ultra vires*.<sup>39</sup>

19. *Diamond Sugar Mills v State of U. P.*, A. 1961 S.C. 662.

20. *Burmah Shell Co. v. Belgaum Municipality*, A. 1963 S.C. 900 (912).

20a. *Jajarahad Municipality v. Kathawar Industries*, A. 1969 Guj. 344 (347).

21. *J. C. Mills v. State of M. P.*, A. 1963 S.C. 414 (416).

21a. *State of T. C. v. Lashewnut Factory*, A. 1963 S.C. 333.

22. *J. K. Jute Mills v. State of U. P.*, A. 1961 S.C. 1534 (1539).

23. *State of Madras v. Dunkerly*, A. 1968 S.C. 560 (567, 570, 577).

24. *S. T. O. v. Budh Prakash*, A. 1954 S.C. 459.

25. *Georje Oakes v. State of Madras*, A. 1962 S.C. 1037 (1040).

1. *Bhopal Sugar Industries v. S. T. O.*, (1962) S.C. (Peta, 85/61).

2. *Abdul Qader v. S. T. O.*, A. 1964 S.C. 922 (924).

Thus, the State Legislature cannot provide—

(i) That though an amount which has been wrongly collected was not tax on the sale or purchase of goods may still be collected as such tax.<sup>3</sup>

But—

Where there has been a 'sale' in the proper sense, the State Legislature is not debarred from legislating with respect of the *situs* of the sale, if it is otherwise within its competence.<sup>4</sup>

#### Ancillary powers.

1. The present Entry is wide enough to confer power to legislate—

For compelling refund of tax improperly and illegally collected,<sup>5</sup> or for its confiscation.<sup>6</sup>

2. But the ancillary power cannot be extended to include that ever though an amount which has been collected, by mistake or otherwise, is not a tax on the sale or purchase of goods, it shall still be collected as if it were such tax.<sup>7</sup>

#### 'Sale of goods'.

1. In popular parlance, 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But the word 'sale' in Entry 54 of List II and the connected Articles has been used in the sense in which it is used in s. 4 of the Sale of goods Act.<sup>8-7</sup>

2. According to the Sale of Goods Act, the essential conditions of a sale are—

- (i) an agreement for transferring title to the goods,
- (ii) a money consideration for such agreement,
- (iii) actual transfer of property in the goods in pursuance of such agreement.<sup>9</sup>

According to this definition, a sale takes place only when the property in goods is transferred under a contract of sale and it is in that sense that the word 'sale' is used in the present Entry.<sup>6-7</sup>

3. But the contract may be express or implied, and the absence of the word 'sale' in a written contract is not conclusive.<sup>8</sup>

4. The present Entry is applicable only to pure contracts of sale of goods and not to mixed contracts of sale of goods coupled with the cost of labour.<sup>7</sup>

#### Essentials of a 'sale'.

(1) 'Sale of goods' is a composite expression and there is no sale of goods unless and until all the component transactions are completed.<sup>7-9</sup>

Firstly, a sale must be distinguished from an 'agreement of sale' under the present Entry, a State Legislature has no power to tax an 'agreement for sale'. Sale involves (i) an agreement for sale, i.e. an agreement to transfer the property in the goods to the buyer (ii) for a price and (iii) an actual sale by which the property in the goods passes from the seller to the buyer.<sup>8</sup>

3. *Tata Iron & Steel Co. v. State of Bihar* (1958) S.C.R. 1355.

4. *Burmah Construction Co. v. State of Orissa* A. 1962 SC 1320 (1322).

5. *Indian Aluminium Co. v. State of Madras*, A. 1963 Mad 116.

6. *New Indian Sugar Mills v. Commr. of Sales Tax* A. 1963 SC 1207; J. C.

7. *Tax Officer v. Y. M. A. Madras* A. 1970 SC 1212 (1216).

8. *State of Madras v. Dunkley*, (1959) S.C.R. 379; A. 1958 S.C. 560 (577).

9. *Govt. of A. P. v. Guntur Tobacco* A. 1965 SC 1396 (1400; 1404), *Chandra Bhan v. State of Orissa*, (1963) 14 STC. 766 (769) SC.

(i) A bargain or agreement is an essential element of sale within the meaning of the present Entry, and an involuntary sale would not come within its purview.<sup>9</sup>

It follows that there is no 'sale' where there is no contract for sale between the supplier of the goods and the person to whom they are transferred.<sup>10</sup> Thus, where in pursuance of a Control Order made under the Defence of India Rules, a manufacturer is obliged to supply his goods to the Government or other party nominated by the Controller, there is no contract for sale between the manufacturer and the party to whom the goods are supplied, even though the manufacturer receives his price. There is no volition in such transaction, the manufacturer acts on pain of penalty for violation of the Control Order.<sup>10</sup> The Controller, in such a case, cannot be regarded as the agent of the party to whom the goods are ordered to be supplied.<sup>10</sup>

For the same reason, consumption by the dealer himself of any portion of the goods does not constitute a 'sale' and cannot be taxed under the present Entry.<sup>11</sup>

(iii) A contract of sale is also to be distinguished from a contract of agency.

But there may be cases where goods are supplied to a person describing him as an agent, though the latter has complete discretion in the matter of selling those goods. In such a case it is a 'sale'.<sup>12</sup>

(iv) An 'agreement for sale' becomes a 'sale' only when the property in the goods is *actually transferred* [s. 4 (4), Sale of goods Act, 1930]. In short, while an agreement to sell is an executory contract, a sale is an 'executed' contract and it is the latter which is referred to by the present Entry.<sup>13</sup> A transaction in which the title to the property does not pass cannot be taxed under the present Entry.<sup>13</sup>

Hence, the present Entry does not extend to transaction of—

- (a). 'Forward contract'.<sup>14</sup>
- (b) Hire purchase agreements with an option to purchase to the hirer.<sup>14</sup>
- (c) Use by the dealer himself from his stock of goods.<sup>15</sup>
- (d) Recovery of damages from a railway for loss of goods in transit.<sup>16</sup>

*Secondly*, payment or promise of price is an essential ingredient of a sale.<sup>16a</sup> Price means money paid or promised as a consideration for the transfer of the goods. If the consideration be other than money, the transaction may be exchange or barter, but not sale.

On this principle, it has been held that the State Legislature cannot bring within the purview of the present Entry, the following transactions inasmuch as the element of money consideration is lacking

Allotment of goods amongst partners upon the dissolution of the firm.<sup>17</sup>

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9. *Pappalal v State of Madras*, A. 1953 S.C. 274 (276).
  10. *New India Sugar Mills v. Commr. of Sales Tax*, A. 1963 S.C. 1207.
  11. *Bhopal Sugar Industries v. S. T. O.*, (1962) S.C. [Petrn. 85/61].
  12. *Rhotas Industries v. State of Bihar*, (1961) XII S.T.C. 615 (S.C.).
  13. *Budh Prakash v. S. T. O.*, A. 1952 All. 764, affirmed by *Sales Tax Officer v. Budh Prakash*, (1955) 1 S.C.R. 243.
  14. *C. J. Instalment Supply Ltd. v. Union of India*, A. 1962 S.C. 53; (1962) 2 S.C.R. 522; *Sundaram Finance v. State of Kerala*, A. 1966 S.C. 1178.
  15. *Behar Co. v. Commr. of Taxes*, A. 1957 Assam 61 (53).
  16. *Newton v. The State*, (1952) N.L.R. 349.
  - 16a. *New India Sugar Mills v. C. S. T.*, A. 1963 S.C. 1207.
  17. *State of Gujarat v. Romani & Co.*, A. 1965 Guj. 60 (64).

*Thirdly*, the transaction, in order to come under present Entry, must relate to goods. Thus, a supply of labour and work cannot be said to be a sale of goods.<sup>18</sup>

The agreement must relate to the *very goods* in which eventually property passes. There is no transaction of sale for the purposes of the present Entry where there is an agreement relating to one kind of property and in carrying out that agreement a transfer of title in another kind of property takes place.<sup>19</sup>

2. The meaning of the expression 'sale of goods' in the present Entry is not linked up with the meaning which that expression might bear for the time being in the Sale of Goods Act. It must be construed according to the true meaning that the expression has in law<sup>18</sup> (which is the same as in s. 4 of the Sale of Goods Act, 1930 as it stood when the present Entry was enacted) and this comprises the essential ingredients just stated.<sup>18 19</sup> In order to be *intra vires*, a taxing law under the present Entry must relate to a 'sale of goods', and the State Legislature has no power to tax transactions which are not sales, by merely enacting that they shall be deemed to be sales,<sup>18 19</sup> e.g., a transaction of hire purchase, which is a mere contract of hire with an option of purchase,<sup>20</sup> or a building contract.<sup>21</sup>

But—

It is competent for the State Legislature, under this Entry, to extend the definition of 'turnover' of the dealer to include the amount of sales tax where it is added to the price charged from the seller and such money remains in the hands of the dealer until the tax is actually paid to the Government by the dealer.<sup>22</sup>

The property in the goods must pass to the buyer under the terms of the alleged contract of sale itself.<sup>23</sup>

#### Sales Tax on building contracts.

There cannot be a taxation under the present Entry unless the transaction sought to be taxed is a 'sale of goods' as explained above. It follows, therefore that there cannot be any sales tax—

(a) On the value of material supplied in an indivisible<sup>24a</sup> building or 'works contract', because there was no agreement to sell the materials as such.<sup>24</sup>

Of course, if there are distinct and *separate* contracts,—one for the transfer of materials for money consideration and another for the payment of remuneration for services and for work done, a tax on the sale of materials cannot be questioned.<sup>24, 25b</sup> There is no such distinct contract where tenders were called for and received for executing works on a *lump sum*,<sup>25</sup> even though it was stipulated, by way of ensuring a proper execution of the work, that all materials brought on the site would become the property of the owner,

18. *State of Madras v. Dunkerley & Co.*, A 1957 SC 560 (573) (1959) SCR 379.

18a. *Peate Lal v. State of Punjab*, A 1958 SC 664 (665).

19. *Tata Iron & Steel Co. v. State of Bihar* (1958) SCR 1355 (1376).

20. *CI Instalment Supply Ltd. v. Union of India*, A 1962 SC 53.

21. *Mithan Lal v. State of Delhi*, A 1958 SC 682.

22. *George Oakes v. State of Madras*, A 1962 SC 1037 (1043).

23. *Popatal v. State of Madras*, (1953) SCR 667.

24. *State of Madras v. Dunkerley & Co.*, (1959) SCR 379; A 1958 SC 560;

24a. *Banarasi v. State of M. P.*, (1959) SCR 427.

24a. *Sundaram Motors v. State of Madras*, A 1959 Mad. 33; *Appasamy v. State*

of Madras, A 1958 SC 560; *United Bleachers v. State of Madras*, (1960)

11 S.T.C. 278 (Mad); *Jariwala v. State of Gujarat*, A 1965 Guj. 251 (258).

24b. *Babulal v. State of Bombay*, (1964) 15 S.T.C. 598 (Bom.).



but that the surplus, after completion of the work, would revert in the contractor and he would be obliged to remove them.<sup>23-1</sup>

(b) On the labour supplied by a contractor.<sup>24</sup>

The basis for determining whether there was a separate contract for the sale of materials is the *terms of the contract* and not the invoice supplied by the contractor.<sup>25</sup>

The cumulative<sup>26</sup> tests are—

(i) Whether a separate price was stipulated for the materials or the consideration was a lump sum for the finished product.<sup>1</sup>

(ii) Whether property in the materials is to pass along with the execution of the works contract or otherwise.<sup>4</sup>

But mere passing of title to the goods as an *incident* of the contract does not indicate that there was a separate contract for the *sale* of the goods, unless there was a *separate money consideration* or price for the supply of the materials, under the terms of the contract, express or implied.<sup>2</sup> Such contract may be implied where the supply<sup>3</sup> or manufacture of the goods is the *essence* of the contract and not a mere *incident* of the works contract.<sup>5</sup>

(iii) In order to constitute a 'sale of goods', there must be an *agreement* between the parties for the sale of the *very goods* in which eventually the property passes.<sup>6-27</sup>

A. In the generality of building contracts, the agreement between the parties is that the contractor should construct a building according to specifications contained in the Agreement, and in consideration thereof receive payment as provided therein. There is in such agreement neither a contract to sell the materials used in the construction, nor does property pass therein *as movables*. A contract for the sale of movables cannot be implied from such an agreement.<sup>6-28</sup>

Where the agreement constitutes a single contract, as in the preceding paragraph, it is not open to the State "to split up that agreement into its component parts, single out that which relates to the supply of materials and to impose a tax thereon *treating it as a sale*."<sup>6-29</sup>

#### 'Tax on sale or purchase'.

1. This Entry confers power upon the State Legislature to tax sale of every kind, including the first sale by a manufacturer. Such tax would be a sales tax and not an excise duty.

2. A sales tax is a tax 'on the occasion of sale'.<sup>2</sup> These words, however, have reference to the *character* of the transaction and not to the point of time at which the duty becomes leviable, and it has no bearing on the question as to when such a tax could be imposed.<sup>3</sup> There is, therefore, nothing to bar the enactment of a retrospective law to tax sales or of a validating Act to give retrospective validity to an invalid law of sales tax.<sup>4</sup>

4. It is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers, though it may be a usual feature of such legislation.<sup>5</sup> A sales tax need not be an indirect tax. It may be imposed upon

23. *Pears Lal v. State of Punjab*, (1959) S.C.R. 438; A. 1958 S.C. 664.

1. *Carl Still v. State of Bihar*, A. 1961 S.C. 1615 (1619).

2. *Amul Electric v. C. S. T.*, (1955) S.C. (C.A. 104/55, d. 16-12-55).

3. *Govt. of A. P. v. Gunjur Tobacco*, A. 1955 S.C. 1396 (1404).

4. *John Munday v. C. S. T.*, (1955) 19 S.T.C. 58 (S.C.).

5. *Chandra Bhan v. State of Orissa*, (1963) 14 S.T.C. 766 (S.C.).

a seller without giving him an opportunity of recouping the amount of the tax from any other party, say, the consumer.<sup>6</sup>

5. The power conferred by this Entry may be exercised to tax sales of every kind and at all stages between a producer and a consumer. Thus, the tax can be collected on wholesale or retail sales as well as on the 'turnover' which means the sum-total of prices for which taxable goods were sold during a particular period.<sup>7</sup>

Where a sales tax is passed on to the buyer and the sale price includes the amount payable as sales tax, it is competent for the Legislature to include the amount of tax in the 'turnover', being the aggregate amount for which goods are bought and sold and to tax the turnover. Such tax on the turnover does not constitute a 'tax on a tax', but a tax on 'sale' because the amount of the tax which the dealer recovers from the buyer goes into his common till and he may use it for his business as any other part of his assets till he actually pays the tax to the Government.<sup>8</sup>

6. It means a tax upon the event of a sale or the proceeds thereof, whether taken individually or collectively.<sup>9</sup> It may also be imposed upon the gross receipts or turnover of a dealer from the sale of specified commodities.<sup>10</sup>

7. It may be imposed either on the seller or the buyer.<sup>11</sup>

8. It may be imposed on any person carrying on the business of sale or purchase, including a commission agent<sup>12</sup> but not a mere broker.<sup>13</sup>

9. If a law, in its 'pith and substance', relates to taxation of sale of goods, it may incidentally trench on items 7 and 8 of the Concurrent List without Art. 254 being attracted.<sup>14</sup>

#### No bar against being retrospective.

1. In whatever form a tax under the present Entry is imposed, there is nothing to prevent it from giving it a retrospective operation.<sup>15</sup>

2. The validity of the imposition of a sales tax with retrospective effect cannot be challenged on the ground that it is not possible for the sellers to pass on such tax to the consumers.<sup>16</sup>

**Sales tax and excise duty.**—See p. (55), *ante*.

#### Power to tax sale or purchase, subject to Art. 286.

The power to tax sale or purchase, conferred by the present Entry, is subject to the limitations imposed by Art. 286.

Thus, if Parliament has, by law, declared any goods to be of special importance in inter-State trade, the intra-State sales of such goods can be taxed by a State only subject to the restrictions imposed under Art. 286(3).<sup>16a</sup>

6-25. *State of Madras v. Dunkerley*, (1959) SCR 379 (414, 418, 424-5).

1-2. *Prov. of Madras v. Boddu Puddanna*, A. 1942 F.C. 33.

3. *J. K. Jute Mills v. State of U. P.*, A. 1961 S.C. 1534.

4. *Sundaramur v. State of U. P.*, (1958) S.R. 1422.

5. *J. K. Jute Mills v. State of U. P.*, A. 1961 S.C. 1534.

6. *Buchirajalingam v. State of Hyderabad*, A. 1958 S.C. 756 (759).

7. *Re C. P. & Berar Act*, (1939) F.C.R. 18.

8. *George Oakes v. State of Madras*, A. 1962 S.C. 1037.

9. *In re C. P. & Berar Motor Spirit Taxation*, A. 1939 F.C. 1.

10. *In re C. P. & Berar Motor Spirit Taxation*, A. 1939 F.C. 1.

11. *Shrinam v. Board of Revenue*, A. 1951 S.C. 314 (315).

12. *Syed Muhammad v. State of Andhra*, A. 1957 Nag. 61.

13. *Comm. of S. T. v. Pandurang*, A. 1953 Pat. 87.

14. *Bengal Immunity v. State of Bihar*, A. 1953 Pat. 87.

15. *J. K. Jute Mills v. State of U. P.*, A. 1961 S.C. 1534 (1540).

16. *Tata Iron & Steel Co. v. State of Bihar*, A. 1958 S.C. 452 (463).

16a. *Mithan Lal v. State of Delhi*, (1959) S.C.R. 445.

16. *Dilip v. C. T. O.*, A. 1965 Cal. 498 (506).

### Power of Parliament to tax sales.

So far as Union Territories are concerned, the Supreme Court has held that while legislating by virtue of the power conferred by Art. 246 (4), Parliament is not fettered by anything in Entry 54 of List II or the implications thereof. Hence, under Art. 246 (4), Parliament is competent to impose a sales tax on building contracts, or hire purchase agreement.<sup>16b</sup>

The reason is that the distribution of legislative powers between the Union and the States is not applicable to the power of Parliament under Art. 246(4). Hence, it is competent to impose any tax if it is not prohibited to Parliament by the Constitution.<sup>16b</sup>

### 55. Taxes on advertisements other than advertisements published in the newspapers.

#### Tax on advertisements.

A tax on advertisements, which is specifically authorised by the present Entry, does not constitute a tax on 'professions' or 'callings' under Entry 60 of List II. Hence, it is not subject to the monetary limit imposed by Art. 276 (2),<sup>17</sup> though a firm which has been advertised would be taxable even where it is not exhibited after being advertised.<sup>17</sup>

### 56. Taxes on goods and passengers carried by road or on inland waterways.

#### 'Taxes on goods and passengers'.

1. This Entry authorises a tax the incidence of which is on goods and passengers (by road or inland waterways), even though the amount of the tax is measured by the fares;<sup>1</sup> or by the distance travelled.<sup>18</sup>

2. It is open to the Legislature to recover this tax from the owners or operators of the carriers.<sup>19a</sup>

The present Entry does not specify who should be the assessee. Hence, where a tax is payable at a certain rate on all passengers and goods carried by stage carriages, it is a tax under this Entry, even though it is levied on the operator.<sup>19a</sup> It is not a tax on income, for, had it been a tax on income, the operator would not have been liable to pay in a year in which he did not make any profit or gain.<sup>19</sup> Further, the operator is entitled to pass on the tax to the passenger or consignor of the goods, even though the statute does not confer that right expressly.<sup>19b</sup>

16b. In *Instalment Supply Ltd. v. Union of India*, A. 1962 S.C. 53, the Supreme Court referred to the definition of sale in s 2(g) of the Central Sales Tax Act but the competence of Parliament to impose sales-tax on such a transaction was not discussed. It was not noticed that the Central Sales Tax Act was enacted by virtue of the power conferred by Entry 92A of List I which was inserted by the Constitution (Sixth Amendment) Act, 1956. Under that Entry, Parliament is competent to impose tax on sale only if it is a transaction of sale and the wording of this Entry is similar to that of Entry 54 of List II. Hence, if a hire-purchase transaction is a contract of hire with an option of purchase as explained by the Supreme Court, it cannot be taxed as a sale by extending the definition of sale either by the State Legislature or by Parliament under Entry 92A of List I.

Whether such taxation can be supported under the residuary Entry 97 of List I raises a different question, which was not discussed by the Supreme Court in the cited case.

17. *Ismail & Co. v. State of Kerala*, A. 1965 Ker. 237 (238-9).

18. *Sahni Motors v. State of Rajasthan*, A. 1961 S.C. 1480 (1484).

19. *Ramkrishna v. State of Bihar*, A. 1963 S.C. 1667 (1673).

19a. *Mathurani v. State of Madras*, A. 1964 Mad. 569.

19b. *Mhyerbati Tea Co. v. State of Assam*, A. 1964 S.C. 925 (935).

For the same reason, the Legislature may make the producee liable for this tax even where he sells the goods to a purchaser *before* the goods are carried away from the place of production, provided only the liability of the producer arises only when the goods are carried from his place, by road or inland waterways.<sup>19b</sup>

3. It is open to the Legislature to tax goods and passenger either individually or collectively.<sup>20</sup>

'Goods'.—See Art. 366 (12), *ante*

'Carried'.

1. It has no reference to the mode in which the goods are carried. The Entry is not limited to goods carried by common or public carrier.<sup>20</sup>

2. Nor has it any reference to the purpose for which the goods are carried.

*Acts coming under this Entry* Rajasthan Motor Vehicles Taxation Act, 1951;<sup>21</sup> s. 128 of the U. P. Municipalities Act, 1946;<sup>22</sup> Assam Taxation (on Goods carried by Roads or In and Waterways) Act, 1951;<sup>23</sup> Rajasthan Passengers and Goods Taxation Act, 1959;<sup>24</sup> Bihar Finance Act, 1950.<sup>24</sup>

57. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads including tramcars subject to the provisions of entry 31 of List III.

**Taxes on vehicles.**

While the matter of *principle* on which taxes on mechanically propelled vehicles are to be levied falls under Entry 35 of the Concurrent List, the power to tax vehicles, whether mechanically propelled or not, belongs exclusively to the State Legislature under Entry 57 of List II.

This power of the State Legislature being cut out to Entry 35 of List III, if there is an existing law made by Parliament laying down the principles on which taxes on mechanically propelled vehicles should be levied, then any State legislation enacted under the present Entry must conform to those principles as laid down in the existing law or the earlier law made by Parliament. If the provisions of the State law are repugnant to those principles, the law made by the State Legislature must fail to the extent of the repugnance, unless reserved for the consideration of and assented to by the President.<sup>25</sup> But no assent of the President is necessary to validate the State law, in the absence of any such repugnance,<sup>26</sup> or any such existing Central law.<sup>26</sup>

58. Taxes on animals and boats.

59. 'Tolls'.

1. This Entry authorises the State Legislature to levy a 'toll' which means a payment required for some benefit, e.g., for the use of a market, or a bridge, the temporary use of land.<sup>27</sup> It is not essential that the toll should be collected prior to the rendering of the benefit. Thus, provided that it is not collected twice in respect of the same benefit, a toll may be collected from a trader either when he enters the market place or when he leaves it, or from a

16b. *Malharas v. State of Madras*, A. 1954 Mad 569.

20. *P. B. run v. State of Assam*, A. 1955 Assam 249 (S.L.).

21. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj 114 (119).

22. *Municipal Board v. Nagpur*, A. 1950 All 430.

23. *Atiabari Tea Co. v. State of Assam*, A. 1961 S.C. 242 (243).

24. *Atma Ram v. State of Bihar*, A. 1952 Pat 359.

25. *Phoolchand v. State of M. P.*, A. 1956 M.P. 131 (132).

vehicle when it either enters into or leaves the limits of the Municipality which levies a toll for the use of its roads.<sup>1</sup>

2. Tolls are of various kinds and Entry 59 is not confined to 'toll thorough' and 'toll traverse'.<sup>2</sup>

#### 60. Taxes on professions, trades, callings and employments.

##### Tax on trade.

1. A tax levied on the promoters of a gambling scheme, based on the entry fees, is a tax on gambling under Entry 62 and not a tax on trade.<sup>3</sup>

2. Similarly, where the object of a tax is an act of entertainment, it comes under Entry 62 and not the present Entry, whether it falls upon the giver or the receiver of the entertainment.<sup>4</sup>

3. A tax imposed upon the business carried on by a company comes under the present Entry, even though it is measured with reference to the share capital.<sup>5</sup>

##### 'Trades, callings'.

These words seem to have been used in the widest sense in which they are usually used in fiscal statutes, as connoting "any activity for gaining livelihood".<sup>6-7</sup>

##### Tax on professions, employments.

A tax on pensions cannot be levied under this Entry,<sup>8</sup> because it is not a tax on employment but a tax on income, coming under Entry 82 of List I.<sup>9</sup> The present Entry applies only to persons who are carrying on a profession or are employed in a service,<sup>10</sup> during the assessable period. Income from *past services* or income from *investments* cannot be brought in under the present Entry.<sup>11</sup>

2. A tax imposed in exercise of the present power cannot be challenged on the ground that it is a tax on income within the meaning of Entry 82 of List I [see Art. 276, *ante*].

3. The power conferred by this Entry is subject to the limitation imposed by Art. 276 (2), and a levy which does not fix a maximum below Rs 250/- shall be invalid in toto.<sup>12</sup>

4. A 'circumstances and property' tax is a composite tax imposed under this Entry and Entry 49 of List I.<sup>13</sup>

#### 61. Capitation taxes.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

##### Scope of Entry.

A tax, under the present Entry, may be imposed not only on the person

1. *Salaram v. Janapada Sabha*, A. 1952 Nag. 401.
2. *Hindurshan Vaidya v. Municipal Bard*, A. 1982 All. 35.
3. *State of Bombay v. Omarambhaugwala*, A 197 S.O. 59 (710).
4. *Western India Theatres v. Censorship Board*, A. 1959 S.O. 582 (585).
5. *Calcutta Chemical Co. v. Bhagalpur Municipality*, A. 197 Pat. 465.
6. *Of Masagan Dock v. I T. Commr.*, A. 197 S.O. 551 (556).
7. *Kran v. Bheawal Municipality*, A. 1964 Bom. 15 (17).
8. *Shrikrishna v. Ujjain Municipality*, A. 1962 M.B. 144.
9. *Waidat Ram v. Bager Municipality*, A. 1960 Punj. 8-9 (579).
10. *Banik v. Dt. Panchayat Officer*, (1964) 69 O.W.N. 219 (220). [See under Art. 276 (2), *ante*].
11. *Sita parichad v. Jugal Kishore*, A. 1965 All. 40 (P.B.).

spending on luxuries, entertainments or amusements but also on the act of entertaining or the subject of entertainment, e.g., on a cinema show.<sup>12</sup>

### 'Luxuries'.

The use of the plural suggests that the tax that is contemplated is not a tax on an *activity* which may be considered as unnecessary and in that sense a 'luxury' but a tax on *goods* or articles which constitute luxuries,<sup>13</sup> e.g., tobacco,<sup>14-15</sup> as distinguished from a tax on its *production*, in which case it becomes an excise duty.<sup>16</sup>

### 'Entertainments'.

1. This word is not controlled by the word 'luxuries'. Hence, it would include entertainments like a cinema show, a dramatic performance or a cricket match.<sup>17-18</sup>

2. It cannot be contended that because the word 'cinema' is specifically mentioned in Entry 3 of List II and omitted from the present Entry, no tax can be imposed under the present Entry upon cinemas.<sup>19</sup> 'Cinema' had to be separately mentioned in order to make it clear that the power of the State Legislature to make laws with respect to cinemas was subject to item 60 of the Union List.<sup>20</sup>

3. The Entry does not draw any distinction between the person who derives the amusement and the person who caters it.<sup>21</sup>

### Tax on entertainments : Entries 60 and 62 of List II.

1. The question whether a particular tax is a tax on entertainments under the present Entry or a tax on callings under Entry 60 becomes material because of the limitations imposed by Art. 276 (2) upon a tax under Entry 60.<sup>22</sup>

2. The tax authorised by this Entry is a tax imposed in respect of the show, exhibition, performance or the like. It may be levied either upon the person who offers the entertainment or upon the person who enjoys it or on both.<sup>23</sup>

3. Where the incidence of the tax falls on the person who offers the entertainment, it does not become a tax on 'calling' or 'profession' within the meaning of Entry 60 of List II, if the tax is to be paid in respect of an entertainment<sup>24</sup> (say, a cinema show), irrespective of whether it is given by a professional exhibitor or by one following a different calling, e.g., by a charitable society to raise funds for a charity,<sup>25</sup> and the tax is levied on each of the exhibitions, separately.<sup>26-28</sup> In such case what is taxed is not the calling of the person providing the entertainment but the entertainment itself,<sup>29</sup> and the question of applying Art. 276 (2) does not, consequently, arise in such cases.

4. On the other hand, if the incidence of the tax is upon the person because he is engaged in the business of providing the entertainment irrespective of the number of occasions when he provides the entertainment, it is a tax on calling. It would be an entertainment tax if the tax is imposed on every act of entertainment, e.g., on a cinema show, so that there would be no such tax if no cinema show is held.<sup>30</sup>

12. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (710).

13. *Abraham v. State of T. C.*, A. 1958 Ker. 129 (134).

14. *Kudhalkutia v. Board of Revenue*, 1966 Ker. 44 (57).

15. *Bravindanmuthy v. State of Mysore*, A. 1959 S.C. 895.

16. *Western India Theatres v. Cantonment Board*, A. 1969 S.C. 489.

### Tax on betting and gambling.

1. A tax on the promoters of a gambling prize competition, being a percentage of the entry fees received, is a tax on betting and gambling and not a tax on 'trade' under Entry 60 of List II. The tax is levied on the promoter for the convenience of collection, with the expectation that he will indemnify himself at the expense of the gamblers.<sup>17</sup>

2. A 'wagering contract' is 'gambling', its essence being an intention of the parties that though it purports to be a contract for sale, no actual transfer of the goods should take place under it but the parties should only pay or receive (as the case may be) the difference according as the market price should vary from the contract price on a future date. Such a transaction is not a commercial transaction but a 'wager' on the rise or fall of the market. Where, therefore, a State Legislature seeks to tax a 'forward contract' as defined by it, and the wagering intention is not an essential element of the definition, the tax would not be covered by the present Entry 48 of List I.<sup>18</sup>

**Entries 34 and 62 of List II.**—See under Entry 34, *ante*

*Acts coming under the present Entry*—S. 12 of the Bombay Lotteries and Prize Competitions Act, 1948.<sup>17</sup>

**63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.**

**'Duty in respect of documents'.**

The occasion for levy of the stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.<sup>20</sup>

**'Other than those specified in List I'.**

Since the following documents are not mentioned in Entry 91 of List, I, the State Legislature is competent to alter the rate of stamp duty in regard to them within its own jurisdiction—

(a) Acknowledgment ;<sup>21</sup>

(b) Application<sup>22</sup> or certificate<sup>23</sup> of enrolment of an Advocate

**64. Offences against laws, with respect to any of the matters in this List.**  
**Offences.**

By reason of this Entry, the State Legislature may, while making a law pertaining to a tax on sale or purchase, provide for punishments in that law for non-compliance with the provisions of that law.<sup>24</sup>

**65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.**

**Jurisdiction of Courts with respect to matters in List II.**

The State Legislature has ample powers with regard to the jurisdiction and powers of Courts to deal with the species of property described in Entry 18 of this List.<sup>25</sup>

17. *State of Bombay v. Chomarbawala*, A. 1957 S.C. 409 (110).

18. *Bullion & Grain Exchange v. State of Punjab*, A. 1961 S.C. 268 (371).

19. *Waverly Jute Mills v. Raymon & Co.*, A. 1944 S.C. 10 (95).

20. *Of Shasharatham v. Gift Tax Officer*, A. 1960 A.P. 115 (119).

21. *Chander Bhan v. Mehar Singh*, A. 1965 P.W. 279 (163).

22. *Basandra, in re*, A. 1955 A.P. 64 (5 B.).

23. *Pittel v. State of Mysore*, A. 1966 Mys. 129 (140).

24. *State of Mysore v. Inmail*, A. 1958 Mys. 148.

25. *Brij Bhawan v. S. D. O.*, A. 1955 Pat. 1 (5 B.).

**66. Fees in respect of any of the matters in this List, but not including fees taken in any court.**

**'Fees'.**

1. This Entry gives power to the State Legislature to levy fees in most general terms in all matters which are within its legislative field. If the conditions of a 'fee' are satisfied (see under art. 277, *ante*), the nomenclature given by the Legislature is immaterial.

Thus, cess imposed by a State Legislature for the purpose of controlling sugar or a cess levied upon owners of mines in a notified area to render specific services to such owners by developing the notified area,<sup>1</sup> can be treated as a fee under this Entry; or a fee for keeping stalls in a market [Entry 28]<sup>2</sup>, or a water tax to be imposed by a municipality [Entry 5].<sup>3</sup>

2. But in order to come under this Entry, the imposition must be a fee for services rendered by the State relating to any of the subjects included in this List. Thus, if a Municipality maintains a burial ground [Entry 10, List II], it can levy a fee for every person buried in that burial ground;<sup>4</sup> if a State Government maintains an establishment for the inspection of factories, it may levy a fee on factories by way of realising the expenses involved.<sup>5</sup> But a 'fee' cannot be justified with reference to the general purposes of 'local government'.<sup>6</sup>

3. The power to levy a fee under the present Entry is dependent upon the State Legislature's power to legislate with respect to independent subject-matter in the State List. If, for any reason, e.g., a declaration by Parliament under Entry 54 of List I,<sup>7</sup> the State Legislature loses its power over that subject-matter, it loses the power to impose a cess in relation that subject-matter.

4. An imposition cannot be justified under this Entry when the authority fails to show that any services are being rendered which have a proximate relationship with the imposition.<sup>8</sup>

On this principle, the following have been held to be a 'tax' and not a 'fee' covered by the present Entry—

A fee for registration of animals sold, based not upon the kind of animal registered but upon the price paid in respect of each animal sold,<sup>9</sup> irrespective of the class to which it belonged.<sup>10</sup>

### List III—Concurrent List

**1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.**

1. *Hingir-Rampur Coal Co. v. State of Orissa*, A 1961 S.O. 469 (467).

2. *Haralal v. Dabrugrah Municipality*, A 1958 Assam 166.

3. *Jagdish v. Saharanpur Municipality*, A. 1951 All. 583 (586).

4. *M. K. Mills v. Kihangrah Municipality*, A 1960 Raj. 185 (187).

5. *Umaed Mills v. State of Rajasthan*, A 1964 Raj. 178.

6. *State of Orissa v. Tullach*, A. 1964 S.O. 1948 (1292).

7. *Nagpur Kshatriya Samaj v. Corporation of Nagpur*, A. 1952 Nag. 102.

8. *Dhaniram v. Jangad Sabha*, A. 1938 M.P. 219 (221).



2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

'Including all matters included in the Code of Criminal Procedure'.

The word 'including' is a word of enlargement and not restriction. Hence all matters included in the Code of Criminal Procedure at the date of commencement of the Constitution, whether they relate to procedure or to substantive right, would be concurrent legislative subject.<sup>1-3</sup> Investigation of offences is included in the present Entry.<sup>3</sup>

3. Preventive detention for reasons connected with the security of a State the maintenance of public order, or the maintenance of supplies and services essential to the community ; persons subject to such detention.

'Reasons connected with'.

These words imply that the connection between the reason for which preventive detention is sought to be prescribed and 'security of a State', 'public order' and the like must be 'real and proximate, not far-fetched and problematic'.<sup>4</sup>

'Maintenance of supplies and services'.

Under the present Entry, preventive detention may be provided for the maintenance of either supplies essential to the community or services essential to the community or both.<sup>5</sup> It includes the maintenance of supply of goods or commodities essential to the community, even though 'supply of goods' is included in Entry 37 of List II.<sup>7</sup>

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Personal law.

The Entry confers legislative power to enact laws, amend, alter or repeal the personal laws, in whole or in part.<sup>8</sup>

Agricultural lands are not excluded from the power relating to wills, intestacy and succession.<sup>9-10</sup>

6. Transfer of property other than agricultural land ; registration of deeds and documents.

'Transfer'.—This word would include partition of a joint family property.<sup>11</sup>

1.3. *Narayanaswami v. Inspector of Police*, (1948) 11 F.L.J. 48 (F.B.).

4. *Ukha v. State of Maharashtra*, A. 1968 S.O. 3531 (1941).

5. *R. v. Basudeva*, A. 1960 F.C. 67 (69).

6. *Dayanand v. State of Bihar*, A. 1961 Pat. 47.

7. *Jagannath v. State of Bihar*, A. 1962 Pat. 185 (188) F.B.

8. *Srinivasa v. Saraswathi*, A. 1952 Mad. 193.

9. *Laxmi v. Surendra*, A. 1957 Orissa 1 (5); *Dayabhai v. C. J. F.*, A. 1966 M.P. 11.

10. But see *contra Prama Devi v. Jt. Director*, A. 1970 All. 234 (141).

11. *Sankhamma v. Neelamma*, A. 1969 Mad. 642 (650).

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

'Not including contracts relating to agricultural land'.

Thus, contracts between landlord and tenant for payment of rent in respect of agricultural land are excluded from this Entry, irrespective of the form in which such contract may be made.<sup>12</sup>

But 'forward contracts' would come not under the present Entry but under the specific Entry 48 of List I.<sup>13</sup>

8. Actionable wrongs.

9. Bankruptcy and insolvency.

10. Trusts and Trustees.

11. Administrators-general and official trustees.

12. Evidence and oaths ; recognition of laws, public acts and records, and judicial proceedings.

This Entry includes the power to define 'foreign judgments' and to provide for their enforceability.<sup>14</sup>

13. Civil procedure, including all matters included in Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

'Including'.

This word indicates that the Entry is not restricted to matters contained in the Code of Civil Procedure. Thus, the procedure for disposal of *second* appeals, or the right to such appeal would come under the present Entry and not Entry 3 or 65 of List I.<sup>15</sup>

14. Contempt of court, but not including contempt of the Supreme Court.

15. Vagrancy ; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

17. Prevention of cruelty to animals.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

'Drugs'.

While drugs, generally, come under the present Entry, it may come—

(a) under Entry 51 of List II, if it is a narcotic drug;<sup>16</sup>

(b) if it is opium, its cultivation, manufacture and sale for export shall be exclusively under Entry 59 of List I.<sup>17</sup>

20. Economic and social planning.

21. Commercial and Industrial monopolies, combines and trusts.

'Monopolies'.

1. This entry empowers the State to make laws conferring monopoly.

12. *Hulas Narain v. Deen Md.*, A. 1943 F.C. 9.

13. *Waverly Jute Mills v. Raymon & Co.*, A. 1963 S.C. 90 (97).

14. *Gauri Lal v. Jugal Kishore*, A. 1959 Punj. 265 (269) F.B.

15. *Sati Ram v. Gauri Shankar*, A. 1961 All. 321.

16. *Indian Chemical Works v. State of A. P.*, (1965) S.C. [C.A. 649/64].

on itself to the exclusion of citizens doing a particular business.<sup>17-21</sup> It is not confined to the grant or creation of commercial or industrial monopolies.<sup>21</sup>

2. It also gives the State the power to control monopolies.<sup>21</sup>

## 22. Trade Union; industrial and labour disputes.

### 'Industrial and labour disputes'.

1. This Entry has a wide scope. It not only includes the power to legislate with respect to industrial disputes or disputes arising out of 'industry', but also any labour dispute i.e., dispute arising between employers and employees of any class,—even though the employers were not conducting an 'industry' in the usual sense of that word.<sup>22</sup> Hence, the Industrial Disputes Act is not *ultra vires* on the ground that it defines 'industry' as comprising both industrial and non industrial concerns.<sup>22-23</sup>

2. Though the Union Parliament has no power to legislate on the powers of a Municipality (Entry 5, List II), it has power to legislate with respect to disputes between a Municipality and its employees, provided the legislation is, in its 'pith and substance', a legislation with respect to labour disputes.<sup>24</sup> A Central Act relating to industrial disputes is not *ultra vires* on the ground that the power conferred by the Act to reinstate dismissed employees is in conflict with the power of appointment and dismissal belonging to the Commissioners under the Bengal Municipal Act. For, the Act deals with industrial disputes and not with local Government (Entry 5 of List II). The incidental encroachment is cured by the doctrine of 'pith and substance'.<sup>25</sup>

*Act coming under this Entry.*—Industrial Disputes Act, 1947.<sup>23-24</sup>

## 23. Social security and social insurance ; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

### 'Welfare of labour including conditions of work'.

1. This power includes the power to regulate the hours of work of persons employed in shops and commercial establishments and the power to close the shops on particular days,<sup>25-26</sup> to fix minimum wages.<sup>25</sup>

2. The Entry is wide enough to include industrial as well as non-industrial labour.<sup>25-26</sup>

*Acts coming under this Act.*—Bihar Shops and Establishments Act, 1938.<sup>1</sup>

## 25. Vocational and technical training of labour.

## 26. Legal, Medical and other professions.

### Ancillary power.

Legislating under this Entry, Parliament is competent to prescribe the stamp duty payable on an application for enrolment as an advocate.<sup>2</sup>

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

*Act coming under this Entry.*—West Bengal Land Development and Planning Act, 1948.<sup>3-4</sup>

17-20. *Kendala v. A. P. S. R. T. C.*, A. 1961 S.C. 82 (87).

21. *Narayanappa v. State of Mysore*, A. 1960 S.C. 1073 (1078).

22. *D. N. Banerjee v. P. K. Mukherjee*, (1963) S.C.R. 302: (1932-54) 2 C.C.

23-24. *Neimla Textile Finishing Mills v. 2nd Punjab Tribunal*, A. 1957 S.C. 329.

25. *Deyal v. State of M. P.*, A. 1962 M.P. 342 (345).

1. *Jugal Kishore v. Labour Commr.*, A. 1958 Pat. 442.

2. *Rupendra. In re*, A. 1957 Andhra 63 (S.B.).

3-4. *Benoy Krishna v. State of W. B.*, A. 1966 Cal. 429 (430).

**28. Charities and charitable institutions, charitable and religious endowments and religious institutions.**

**'Charities', 'Charitable institutions'.**

1. The additional words after 'charities' in this Entry are only illustrative of the directions, which the power to legislate in respect of charities may take. The word 'charities' is a generic term of wide scope, including all public, secular, charitable and religious trusts and institutions, recognised as such by the Indian law, and a power to legislate in respect of charities will include the power to legislate in respect of *all matters* connected with charitable and religious institutes and endowments, <sup>5</sup> e.g., the power to throw open the Hindu temples to all Hindus who had previously been excluded by custom or usage.<sup>6</sup>

2. Read with Entry 47, List III, this Entry authorises the imposition of a fee for rendering services in connection with the maintenance, supervision and control over religious institutions.<sup>6</sup>

*Acts coming under this Entry.*—Orissa Jagannath Temple (Administration) Act, 1954.<sup>7</sup>

**29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.**

**30. Vital statistics including registration of births and deaths.**

**31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.**

**32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods of inland waterways subject to the provisions of List I with respect to national waterways.**

**33. Trade and commerce in, and the production, supply and distribution of,—**

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products

(b) foodstuffs, including edible oils and oils,

(c) cattle fodder, including oilcakes and other concentrates,

(d) raw cotton, whether ginned or unginned, and cotton seed, and

(e) raw jute.

**Amendment**—The italicised words were added by the Constitution (Third Amendment) Act, 1954.

**Object of Amendment.**—This Entry has to be read with Entry 52 of List I, which empowers Parliament to vest the control of particular industries in the Union.

Entries 26 and 27 of Sch II of the Constitution give exclusive power to the State with respect to 'trade and commerce within the State' and 'production, supply and distribution of goods' 'subject to the provisions of Entry 33,

5. *Manikkasundara v. Navasudra*, (1946) F.L.J. 57; A. 1947 F.C. 1, *Gadadhar v. Prov. of Orissa*, A. 1950 Orissa 47.

6. *Sudhindra Tirtha v. Commr., H. R. & C. E.*, A 1963 S.C. 986 (976).

7. *Bhimsen v. State of Orissa*, A 1959 Orissa 17.

List III.' The result of this is that the exclusive power to legislate regarding intra-State trade and commerce and production, supply and distribution of goods belongs to the State Legislature, excepting such matters as are included in Entry 33 of List III. Now, in the original Entry 33 of List III, the only matter which was included was 'trade and commerce in, and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest' in exercise of the power conferred on Parliament by Entry 52 of List I. By virtue of the power conferred by Entry 52 of List I, Parliament enacted the Industries (Development and Regulation) Act (LXV of 1951) declaring that the control of certain industries, specified therein, was expedient in the public interest. Hence, by the original Entry 33, only the products of those industries which are specified in similar Acts of Parliament as might be made under Entry 52 of List I were excluded from the exclusive legislative power of the State.

By means of the present amendment the concurrent power which was given to Parliament for a temporary period with respect to the commodities mentioned in Art. 369, is placed on a permanent footing.

'Products'.—It means a finished product and not the raw materials required for production.<sup>8</sup>

'Industry'.—The manufacture of gold ornaments is a process of systematic production and therefore falls within the connotation of the word 'industry'.<sup>9</sup>

'Foodstuff'.—This would include not only finished products, such as sugar but also raw materials, such as sugarcane.<sup>10</sup>

Acts coming under the present Entry.—U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953,<sup>11</sup> Essential Commodities Act, 1955.<sup>12</sup>

### 34. Price control.

#### Price Control.

It authorises the fixing of maximum as well as minimum<sup>13</sup> prices.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

'Newspapers, books and printing presses'.

The power conferred by these words is wide enough to include the power to suppress the printing of 'objectionable matters' even though such legislation incidentally relates to 'public order'.<sup>14</sup>

40. Archaeological sites and remains other than those declared by or under law made by<sup>15</sup> Parliament to be of national importance.

Amendment.—The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, ante.

8. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (412).

9. *Harachand v. Union of India*, A. 1970 S.C. 1453 (1460).

10. *C. Secy. to Govt. v. A. G. Factory*, A. 1959 A.P. 538 (543).

11. *Shankar v. State of Bombay*, A. 1954 Bom. 303.

12. Inserted by the Constitution (Seventh Amendment) Act, 1956.

**41. Custody, management and disposal of property\* (including agricultural land) declared by law to be evacuee property.**

**Evacuee property.**

Since Entry 18 of List II is general, and the present Entry is specific, under the present Entry, Parliament has the power to pass a law providing for the management of evacuee property, including land, notwithstanding Entry 18 of List II,<sup>13</sup> and also an *ancillary* power necessary for the purpose of legislating upon taking possession, custody, and disposal of evacuee property,<sup>14</sup> including extinguishment of a mortgage.<sup>15</sup>

**42. Acquisition and requisitioning of property.<sup>16 25</sup>**

**Amendment.**—By the Constitution (Seventh Amendment) Act, the present Entry has been substituted for the original Entry which was as follows—

“Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given”

**Object of Amendment.**—The object of the amendment has been thus explained—

“The existence of three entries in the legislative lists (83 of List I, 86 of List II and 49 of List III) relating to the essentially single subject of acquisition and requisitioning of property by the Government gives rise to unnecessary technical difficulties in legislation. In order to avoid these difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State List and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject.”<sup>17-18</sup>

**Effect of Amendment.**—The effects of amendment of the present Entry are far-reaching

(1) *Firstly*, while originally, the legislative power relating to acquisition and requisitioning was distributed by Entries in each of the three Legislative Lists, the Constitution (Seventh Amendment) Act, 1956 has omitted Entries 33 of List I and 86 of List II (see *ante*), and now only the concurrent Entry is available to either the Union or a State Legislature.

While previously, the substantive power to enact legislation with respect to acquisition and requisitioning was divided between the Union and state Legislatures according to the purposes for which such acquisition or requisitioning was to be made, now the entire field is left open to concurrent legislation. In other words, while previously, the State Legislature could not enact a law affecting acquisition or requisitioning for Union purposes, nor could Parliament authorise it for State purposes, it would now be possible for laws made by either Legislature to apply to the entire field, subject of course, to the usual limitations of local jurisdiction and the canons applicable for the concurrent power of legislation. Hence, a contention such as was raised in the case of *State of Bombay v. Gulshan*,<sup>19</sup> viz., that a State could not requisition or acquire property for the accommodation of consular representatives because that was a ‘Union purpose’, can no longer be raised after the amendment. Either the State or the Union Legislature will now be competent to requisition or acquire property, for any public purpose. This would also obviate the need to delegate the executive power to acquire or requisition for Union purposes to the State Governments, under Art. 258 (1).<sup>20</sup>

13. *Sardara v. Custodian*, A. 1952 Pepsu 12.

14. *Sahib Dayal v. Asstt. Custodian*, A. 1952 Punj. 389; *Samruddin v. Custodian*, A. 1953 Sau. 73.

15. *Raghubir v. Union of India*, A. 1954 Punj. 261.

16-25. Substituted by the Constitution (Seventh Amendment) Act, 1956.

1-11. Statement of Objects and Reasons.

12. *State of Bombay v. Gulshan*, (1955) 2 S.C.R. 867.

13. *T. D. Corpe v. State of Assam*, A. 1961 Assam 138 (138).

It should also be noted that the question in which Government the property is to vest after the acquisition is also immaterial for the purpose of exercising the legislative power.<sup>14</sup>

Secondly, as the Supreme Court has already held,<sup>15</sup> reference to 'public purpose' having been omitted from the present Entry, the existence of a public purpose is no longer a condition for the exercise of the power of acquisition or requisitioning under the present Entry. Such condition now follows from the express provisions of Art. 31 (2), so that where that provision is inapplicable, e.g., under Arts. 31A-31B, a law of acquisition would be valid even if there is no public purpose.

Similarly, the original Entry 42 dealt with compensation and it was interpreted to act as a limitation upon the legislative power conferred by Entry 33 of List I or 36 of List II, in the sense that neither Legislature could provide as compensation something which was no compensation at all,<sup>16</sup> because the original Entry 32 laid down that the Legislature must lay down the principles on which compensation was to be 'determined' and 'given'.

Thus, the doctrine of 'colourable legislation' came to be applied to the legislative power relating to 'acquisition' and 'requisitioning'. In subsequent cases,<sup>17</sup> it was made clear that the doctrine of colourable legislation was relevant only in connection with legislative competence and that it could be invoked only because the words of Entry 42 stood there as stated.

It follows, therefore, that the doctrine of colourable legislation can no longer be invoked to impeach a law relating to requisitioning and acquisition on the basis of Entry 42 of List III. It is, however, to be noted that the same words 'determined' and 'given' still exist in c' (2) of Art. 31 and that even after the amendment of that clause by the the Constitution (Fourth Amendment) Act, 1955, what the Court is expressly prohibited to do is to question the 'adequacy' of the compensation. Hence, if a Legislature now provides that no compensation is to be paid for an acquisition under the Act, the law would obviously be void for contravention of the mandatory provisions of Art. 31 (2), (in cases to which that clause is still applicable)<sup>17</sup>

In any case, it is now made clear that the obligation to pay compensation is to be derived solely from Art. 31 (2) and not from anything in Entry 42 of List III.

### Scope of the Entry.

1. A law relating to acquisition will come under this Entry even though it relates to military property,<sup>18</sup> or land held under the Government on Ghatwali tenure.<sup>19</sup>

2. There is nothing in this Entry to exclude property belonging to a State.<sup>20</sup>

14. *State of Bihar v. Ramchuar*, A. 1961 S.C. 1649 (1963).

15. *State of Bihar v. Ramchuar* (1952) S.C.R. 889 (935-6).

16. *Gajapati v. State of Orissa*, (1954) S.C.R. 1 (1952-54) 2 C.C. 50; *Bhairadabendra v. State of Assam*, (1956) S.C.A. 736.

17. This view of the Author, expressed at p. 778 of the previous Edition, now finds support from the post-amendment case of *Union of India v. Metal Corporation*, (1966) S.C. [C.A. 1222-N of 1966], where it has been held that where the principles laid down by a law of acquisition are not relevant to the fixation of compensation, and are not intended to compensate the deprived owner for the value of the property at or about the time of compensation, it would be a case of fraud on Art. 31(2),—something beyond the question of mere adequacy of the compensation.

18. *Sonabati v. State of Bihar*, A. 1957 Pat. 270 (274).

19. *Mamohan v. State Bihar*, A. 1961 S.C. 189 (195).

20. *State of W. B. v. Union of India*, A. 1963 S.C. 1241 (1265).

**43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.**

**Recovery in a State of claims arising outside that State.**

The Entry does not require that the claim must arise only after the creation of the particular State which claims to recover it or after the commencement of the Constitution. The existence of the two States is necessary only at the time when the recovery is sought <sup>21, 22</sup>

**44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.**

**45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.**

**'Inquiries'.—**See under Entry 94 of List I, *ante*

The present Entry empowers Parliament to make a law for inquiry for the purpose of any of the matters enumerated in List II even though Parliament cannot legislate with respect to such matters <sup>23</sup>. The power extends to inquire into matters collateral to the matters included in the Entries included the relevant lists <sup>24</sup>

*Acts coming under this Entry—*Commission of Inquiry Act, 1952 <sup>25</sup>

**46. Jurisdiction and power of all courts, except the Supreme Court, with respect to any of the matters in this List.**

**Jurisdiction of Courts other than the Supreme Court.**

By reason of this Entry, read with Entry 5 of this List, both Parliament and a State Legislature have the power to legislate with respect to the jurisdiction and powers of a High Court relating to intestacy and succession <sup>26</sup>

**47. Fees in respect of any the matters in this List, but not including fees taken in any Court.**

**Fees.**

1. Read with the preceding entries the present Entry would authorise the imposition of the following fees, *inter alia*—

(i) A fee for licensing of factories (read with Entry 36).<sup>27</sup>

(ii) A fee or contribution for regulating religious and charitable institutions<sup>28</sup> (read with Entry 28)

2. A levy which was in the nature of a tax may be converted retrospectively into a fee, under the present Entry, by deeming the levy of those characteristics which went to make it a tax, e.g., by creating a separate fund <sup>29</sup>

21-22. *Krishna Rao v S. T. I.*, A 1984 T.C. 518 (F.B.)

23. *Ram Krishna v Tendolkar*, (1958) S.C.A 754 (765) A 1958 S.C. 838 (348).

24. *In re Gordon*, A. 1959 Mys. 83.

25. *Ci U'maid Mills v. State of Rajasthan* A. 1954 Raj. 178 (181).

1. *Ratilal v. State of Bombay*, A. 1954 S.C. 388

2. *Sudhindra v. H. R. E. Commr.*, A. 1963 S.C. 966 (975).



**EIGHTH SCHEDULE**  
**[Articles 344 (1) and 351]**  
**Languages**

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
12. *Sindhi*,<sup>\*</sup>
13. Tamil.
14. Telugu.
15. Urdu.

**\*NINTH SCHEDULE**

[Article 311<sup>b</sup>]

- <sup>a</sup>[1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Acts, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
4. The Bombay Talqudari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).
6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act. LX of 1950).
8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).

3. Item 12 was inserted and the subsequent items renumbered by the Constitution (Twenty-first Amendment) Act, 1967.

\*. Added by the Constitution (First Amendment) Act, 1951, s. 14.

13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli).
- \*[14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).]
15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).
16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).
17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act (1950 (Act XLVII of 1950).
18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).
- \*19. Chapter III-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act, XXVI of 1953).
20. The West Bengal Land Development and Planning Act, 1948, (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.<sup>5</sup>
- \*[21. The Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Andhra Pradesh Act X of 1961).
22. The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands (Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).
23. The Andhra Pradesh (Telangana Area) Ijara and Kowil Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 (Andhra Pradesh Act XXXVI of 1961).
24. The Assam State Acquisition of Lands Belonging to Religious or or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).<sup>6</sup>
25. The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).
26. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except section 28 of this Act).
27. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act I of 1955).
28. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).
29. The Bombay Imams (Kutch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).
30. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960 (Gujarat Act XVI of 1960).
31. The Gujarat Agricultural Lands Ceiling Act, 1960 (Gujarat Act XXVII of 1961).
32. The Sagbara and Mehwasli Estate (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation I of 1962).

5. Added by the Constitution (Fourth Amendment) Act, 1955, s. 5

6. Added by the Constitution (Seventeenth Amendment) Act, 1964, w.e.f. 20-6-64.

7. Cf. *Jivan v. State of Assam*, A. 1966 A. & N. 51 (54)

33. The Gujarat Surviving Alienations Abolition Act, 1963 (Gujarat Act XXXIII of 1963), except in so far as this Act relates to an alienation referred to in sub-cl. (d) of clause (3) of section 2 thereof.
34. The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act XXVII of 1961.).
35. The Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act XLV of 1961).
36. The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).
37. The Jenmikaram Payment (Abolition) Act, 1960 (Kerala III of 1961).
38. The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).
39. The Kerala Land Reforms Act, 1963 (Kerala Act I of 1964).
40. The Madhya Pradesh Land Revenue Code 1959, (Madhya Pradesh Act XX of 1959).
41. The Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (Madhya Pradesh Act XX of 1960).
42. The Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955.)
43. The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act XXIV of 1956).
44. The Madras Occupants of Kudiyiruppu (Protection from Eviction) Act, 1961 (Madras XXXVIII of 1961).
45. The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 (Madras Act LVII of 1961).
46. The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVII of 1961).
47. The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1952).
48. The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).
49. The Mysore Village Offices Abolition Act, 1961 (Mysore Act XIV of 1961).
50. The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).
51. The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).
52. The Orissa and Lalai Reforms Act, 1960 (Orissa Act XVI of 1960).
53. The Orissa Merged Territories (Village Office Abolition) Act, 1963 (Orissa Act X of 1963).
54. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).
55. The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).
56. The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act VIII of 1959).
57. The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).
58. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (Uttar Pradesh Act I of 1961).
59. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954).

60. The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1955).
61. The Delhi Land Reforms Act, 1954 (Delhi Act VIII of 1954).
62. The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).
63. The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).
64. The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).

**Explanation.**—Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955), in contravention of the second proviso to clause (1) of article 31A shall, to the extent of the contravention, be void".<sup>8</sup>

**Constitution (Seventeenth Amendment) Act, 1964.**

Items 21 to 64 have been added to this Schedule by the Constitution (Seventeenth Amendment) Act, 1964.

### Statement of Objects and Reasons.

Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14, article 19 or article 31. The protection of this article is available only in respect of such tenures as were estates on the 26th January, 1950, when the Constitution came into force. The expression "estate" has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19 and 31 of the Constitution and that the protection of article 31A was not available to them. It is, therefore, proposed to amend the definition of "estate" in article 31A of the Constitution by including therein lands held under *ryotwari* settlement and also other lands in respect of which provisions are normally made in land reform enactments. It is further proposed to provide that where any law makes a provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure provides for payment of compensation at a rate not less than the market value thereof.

2. It is also proposed to amend the Ninth Schedule by including therein certain State enactments relating to land reform in order to remove any uncertainty or doubt that may arise in regard to their validity."

8. Added by the Constitution (Seventeenth Amendment) Act, 1964, w.e.f. 20-6-64.



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